No. A20-1344

State of Minnesota in the Court of Appeals

ENERGY POLICY ADVOCATES,

Appellants,

v.

KEITH ELLISON, in his official capacity as Attorney General, Office of Attorney General,

Respondent.

On Appeal from the Ramsey County District Court, Second Judicial District, State of Minnesota. Case No.: 62-CV-19-5899.

BRIEF AND ADDENDUM OF APPELLANTS

DOUGLAS P. SEATON (#127759)
JAMES V. F. DICKEY (#393613)
UPPER MIDWEST LAW CENTER
8421 Wayzata Boulevard, Suite 105
Golden Valley, MN 55426
(612) 428-7000
doug.seaton@umwlc.org
james.dickey@umwlc.org

Counsel for Appellant
Energy Policy Advocates

OLIVER J. LARSON (#392946)
OFFICE OF THE ATTORNEY GENERAL
445 Minnesota Street, Suite 1800
St. Paul, MN 55101
(651) 757-1265
oliver.larson@ag.state.mn.us

Counsel for Respondent
Keith Ellison

COUNSEL PRESS · (866) 703-9373

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STATEMENT OF LEGAL ISSUES

1. **Whether the District Court erred by holding that the Attorney General properly classified the data sought under the Minnesota Government Data Practices Act as not public and thus properly withheld production.**

    a. This issue was raised in the trial court in the parties' cross-motions related to data production under Minn. Stat. § 13.08.
    b. The trial court ruled that the Attorney General properly classified the data at issue and denied Appellant's motion.
    c. This issue was preserved for appeal when Appellant timely filed the Notice of Appeal from the trial court's October 5, 2020 Judgment on October 26, 2020.
    d. Apposite Cases and Statutes:
        i. Minn. Stat. §§ 13.01, 13.02, 13.39, 13.393, 13.65.
        ii. *Kottschade v. Lundberg*, 160 N.W.2d 135 (Minn. 1968).
        iii. *Star Tribune v. Minnesota Twins P'ship*, 659 N.W.2d 287 (Minn. Ct. App. 2003).
        iv. *KSTP-TV v. Ramsey Cty.*, 806 N.W.2d 785 (Minn. 2011).

2. **Whether the District Court erred by not requiring the Attorney General to produce more descriptive identifications of the documents withheld pursuant to the Minnesota Government Data Practices Act to enable Appellant to adequately analyze whether the documents withheld fall within the categories of data the Attorney General claimed.**

    a. This issue was raised in the trial court in the parties' cross-motions related to data production under Minn. Stat. § 13.08. Appellant argued this throughout its Memorandum of Law, including at pages 1-2, 23, and 26-29.
    b. The trial court ruled that the Attorney General's descriptions of each category of documents was sufficient and denied Appellant's motion. Add. 24.
    c. This issue was preserved for appeal when Appellant timely filed the Notice of Appeal from the trial court's October 5, 2020 Judgment on October 26, 2020.
    d. Apposite Cases and Statutes:
        i. Minn. Stat. §§ 13.01, 13.02, 13.39, 13.393, 13.65.
        ii. Minn. Stat. § 595.02, subd. 1(b).
        iii. Minn. R. Civ. P. 26.02(f)(1).
        iv. *City Pages v. State*, 655 N.W.2d 839 (Minn. Ct. App. 2003).

3. **Whether the District Court erred by failing to enjoin the Attorney General's practice of classifying the data sought as not public data.**

    a. This issue was raised in the trial court, in Appellant's notice of motion and motion seeking the relief sought in the Complaint, which requests an injunction.

b. The trial court ruled that the Attorney General properly classified the data at issue and denied Appellant's motion.
c. This issue was preserved for appeal when Appellant timely filed the Notice of Appeal from the trial court's October 5, 2020 Judgment on October 26, 2020.
d. Apposite Cases and Statutes:
    i. Minn. Stat. §§ 13.01, 13.02, 13.39, 13.393, 13.65.
    ii. *Kottschade v. Lundberg*, 160 N.W.2d 135 (Minn. 1968).
    iii. *Star Tribune v. Minnesota Twins P'ship*, 659 N.W.2d 287 (Minn. Ct. App. 2003).
    iv. *KSTP-TV v. Ramsey Cty.*, 806 N.W.2d 785 (Minn. 2011).

4. **Whether the District Court erred by holding that a "common interest exception" to the rules governing privilege "makes sense" and thus protected the Attorney General's communications with other state attorneys general from disclosure.**

a. This issue was raised in the trial court by Appellant on page 24 of Appellant's memorandum of law.
b. The trial court ruled that the common-interest exception to the privilege waiver rule "makes sense" and applied it.
c. This issue was preserved for appeal when Appellant timely filed the Notice of Appeal from the trial court's October 5, 2020 Judgment on September 11, 2020.
d. Apposite Cases and Statutes:
    i. Minn. Stat. § 595.02, subd. 1(b).
    ii. *Walmart Inc. v. Anoka County,* No. A19-1926, 2020 WL 5507884 (Minn. Ct. App. Sept. 14, 2020).

STATEMENT OF THE CASE AND FACTS

In this case, Appellant Energy Policy Advocates sued Respondent Keith Ellison and his Office of Attorney General (collectively "OAG") in Ramsey County District Court. Appellant and Respondent cross-moved under Minn. Stat. § 13.08 for a ruling on OAG's classification of data and withholding of that data in response to Appellant's data requests under the Minnesota Government Data Practices Act ("MGDPA"). Appellant sought to compel production and enjoin OAG's classification method, and Respondent sought an order that its classification was proper and dismissal of the Complaint. The District Court, Judge Thomas A. Gilligan, Jr., presiding, issued an order and entered a subsequent judgment on October 5, 2020, holding that OAG properly classified the data requested and properly withheld the data, which adjudicated the issues presented in the Complaint. This appeal timely followed.

INTRODUCTION

This case relates to the proper classification of government data related to agency interactions with outside parties including other attorneys general, consultants, and privately hired "Special Assistant Attorneys General," "seconded" to OAGs by a donor eager to impact national policy through state litigation. Specifically, the New York University School of Law houses a State Energy and Environmental Impact Center (SEEIC) funded in large part by Michael Bloomberg's philanthropies, which has "embedded" SAAGs in the Minnesota Office of the Attorney General. This case seeks documents related to this arrangement. This Court's decision as to how this kind of

government data is classified will have a lasting impact on how state agencies and constitutional officers classify their interactions with outside parties in the future.

The District Court's decision here allows the Attorney General to share government data with not only other states' attorneys general offices, but with private law firms and activist organizations pursuing private ends, while simultaneously shielding the same information from the public and Minnesota taxpayers. In considering this case, this Court must consider the possibility that a ruling permitting the continued withholding of this government data establishes a precedent of secrecy that shuts the public out of meaningful oversight of a political office while allowing for selective release of the same data to those chosen few an Attorney General deems worthy of knowing.

The precedent established here will guide state agencies and constitutional officers now and in the future. Appellant submits that this Court should hold in favor of transparency and uphold the presumption in the MGDPA that all government data are public unless properly classified otherwise. The Court should reject the District Court's stance, which purports to shield virtually all data ever touched by OAG from public view, and reverse the decision below.

FACTS

The motion below was unique in that Defendant OAG had—and still has—all the documents relevant to this dispute in its possession, and Appellant EPA had—and has—to rely on OAG's descriptions of those documents. Of course, the Court below and this Court possess those documents *in camera* and can evaluate OAG's descriptions. EPA asked the District Court to identify any document descriptions that the District Court deemed

inadequate to allow EPA to fairly evaluate in terms of the requirements of the MGDPA, and allow EPA an additional opportunity to analyze a re-worked description, if necessary. (Index #34, Pl.'s Mem. of Law on Data Classification and Supporting Mot. To Compel Production, Apr. 15, 2020, at 1-2) ("Pl.'s Mem.").

The District Court held that the descriptions provided by OAG were "sufficient for this court to evaluate" the documents withheld, and for it to "evaluate the applicability of the work-product doctrine," which also indicates a reliance by the Court on these sparse descriptions rather than the records themselves. Add. 24. The District Court then erroneously criticized Appellant for not providing more information as to how each category of document did not qualify as private data on individuals. *Compare* Add. 24 *with* Add. 18 ("Energy Policy does not address the Office's specific contentions regarding the application of subdivision 1(b)"). EPA maintains that the descriptions provided by OAG were insufficient to allow it to fully explain to the District Court why the documents at issue were not protected by Minn. Stat. §§ 13.39, 13.393, or 13.65. This Court should reverse on this ground alone, to allow EPA, as the one party operating "in the dark," to more fully analyze the content of the documents withheld with better descriptions.

In the meantime, EPA believes it is valuable to provide the Court information regarding how this lawsuit came to exist, including the common facts that link Minnesota's OAG with other state attorneys general, and about EPA's requests to other state attorneys general offices which have provided EPA documents that suggest that the Respondent possesses more publicly available data than it has disclosed. Other state attorneys general offices, which are of course subject to their own public record laws, have produced public

records of the same character, and in some cases demonstrably even the same records, that EPA believes OAG is classifying as non-public in this case.

I. THE BLOOMBERG SEEIC PROGRAM WAS CREATED TO REDIRECT STATE ATTORNEYS GENERAL TO FOCUS ON CLIMATE CHANGE AND ENVIRONMENTAL LITIGATION.

In approximately 2017, "Bloomberg Philanthropies"—which is the colloquial name for Bloomberg Family Foundation, Inc., a charity organized by former Mayor of New York City and former 2020 candidate for President, Michael Bloomberg—contributed $5.6 million to the New York University School of Law to create a State Energy & Environmental Impact Center providing legal support, privately-funded lawyers, and public relations support to state attorneys general for the purpose of advancing lawsuits related to environmental and climate change litigation (the "Bloomberg NYU Program" or "SEEIC"). (Index #34, Pl.'s Mem. of Law 2; http://www.nyu.edu/about/news-publications/news/2017/august/nyu-law-launches-new-center-to-support-state-attorneys-general-i.html (last visited April 13, 2020)). As reported by the New York Post as recently as February 18, 2020, the Bloomberg SEEIC Program embedded special assistant attorneys general (SAAGs) in Washington, D.C., Delaware, Connecticut, Illinois, Massachusetts, Maryland, Minnesota, New Mexico, New York, and Oregon. (Index #34, Pl.'s Mem. of Law 2; https://nypost.com/2020/02/18/bloomberg-program-reportedly-put-lawyers-in-ag-offices-to-advance-climate-change-agenda/ (last visited April 13, 2020)). Washington State's Office of Attorney General previously had an embedded SAAG.

Minnesota's OAG applied for one or more such privately hired attorneys on March 15, 2019, and asserted that it wished to do more on the multi-state litigation, citing to its

past "support [of] state-led efforts to investigate ExxonMobil" as something it could offer an expanded role in if only it was given outside attorneys offered by the donor for such purposes.[1]

According to one email obtained from the Michigan Office of Attorney General, which uses the descriptor, "the IC" for the Bloomberg SEEIC Program:

- The IC funds the salaries of 17 Law Fellows who serve as SAAGs in their respective states. State AGs recruit and select their own Law Fellows. (Although the program is completely transparent and ethical, it may engender backlash).

- The IC has a pro bono program providing assistance to states on energy and environmental issues from the Impact Center's own staff of attorneys. The IC pays all costs associated with its services. Five states have a formal agreement (attached) with the Impact Center for pro bono services – NY, MA, MD, MN and WA.

- The IC serves as a clearinghouse for all AG actions including litigation, rule-making, federal notices, and notice and comment opportunities. The information posted on its website is always current.

- The IC assists in coordinating multi-state actions in concert with Mike Myers from the NY AGs [sic] office who hosts bi-weekly multi-state calls ([MI OAG's] Neil Gordon participates in the calls). It also sponsors periodic networking opportunities in D.C. for state AAGs and publishes a bi-weekly newsletter on energy and environmental issues.

(Index #34, Pl.'s Mem. of Law 2-3); (Index #37, Aff. of Christopher Horner, April 15, 2020, Ex. O (June 12, 2019 Email from Special Assistant Attorney General Skip Pruss to Attorney General Dana Nessel, Deputy Attorney General Kelly Keenan, Subject: NYU Law School State Energy and Environment Impact Center)).

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[1] Publicly available at https://climatelitigationwatch.org/wp-content/uploads/2019/09/MN-OAG-NYU-Application.pdf. See pp. 5-6.

II. MINNESOTA HAS ACCEPTED BLOOMBERG-FUNDED EMBEDDED SPECIAL ASSISTANT ATTORNEYS GENERAL, WHICH APPEARS TO BE UNAUTHORIZED AND VIOLATES CONFLICT OF INTEREST LAWS APPLICABLE TO STATE EMPLOYEES.

Pete Surdo, now a SAAG at the OAG, posted on his personal LinkedIn profile that he had left Robins Kaplan for the Bloomberg SEEIC Program and would be "embedded with the Minnesota Attorney General's Office as an Environmental Litigator and Special Assistant Attorney General." (Index #34, Pl.'s Mem. of Law 3); (Index #37, Horner Aff. Ex. G). While a SAAG, Surdo has appeared on behalf of Minnesota – while being funded by Bloomberg -- in at least the following cases:

- *California v. Trump*, No. 19-960 (RDM), District of District of Columbia, *see* 2020 WL 1643858;
- *California by and through Brown v. EPA*, No. 18-1114, District of District of Columbia, *see* 940 F.3d 1342;
- *New York v. Wheeler*, No. 20-1022, D. C. Cir. 2020;
- *California v. Wheeler*, No. 19-1239, D. C. Cir. 2019;
- *Leppink v. Water Gremlin Co.*, No. 62-CV-19-7606 (Ramsey County);
- *California v. Chao*, No. 19-CV-2826, D.D.C. 2019;
- *New York, et al. v. EPA*, D.C. Cir. No. 19-1165.

(Index #34, Pl.'s Mem. of Law 3-4); (Index #35, Aff. of James Dickey, April 15, 2020, ¶ 2).

These cases, other than the *Water Gremlin* case, appear to be multistate challenges to administrative decisions by the federal executive branch related to climate change or environmental policies. Surdo has been continually involved in these cases since he was

"embedded" as SAAG through the Bloomberg SEEIC Program. (Index #34, Pl.'s Mem. of Law 4).

Public records obtained from other attorneys general indicate that OAG subsequently engaged the Bloomberg SEEIC Program for another "embed," Leigh Currie. These records also reflect that Ms. Currie is involved in energy and environmental cases on behalf of Minnesota. (Index #34, Pl.'s Mem. of Law 4); (Index #37, Horner Aff. Exs. Q & R). It is public record that Ms. Currie is the former, in fact first, Chair of the Board of Directors[2] and currently a member of the "advisory board" of a "climate" policy activist group called Climate Generation.[3] Also listed as a current member of that board, and as a former Chairman is Michael Noble of Fresh Energy, an activist group that states it "shapes and drives realistic, visionary energy policies,"[4] who boasted in a Zoom call after the State of Minnesota sued the American Petroleum Institute, Exxon-Mobil, and others, that "Fresh Energy helped put this idea in front of Attorney General Keith Ellison shortly after he was sworn in . . . Attorney Leigh Currie on the Attorney General's staff and Pete Surdo have basically been working on this full time over the last few months."[5]

Thus, the Bloomberg SEEIC Program actually is, right now, embedding privately hired and compensated attorneys in the Minnesota OAG as SAAGs for purposes of climate change and environmental litigation, specifically to pursue litigation which both SAAGs

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[2] https://web.archive.org/web/20170927222307/https:/www.climategen.org/who-we-are/board-of-directors/
[3] https://www.climategen.org/who-we-are/advisory-board/, last viewed October 9, 2020.
[4] https://fresh-energy.org, last viewed November 13, 2020.
[5] https://www.youtube.com/watch?v=2MqX14GTm-o, last viewed October 9, 2020, beginning at 1:30.

then filed on behalf of Minnesota and apparently in close contact with activists with whom they shared longstanding relationships. This matter plainly is therefore one of substantial and ongoing importance to Minnesotans. This is particularly true given that Minnesota law prohibits the following:

> Employees in the executive branch in the course of or relations to their official duties shall not directly or indirectly receive or agree to receive any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from any source, except the state for any activity related to the duties of the employee unless otherwise provided by law.

Minn. Stat. § 43A.38, Subd. 2. Plaintiff is not aware of a provision of Minn. Stat. ch. 8 (applicable to the OAG) that allows payment by an outside source for work for the OAG.

Further:

> An employee in the executive branch shall not use confidential information to further the employee's private interest.

Minn. Stat. § 43A.38, Subd. 3. And:

> The following actions by an employee in the executive branch shall be deemed a conflict of interest and subject to procedures regarding resolution of the conflicts, section 43A.39 or disciplinary action as appropriate:
>
> (1) use or attempted use of the employee's official position to secure benefits, privileges, exemptions or advantages for . . . an organization with which the employee is associated which are different from those available to the general public;
>
> (2) acceptance of other employment or contractual relationship that will affect the employee's independence of judgment in the exercise of official duties.

Minn. Stat. § 43A.38, Subd. 5.

Given the structure of the Bloomberg SEEIC Program and Minnesota's statutory code of ethics, EPA believes that the Minnesota SAAG arrangement with the Bloomberg SEEIC Program likely violates state law. SAAG Currie's continued involvement with Climate Generation in particular raises serious questions about the use of state power in pursuit of a private interest. It is inarguable, however, that the public has a strong interest in seeing the records illuminating this relationship. It is also inarguable that, whether or not related to those same statutory restrictions, OAG is an outlier in its unwillingness to disclose information when compared to other state attorneys general.

III. THE SPECIFIC INFORMATION OF THE KIND REQUESTED HERE HAS BEEN DISCLOSED BY OTHER STATES' ATTORNEYS GENERAL WITH BLOOMBERG/SEEIC INVOLVEMENT LIKE MINNESOTA'S.

A. EPA's December 20, 2018 Request to OAG.

On December 20, 2018, EPA requested that OAG provide copies of certain emails sent to or from Deputy Attorney General Karen Olson that also were sent to or from, or which mention certain outside parties, including (a) the lead plaintiffs' law firm recruiting litigants and attorneys general to litigate against or investigate energy companies in the name of "climate change" (Sher Edling); (b) a political trade group; and (c) an employee of the Massachusetts Attorney General's Office named Mike Firestone who, records show, is coordinating recruitment of attorneys general offices to embed privately hired attorneys as "Special Assistant Attorneys General" to pursue issues of concern to the major political donor funding the operation (Mike Firestone). (Index #34, Pl.'s Mem. of Law 5-6); (Index #37, Horner Aff. Ex. A (EPA Dec. 20, 2018 MGDPA request)).

The request specifically asks for:

> [C]opies of all electronic or hard-copy correspondence as described below, and its *accompanying information,[] including also any attachments*:
>
> a) sent to or from **Karen Olson** (including also copying, whether as cc: or bcc:), which *also*
>
> b) contain any of the following, anywhere in the correspondence of which it is a part, whether in the To or From, cc: and/or bcc: fields, the Subject field, and/or the email body or body of the thread or in any attachment thereto: i) SherEdling, ii) Sher Edling, iii) DAGA, iv) @democraticags.org, v) alama@naag.org, and/or vi) Mike.Firestone@state.ma.us.[6]

(Index #34, Pl.'s Mem. of Law 6); (Index #37, Horner Aff. Ex. A (emphasis in original)).

On January 4**,** 2019, OAG replied, claiming that no described records exist containing certain terms directly related to the political trade group ("DAGA," "@democraticags.org," or "Alama@naag.org"), and the remainder of the requested data (related to Sher Edling or Mike Firestone) are exempt under "a number of legal privileges, including the attorney work product, the attorney-client, and the deliberative process privileges". (Index #34, Pl.'s Mem. of Law 6); (Index #37, Horner Aff. Ex. C (OAG Response to Dec. 20, 2018 Request)).

B. <u>EPA's December 26, 2018 Request to OAG.</u>

On December 26, 2018, EPA also requested OAG provide copies of certain Karen Olson correspondences containing the terms <u>googlegroups.com</u>, Google Doc(s),

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[6] These terms were derived from an email indicating that Mike Firestone, Massachusetts OAG Chief of Staff, was serving as the point of contact to provide three more NYU-employed SAAGs to interested attorneys general, and public records showing the roles played in recruiting attorneys general by the National Association of Attorneys General and the Democratic Attorneys General Association.

Sharepoint, Dropbox, and box.com, and/or @ucsusa.org. (Pl.'s Mem. of Law 6; Horner Aff. Ex. B (EPA Dec. 26, 2018 MGDPA request)).

The request specifically asks for:

> [C]opies of all electronic or hard-copy correspondence as described below, and its *accompanying information, including also any attachments*:
>
> a) sent to or from **Karen Olson** (including also copying, whether as cc: or bcc:), which *also*
>
> b) contain *any* of the following, anywhere in the correspondence of which it is a part, whether in the To or From, cc: and/or bcc: fields, the Subject field, and/or the email body or body of the thread or in any attachment thereto: i) @Googlegroups.com, ii) "Google doc" (including also in "Google Docs", iii) @ucsusa.org, iv) Dropbox, v) box.com (including as used in any url containing box.com), and/or vi) SharePoint.[7]

(Index #34, Pl.'s Mem. of Law 6-7); (Index #37, Horner Aff. Ex. B (emphasis in original)).

On January 4, 2019, OAG replied to this request asserting the same privileges and stating that, based on its interpretation of EPA's request and *given OAG's review of EPA's website* (in lieu of contacting EPA), OAG had no responsive data and, in the event its interpretation regarding EPA's intent was incorrect, OAG nonetheless had no responsive data *that it deems public information*. (Index #34, Pl.'s Mem. of Law 7); (Index #37, Horner Aff. Ex. D (OAG Response to Dec. 26, 2018 Request)).

[7] These terms were derived from public records showing the use of such web tools by public employees and the role played by the Union of Concerned Scientists in recruiting attorneys general to sue energy companies.

C. Public Records and Requests Made to Other Involved State AG Offices Have Resulted in More Substantial Response Than the OAG Provided Here.

Public records show that "Google groups" (discussion groups in which all parties are copied by emailing one address, e.g., ExxonKnew@googlegroups.com, ClimateLaw@googlegroups.com) including public employees are routinely created for the purpose of discussing the above-mentioned climate change and environment-related litigation campaigns. (Index #34, Pl.'s Mem. of Law 7); (Index #37, Horner Aff. ¶ 7 & Exs. F & G). Public records also show that @ucsusa.org is the email domain of a pressure group that both originally organized the recruitment of AGs to investigate energy companies on various grounds tied to climate change, briefed them prior to a March 2016 Manhattan press conference announcing such investigations, and also hosted a "secret" briefing[8] for OAGs and "prospective funders"[9] to consider "potential state causes of action against major carbon producers."[10] One participant wrote one such funder from that meeting to

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[8] "I will be showing this Monday at a secret meeting at Harvard that I'll tell you about next time we chat. very [sic] exciting!" April 22, 2016, email from Oregon State University Professor Philip Mote to unknown party, Subject: [REDACTED], and "I'm actually also planning to show this in a secret meeting next Monday-will tell you sometime." April 20, 2016, Philip Mote email to unknown party, Subject: [REDACTED]. Both obtained from Oregon State University on March 29, 2018, in response to January 9, 2018 Public Records Act request. (Index #37, Horner Aff. Ex. I).

[9] "We will have as small number of climate science colleagues, as well as prospective funders, at the meeting." March 14, 2016, email from Union of Concerned Scientists' Peter Frumhoff to Mote; Subject: invitation to Harvard University-UCS convening. (Index #37, Horner Aff. Ex. J).

[10] "Confidential Review Draft-20 March 2016, Potential State Causes of Action Against Major Carbon Producers: Scientific, Legal, and Historical Perspectives." Obtained in Energy & Environment Legal Institute v. Attorney General, Superior Court of the State of Vermont, 349-16-9 Wnc, December 6, 2017. (Index #37, Horner Aff. Ex. K).

describe the discussion as one "about going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide."[11] (Index #34, Pl.'s Mem. of Law 7-8); (Index #37, Horner Aff. Exs. H-L).

In addition, EPA and others have sent similar requests to other states' attorneys general offices, which have disclosed substantially more than Minnesota's OAG. These states include, but are not limited to, Michigan, Illinois, Virginia, Maryland, New York, Oregon, Washington, Massachusetts, and Vermont. (Index #34, Pl.'s Mem. of Law 8); (Index #37, Horner Aff. ¶ 10). That other states so willingly disclose what Minnesota claims it must hide illustrates the paucity of Minnesota's privilege claims and a recognition that the public has the right to know about this information.

Related to the December 20, 2018 Request

NAAG Requests

EPA's similar requests for certain described correspondence with @naag.org have yielded public record productions from several offices. For example, May 6, 2019 and October 30, 2019 requests to Washington's OAG for certain correspondence with or mentioning a rival tort lawyer (of the firm working with OAG) named Matt Pawa, and with twood@naag.org and jmanning@naag.org, respectively, revealed NAAG's involvement in

[11] "Hi Dan, Thought you would like to hear that Harvard's enviro clinic, UCLA Emmett Institute, and the Union of Concerned Scientists are talking together today about going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide. Good discussion." April 25, 2016 email from UCLA Law School's Cara Horowitz to Harvard and UCLA center funder Dan Emmett, Subject: See, e.g., https://climatelitigationwatch.org/on-the-subject-of-recruiting-law-enforcement-email-affirms-origin-of-prosecutorial-abuses/. This email was sent from the event. (Index #37, Horner Aff. Ex. L).

distributing activists' requests to investigate Exxon to certain "Energy & Environment Bureau Chiefs." (Index #34, Pl.'s Mem. of Law 8-9); (Index #37, Horner Aff. ¶ 11).

Mike Firestone and Bloomberg SEEIC Program Correspondence

In response to a February 6, 2019 request, the Massachusetts Attorney General released 300-plus pages of Chief of Staff Mike Firestone's correspondence about the SEEIC Bloomberg project and the Massachusetts Attorney General's application to participate. (Index #34, Pl.'s Mem. of Law 9); (Index #37, Horner Aff. ¶ 13). Firestone is widely known across state attorneys general as having been the coordinator for state AGs of the Bloomberg SEEIC Program. (Index #34, Pl.'s Mem. of Law 9); (Index #37, Horner Aff. ¶ 13). There is no reason that Massachusetts can release intraoffice information related to the Bloomberg SEEIC Project, as well as correspondence with the SEEIC, but Minnesota should not release communications with outside offices related to the same topic.

In addition, an April 3, 2019 request to the Maryland Office of the Attorney General for correspondence of Attorney General Frosh and certain staff to, from, and copying SEEIC employees led to the release of, for example, emails between Attorney General Frosh and Connecticut Attorney General Tong discussing and sharing Maryland's application to participate in the program. (Index #34, Pl.'s Mem. of Law 9); (Index #37, Horner Aff. ¶ 13; *see also* Horner Aff. Ex. O (Michigan Department of the Attorney General email describing SEEIC's offer and relationships)).

This is a non-exhaustive list affirming the willingness of other states to release correspondence between other offices which stands in sharp contrast to Minnesota's unwillingness, under claims of privilege, to share similar correspondence.

Related to the December 26, 2018 Request

Dropbox/Google Groups

EPA submitted an Access to Public Records Request to the Rhode Island Attorney General on January 24, 2020 for correspondence using @googlegroups.com and @dropbox.com, among other terms, dated over a period of time similar to that covered by EPA's December 26, 2018 request to OAG, and received 155 pages of responsive documents on March 6, 2020. (Index #34, Pl.'s Mem. of Law 10); (Index #37, Horner Aff. ¶ 14). EPA submitted an identical request to the Vermont Attorney General January 24, 2020 and received 134 pages on February 14, 2020. (Index #34, Pl.'s Mem. of Law 10); (Index #37, Horner Aff. ¶ 15).

Union of Concerned Scientists (UCSUSA)

EPA, and other requesters whose work EPA is familiar with, have received volumes of records from, for example, the Massachusetts and Vermont Offices of Attorney General, UCLA and Oregon law schools, and Virginia's George Mason University related to the Union of Concerned Scientists and its role in coordinating recruiting for attorney general investigations of energy companies, and briefing OAGs in pursuit of the same objective. (Index #34, Pl.'s Mem. of Law 10); (Index #37, Horner Aff. ¶¶ 8, 16).

As the Court can see, these state attorneys general and other public institutions covered by their respective open records laws have produced data of the same class as OAG withheld. Other attorneys general have produced records documenting that OAG has been in communication with other state AGs based on the same SEEIC Bloomberg Program. (Index #34, Pl.'s Mem. of Law 10); (Index #37, Horner Aff. ¶ 18 & Exs. M-O).

Thus, it appears that OAG has been over-withholding information in its responses to EPA's MGDPA requests.

IV. OAG FAILED TO PERFORM THE DROPBOX SEARCH REQUESTED IN THE DECEMBER 26, 2018 REQUEST.

In discovery, OAG informed EPA that it had not performed the requested search for documents with the word "Dropbox" in them. (Index #34, Pl.'s Mem. of Law 10); (Index #35, Dickey Aff. ¶ 4). This is a straightforward violation of the MGDPA, but the District Court failed to address it. *See generally* Add. This alone is grounds for reversal, as Appellant is correct in its Complaint that OAG failed in its DPA obligations related to this search. OAG indicates that it has now performed that search, but OAG's failure to perform the Dropbox search demonstrates at least one significant lapse and indication that it may not have been taking its DPA responsibilities seriously enough to otherwise reflect compliance with the law in response to EPA's requests. EPA argues that this is supported by OAG's categorical denials of requested data, as an outlier standing in stark contrast to the practice of other attorneys general.

V. SPECIFIC REASONS FOR THE SEARCH TERMS USED IN THESE REQUESTS.

Although a requester's motive and identity are not considerations in enforcing open records laws, EPA notes that the specific search terms in its requests are relevant to the information EPA seeks related to the Bloomberg SEEIC Program for several reasons. The out-of-state tort law firm named in EPA's December 20, 2018 request is recruiting governmental plaintiffs to pursue "climate" litigation. (Index #34, Pl.'s Mem. of Law 11); (Index #37, Horner Aff. ¶ 19). This pitch comes on the heels of a now infamous plea by

the aforementioned "climate nuisance" tort lawyer, Matt Pawa, that, "State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[12] Subsequent to this plea, numerous attorneys general recruited by this attorney did in fact initiate investigations, and the same offices have brought in the privately hired attorneys described, *supra*, to pursue those "investigations" and other, similar work, including to support "climate nuisance" litigation as *amici curiae*. (Index #34, Pl.'s Mem. of Law 11); (Index #37, Horner Aff. ¶ 19).

The general public interest in transparency is heightened concerning the possible use of state power to advance private interests. Similarly, the public has a great interest in how public office, particularly law enforcement, is used in combination with private interests.

In addition, the Minnesota Attorney General, as the chief legal officer of the State of Minnesota, is the only attorney who can represent the State in legal proceedings except in two very rare circumstances: if (i) the governor, attorney general, and chief justice of the Minnesota Supreme Court agree in writing to employ additional attorneys; or (ii) the governor decides that the attorney general is interested adversely to the state. Otherwise,

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[12] (Index #34, Pl.'s Mem. of Law 11); (Index #37, Horner Aff. Ex. N, Climate Accountability Institute, *Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control* (Oct. 2012), at p. 11 (Summary of the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies") (Last viewed April 15, 2020) (available at http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf)).

"[t]he attorney general shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties." Minn. Stat. § 8.06.[13]

Thus, EPA brought this suit to discover items of particular public interest and importance related to how public offices—particularly law enforcement and state constitutional offices—are now being used in combination with private interests. In addition, the documents sought are relevant to a broader investigation into the manner in which the Bloomberg SEEIC Program, tort law firms, and activists who are coordinating this effort are impacting state attorneys general decisions and operations across the country. The Minnesota OAG's response to EPA's request, compared to other states' responses, indicated to EPA that OAG had more than it was revealing to EPA. Consequently, EPA was compelled to bring this suit under the MGDPA.

VI. THE ATTORNEY GENERAL'S CATEGORIZATION OF THE RESPONSIVE DOCUMENTS.

In its memorandum related to data classification and the Declaration of Oliver Larson, OAG categorizes its responses to EPA's two data requests at issue.

Out of the 145 documents related to the December 20, 2018 request, Appellant narrowed its focus and asked the District Court to analyze the 80 documents that were classified as non-privileged but nevertheless not produced, and the privilege log

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[13] (Index #34, Pl.'s Mem. of Law 12); (Index #35, Dickey Aff. Ex. 1). Even if he wanted to, former Governor Tim Pawlenty could not fire then-Attorney General Mike Hatch despite substantial acrimony between their respective offices, http://news.minnesota.publicradio.org/features/2003/08/01_mccalluml_pawlentyhatch/.

descriptions of the 13 documents allegedly privileged and not produced. (Index #34, Pl.'s Mem. of Law 12-13). Categories 1-4 relate to non-privileged and not produced documents for the December 20, 2018 request. Categories 5 and 6 are allegedly privileged and described in paragraph 11 of the Larson Declaration. Appellant will not repeat these categorizations here, but refers the Court to the Larson Declaration which is part of the record on appeal for those descriptions. Appellant's analysis of each will follow in the argument section here.

Out of the 154 documents related to the December 26, 2018 request, Appellant only asked the District Court to analyze the 6 non-privileged but not produced documents, the 5 "non-responsive" and not produced documents, and the privilege log descriptions of the 37 allegedly privileged and not produced documents. (Index #34, Pl.'s Mem. of Law 13). Categories 7-9 relate to non-privileged and not produced documents for the December 26, 2018 request. Categories 10-14 relate to the allegedly privileged and not produced documents, which are described on pages 6 and 7 of OAG's memorandum and paragraph 16 of the Larson Declaration. Categories 15-18 relate to the Dropbox search that was not performed before this lawsuit was filed. Again, Appellant will not repeat these categorizations here, but refers the Court to the Larson Declaration which is part of the record on appeal for those descriptions. Appellant's analysis of each follows here.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW ON APPEAL

On appeal from this *in camera* proceeding pursuant to Minn. Stat. § 13.08, the Court reviews the District Court's legal determinations and statutory interpretations *de novo*.

Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 606 (Minn. 2014); *Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 301 (Minn. 2014).

II. THE MINNESOTA GOVERNMENT DATA PRACTICES ACT EXPRESSLY PRESUMES THAT GOVERNMENT DATA ARE PUBLIC.

In defining its scope, the MGDPA expressly states:

> This chapter regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities. It establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.

Minn. Stat. § 13.01, Subd. 3 ("Scope"). The Legislature first enacted this "presumption that government data are public" in 1979. *See* Act of June 5, 1979, ch. 328, § 7, 1979 Minn. Laws 910, 911. The Legislature enacted this presumption based on "considerable input from the Minnesota media community." Donald A. Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, in GOVERNMENT LIABILITY 241, 243 (Minn. CLE Cmte. ed., 1981), https://bit.ly/2xXb2O1. The Minnesota media "argued strongly" that "data classification ought to be solely a legislative prerogative" and that the Legislature needed to adopt a broad express presumption that all government data are public. *Id.* at 251.

The Minnesota media advocated for a presumption of access because of its experience with government agencies exploiting judicial and legislative developments in data classification to hide government data. This experience included the *Kottschade v. Lundberg*, 160 N.W.2d 135 (Minn. 1968) case, which "[m]any agencies" cited "to argue that information sought by the media and the public did not constitute an official record."

Gemberling at 252. It also included the Legislature's passage of the 1975 data-privacy statute, which agencies cited to "routinely deny[] access to what had [previously] been public records." *Id.* at 249.

Interestingly, the final enactment of this presumption reflected a bargain between the Minnesota Senate and House. "The [Minnesota] Senate agreed to accept the House's presumption of openness in governmental data handling. In return, the House agreed to accept provisions which classified a variety of data or types of data as either private or confidential." *Id.* at 254.

Because there is a presumption of publicity in the MGDPA, it is OAG's burden to prove that an individual statutory provision applies to the data sought to except it from disclosure. Meeting that burden involves not the bare recitation of statutory language as if it were a talisman, but rather demonstrating on the basis of admissible evidence the application of any particular exemption to each discrete record at issue.

III. THE ATTORNEY GENERAL MUST PRODUCE THE WITHHELD DATA.

In this case, OAG cited four statutory provisions pursuant to which it claims data are exempt from disclosure under the MGDPA: Minn. Stat. §§ 13.65, 13.39, 13.393, and 13.03,[14] Subd. 1. None of these provisions protect the data described by OAG, and OAG must, therefore, produce that data to Appellant. The District Court erroneously held that these provisions protect the data at issue from disclosure, based on OAG's description.

[14] EPA addresses the proper interpretation of § 13.03 in detail *supra*.

This Court should reverse, compel disclosure, and enjoin OAG from classifying data in a manner inconsistent with the MGDPA.

A. Minn. Stat. § 13.65 Only Covers "Data on Individuals," and the Attorney General's Categories Indicate That No Withheld Data Is "Data on Individuals" Under That Section and Section 13.02, Subd. 5.

1. The Meaning of Section 13.65, Subdivision 1.

The District Court held that because the phrase "private data on individuals" prefaces the subcategories listed in Minn. Stat. § 13.65, Subd. 1, all data in the subcategories is not subject to disclosure under the MGDPA, and thus Categories 1-5, 7-8, and 15 identified by OAG were not subject to disclosure under that provision. Add. 17. Appellant submits that this was error.

The Supreme Court has addressed the breakdown of ***all*** government data, as classified by the MGDPA, as follows:

> ***[A]ll*** government data falls into one of two main categories based on the type of information included in the data: (1) data on individuals, or "government data in which any individual is or can be identified as the subject of that data," Minn.Stat. § 13.02, subd. 5, and (2) data not on individuals, which is all other government data, Minn.Stat. § 13.02, subd. 4.

KSTP-TV v. Ramsey Cty., 806 N.W.2d 785, 789 (Minn. 2011) (emphasis added). In addition, *documents* can contain different types of *data* that are both public and private. *Id.* In other words, a single document can discuss individuals and thus be private except for the subject of that data, and the same document can discuss issues not relating to individuals, and thus not be private at all. *See id.* (sealed absentee ballots can contain both data on individuals and data not on individuals).

This binding interpretation of the MGDPA shows that "data on individuals" means what it says: it is data about individuals, who may or may not be its subjects. The phrase "private data on individuals" does not include data that is not on individuals. Just because the Legislature prefaced the subcategories of Minn. Stat. § 13.65, Subd. 1 with "private data on individuals" does not mean that if the data in the subcategories is *not about an individual*, that it is magically transformed into data on individuals. Making data that is not "on individuals" to be "data on individuals" contradicts the plain meaning of the phrase, "data on individuals." *KSTP*, 806 N.W.2d at 789; Minn. Stat. § 13.02, Subd. 5; Minn. Stat. § 645.17(1) ("the legislature does not intend a result that is absurd, impossible of execution, or unreasonable"). The Legislature could not have intended a phrase to mean the opposite of its plain meaning.

Rather, Minn. Stat. § 13.65, Subd. 1 means that where individuals are the subjects of the data in the subcategories, the data is private, and where individuals are not mentioned or are not the subject of the data in the subcategories, the data is not protected by that section. The District Court erred when it rejected this argument below. Add. 17.

Moreover, the District Court's interpretation of Minn. Stat. § 13.65, Subd. 1 is dangerous in its scope. Below, OAG argued that "the Court will see [that] . . . the bulk of the data identified in response to plaintiff's data requests consists of communications on policy issues on which the Office took no action (public or otherwise)." (Index #22, OAG Mem. at 10). OAG did not, however, specifically state that the data is "data on individuals" protected by that statute. *See id.* Instead, OAG bluntly claimed that "all of [OAG's] policy and administrative communication are classified as private." (Index #22, OAG Mem. at

12). This is a sweeping assertion that, if accepted, would essentially shield any document OAG ever touched from disclosure. Given the structure of the MGDPA and Minn. Stat. §§ 13.39 and 13.65, which contemplate exceptions to a presumption of publicity when OAG handles data—not the contrary—OAG's premise that the Legislature intended to shield all data touched by OAG as private is unsupportable. If the Legislature had wanted to shield all OAG data from the public, it could have simply said so.

Thus, Appellant submits that the plain meaning of the statute prevails; that is, for data to be private and thus protected from production under Section 13.65, Subd. 1, they must both be "data on individuals" and satisfy a subcategory listed under the relevant subdivision. Related to "data on individuals," while an individual "subject" alone means any data on a person appearing within that data, *Burks v. Met. Council*, 884 N.W.2d 338, 341-42 (Minn. 2016), data on individuals is "incidental" related to an individual subject if it is "incidental to the factual focus of the inquiry" and not obtaining "private or confidential information" concerning the subject. *See Edina Educ. Ass'n v. Board of Educ. of ISD 273*, 562 N.W.2d 306, 311-12 (Minn. Ct. App. 1997) (holding that no Tennessen warning needed to be provided to an individual who was only incidentally identified by government data). Thus, just because a datum has a person's name in it and was handled by OAG does not transform it into protected data under Section 13.65. To accept such an argument would transform not only every item of correspondence any OAG employee sends into private data, but also such routinely shared items as business cards and v-cards.

2. The Application of That Meaning to the Data at Issue.

OAG lists some of the categories of data to which it claims section 13.65 applies: Categories 1-4, 7, 8, and 15. Larson Decl. Categories 1-4, again, refer to data that are responsive to the December 20, 2018 request asking for information about i) SherEdling, ii) Sher Edling, iii) DAGA, iv) @democraticags.org, v) alama@naag.org, and/or vi) Mike.Firestone@state.ma.us. Categories 7, 8, and 15 refer to data that are responsive to the December 26, 2018 request asking for information about i) @Googlegroups.com, ii) "Google doc" (including also in "Google Docs", iii) @ucsusa.org, iv) Dropbox, v) box.com (including as used in any url containing box.com), and/or vi) SharePoint. A review of OAG's descriptions reveals that Section 13.65 does not apply to any of the listed categories—none relate to "individuals" who are "subjects" of the data at issue.

a. Categories 1 and 2.

OAG identifies responsive documents under Category 1 as: "communications concerning a request that the Office oppose an appointment of a particular individual" to FERC. (Index #22, OAG Mem. at 10). First, these data are not communications *on that person* so much as they are communications related to OAG's opposition to that person on policy grounds. The person is a subject of the data, but is only incidental and only relevant for his or her policy preferences that OAG may or may not disagree with. Further, the data on the potential FERC appointee were not retrieved by OAG's search for that appointee; rather, they were obtained by searching for the terms noted above. That person is only an incidental subject of the data, so Section 13.65 does not apply.

The same analysis applies the data categorized by OAG as Category 2 related to the appointment of an individual to the EPA.

b. Categories 3, 4, 7, 8, and 15.

The plain language of Categories 3, 4, 7, 8, and 15 indicates that they are not "data on individuals" at all, as they do not identify any person as being the "subject" of that data. Category 3 relates to a comment letter on the Paris Climate Accord. (Index #23, Larson Decl. ¶ 9). Category 4 relates to a comment letter opposing a federal legislative subpoena. *Id.* Category 7 relates to administrative practices for handling use of file sharing services. (Index #23, Larson Decl. ¶ 15). Category 8 relates to an energy independence executive order. *Id.* Category 15 relates to administrative practices related to file sharing. (Index #23, Larson Decl. ¶ 20). If OAG cannot even state that the data relates to an individual, then it cannot fall under the protections of Section 13.65. Communications about comment letters concerning the Paris Accord, opposition to a federal legislative subpoena, administrative practices for handling use of file sharing services, and an executive order signed by President Trump, are not data on individuals. Section 13.65 does not apply to these categories.

c. Categories 6, 10-14, 16, and 17.

OAG also cited to subdivision 1(d) of section 13.65 seeking protection for Categories 6, 10-14, 16, and 17. The District Court erroneously held that they were protected from disclosure under that provision. Add. 21-22. The above analysis of section 13.65 applies in equal force to these subdivisions, as OAG again fails to show that the data

is "data on individuals." In fact, based on OAG's descriptions, these documents could not relate to any individual.

Category 6 supposedly relates to existing or proposed multi-state litigation challenging auto and ozone rules, but no individual is identified as a subject of the data. (Index #23, Larson Decl. ¶ 11). Category 10 relates to a potential amicus brief in *Coachella Valley Water District, et al. v. Agua Caliente Band of Cahuilla Indians*. (Index #23, Larson Decl. ¶ 16). Category 11 relates to four documents about privilege review in a case about mental health, with no individual referenced in the description. (Index #23, Larson Decl. ¶ 16). Category 12 relates to OAG's representation of the State in the *Cruz-Guzman* case, and the documents do not appear to relate to an individual. (Index #23, Larson Decl. ¶ 16). Category 13 relates to internal and multi-state communications related to the *In re DRAM Antitrust Litigation* application for attorney fees, which documents do not appear to relate to an individual. (Index #23, Larson Decl. ¶ 16). Category 14 relates to the *In re TFT-LCD (Flat Panel) Antitrust Litigation* application for attorney fees, which documents do not appear to relate to an individual. (Index #23, Larson Decl. ¶ 16). Category 16 relates to discovery in fraud investigations, which may concern an individual, but no individual is identified, and the extent to which the data in the documents relate to an individual or could be redacted is not identified. (Index #23, Larson Decl. ¶ 20). Category 17 relates to discovery in civil antitrust, charities, or consumer fraud investigations, which may concern an individual, but no individual is identified, and the extent to which the data in the documents relate to an individual or could be redacted is not identified. (Index #23, Larson Decl. ¶ 20).

Because these documents are not "data on individuals," or could be produced with redactions related to any "individuals," the District Court erred in not compelling their production.

B. <u>Section 13.39 Does Not Apply Because None of the Categorized Data Exists or Was Collected for the Purpose of a "Pending Civil Legal Action."</u>

In the District Court, OAG listed the categories of data to which it claims section 13.39 applies: Categories 6, 10-14, 16, and 17. Category 6, again, refers to data that are responsive to the December 20, 2018 request asking for information about i) SherEdling, ii) Sher Edling, iii) DAGA, iv) @democraticags.org, v) alama@naag.org, and/or vi) Mike.Firestone@state.ma.us. Categories 10-14, 16, and 17 refer to data than are responsive to the December 26, 2018 request asking for information about i) @Googlegroups.com, ii) "Google doc" (including also in "Google Docs", iii) @ucsusa.org, iv) Dropbox, v) <u>box.com</u> (including as used in any url containing <u>box.com</u>), and/or vi) SharePoint. A review of the law and OAG's descriptions reveals that Section 13.39 does not apply to any of the listed categories.

1. The District Court Directly Contradicted This Court in Its Interpretation of Minn. Stat. § 13.39.

The District Court used Minn. Stat. § 13.39 as, essentially, a "catch-all" for any documents it did not hold were protected by section 13.65. Add. 21. The District Court's broad holding could be summarized based on its characterization on page 18 of the Order below: "the investigative data described in Category 6 is protected from disclosure under Minn. Stat. § 13.65, subd. 1 if the investigation is inactive or by Minn. Stat. § 13.39, subd.

2 if the investigation is active." Add. 21. The District Court's holding would shield virtually all documentation related to the Attorney General's process and decisions on any matter, even if the matter is over or the AG declined to participate. Again, that could not have been the Legislature's intent given the express presumption of publicity in the MGDPA. In addition, the District Court's holding renders Minn. Stat. § 13.39, Subd. 3 related to the disclosure of inactive civil investigative data nugatory as applied to the Attorney General. The Legislature could not have intended this kind of gag order on any decisions made by or documents created or kept by the Attorney General, ever.

A few portions of section 13.39, subdivision 1 are particularly important to OAG's data classifications at issue here:

> [D]ata collected by a government entity as part of an ***active*** investigation ***undertaken for the purpose of the commencement or defense of a <u>pending</u> civil legal action***, or which are retained in anticipation of a pending civil legal action, are classified as protected nonpublic data pursuant to section 13.02, subdivision 13, in the case of data not on individuals and confidential pursuant to section 13.02, subdivision 3, in the case of data on individuals.

(emphasis added). This Court has explained the meaning of the phrase, "undertaken for the purpose of the commencement or defense of a pending civil legal action." *Star Tribune v. Minnesota Twins P'ship*, 659 N.W.2d 287, 298 (Minn. Ct. App. 2003) (explaining Minn. Stat. § 13.39). In *Star Tribune*, this Court held that a "pending civil action" does *not* relate to an action that has already been commenced. *Id.* ("Thus, the CD-ROM was not collected for the purpose of the commencement or in anticipation of a pending civil action because the civil action had already commenced."). This Court noted that the purpose of this provision is to "prevent government agencies from being disadvantaged in litigation by

having to prematurely disclose their investigative work product to opposing parties and the public." *Id.*

In addition, subdivision 3 of section 13.39 states: "Inactive civil investigative data are public, unless the release of the data would jeopardize another pending civil legal action, and except for those portions of a civil investigative file that are classified as not public data by this chapter or other law." "Civil investigative data become inactive if the government decides not to pursue a civil action, the time to file a civil action has expired, or the rights of appeal of either party in the civil action have been exhausted or expired." *In re GlaxoSmithKline plc*, 732 N.W.2d 257, 265 (Minn. 2007).

The District Court held that Appellant was wrong that "an investigation [is] no longer 'active' in a 'pending civil legal action' once the civil legal action is commenced." Add. 22. However, this holding directly contradicts this Court's decision in *Star Tribune* that "the CD-ROM was not collected for the purpose of the commencement or in anticipation of a pending civil action because the civil action had already commenced." 659 N.W.2d at 298. The District Court directly contradicted this Court's interpretation of Minn. Stat. § 13.39, which is reversible legal error.

The District Court attempts to use Minn. Stat. § 13.39, Subd. 3 to claim that data can be covered by subdivision 1 if created, collected, or maintained after the commencement of a civil action. Add. 22-23. The District Court argued that if data only becomes "inactive" when a case closes, for example, then it must have been "active" *and* "investigative" during the case: "subdivision 3 provides that civil investigative data only becomes "inactive" under certain specific circumstances which could only occur if such

data was "active" while litigation was pending. *See id.* This argument fails because it does not consider that data cannot be "investigative data"—and therefore is not covered by this statute—if it is created, collected, or maintained during an ongoing judicial proceeding. *Star Tribune*, 659 N.W.2d at 298. "Investigative" data that was collected before a case began can still be "active" until the case closes or the case is not pursued, but data cannot be "investigative" and protected by Minn. Stat. § 13.39 if it was created, collected, or maintained ***during*** a case. This graphic summarizes the difference:

When data was collected	**Before case**	**During case**	**After case**
Is data investigative?	Investigative	Not investigative	Not investigative
If investigative, still "active"?	Yes	Yes	No

Using this graphic and this Court's decision in *Star Tribune*, the classification of data under section 13.39 is clearer. If the data is created, collected, or maintained by the AG before a case is commenced, it is investigative. Only that data which was created, collected, or maintained before a case remains "active investigative data" until the AG drops the case, it is closed, or the statute of limitations runs. If data was collected, created, or maintained after a case began, then it is not protected by section 13.39—to be exempt from disclosure, it must be protected by another category under the MGDPA. If a case is closed, the AG drops the matter, or the statute of limitations runs, any investigative data collected, created, or maintained by the AG becomes inactive and is public.

OAG did not provide sufficient descriptions for the District Court to hold that the data allegedly protected by Minn. Stat. § 13.39 was definitely (1) collected before a case

began and (2) is still ongoing, nor did the Court provide any information to suggest it independently arrived at such a reasoned analysis following in camera review. In fact, the District Court appears either to have undertaken an analysis based upon a faulty legal premise which contradicts the binding precedents of this Court, or to have undertaken no analysis at all. This Court should reverse the District Court's determination that the data in Categories 6, 10-14, 16 and 17 is protected by Minn. Stat. § 13.39.

2. Categories 11, 12, 13, and 14 Relate to Already-Commenced Actions, and OAG Has Not Indicated That It Is Still Actively Participating in Those Actions.

The documents OAG identified as responsive to EPA's requests in Categories 11-14 are not protected by section 13.39 because they relate to already-commenced litigation, not pending litigation, and there is no indication that the data at issue was created, collected, or maintained before the case began and the case is still active. Again, this Court, in a published decision, held that information related to an already-started civil action was not collected or maintained "for the purpose of the commencement or in anticipation of a pending civil action." *Star Tribune*, 659 N.W.2d at 298. The District Court contradicted this Court's mandatory authority.

Categories 11-14 relate to actions started in 2009, 2015, 2002, and 2007, respectively. (Index #22, OAG Mem. at 13); (Index #35, Dickey Aff. Exs. 2-3). Because they have already begun, they are not "pending." *Star Tribune*, 659 N.W.2d at 298. In addition, two of the cases cited by OAG are closed and appeal rights have definitely expired: *In re DRAM Antitrust Litigation* and *In re TFT-LCD (Flat Panel) Antitrust Litigation.* Minn. Stat. § 13.39, Subd. 3(3); (Index #35, Dickey Aff. Exs. 2-3). Because

these cases are closed, the data must be released pursuant to subdivision 3 of section 13.39, which states: "[i]nactive civil investigative data are public, unless the release of the data would jeopardize another pending civil legal action." OAG has not identified another pending civil action to which the data in Categories 13 and 14 would relate, so they are public data because the cases are closed or "inactive." OAG admits that some of the data relate only to "inactive civil legal actions." (Index #22, OAG Mem. at 14).

There is no indication from OAG that it is actively participating in the actions in Categories 11-14. Thus, none of the documents in Categories 11-14 are protected by section 13.39.

3. Category 6 Does Not Describe a Pending Civil Legal Action.

Category 6, which EPA addresses in more detail related to privilege claims below, describes "multi-state litigation around federal rule changes on auto and ozone emissions." (Index #22, OAG Mem. at 13). The Larson Declaration further describes these documents as

> communications by other non-Minnesota attorney generals with the Office concerning existing or proposed multi-state litigation challenging rule changes on auto and ozone emissions. The Office shares a common interest with the other attorneys generals in reviewing federal rule changes on these issues, and where appropriate, bringing litigation to challenge such rule changes.

Keeping the focus on section 13.39 for now, OAG failed to identify any matter that is "pending"[15] to which these communications might relate. As for the "existing" matters,

[15] Based on OAG's reply memorandum below, Appellant expects that OAG will argue that "pending" never refers to a future event. It does, in one of its common definitions,

these are not "pending" under section 13.39, so data created, collected, or maintained after those actions commenced are not protected under that provision. As for the "proposed" matters, it is not clear if these actions are set to begin in the near future, are far off, or have been removed from consideration. It is also not clear whether the OAG is interested in pursuing these actions—so they could easily be inactive. It is unclear whether the rule changes at issue are in place, have been proposed, have been rejected, or modified. OAG simply has not provided enough information for EPA or the Court to fairly evaluate this category in light of section 13.39, other than the data definitively not protected by virtue of its collection during an action having already begun and thus not being "pending" at the time of the data collection.

Therefore, the Court should reverse the District Court and rule that OAG must produce these documents because OAG has failed to carry its burden to show that section 13.39 applies. Alternatively, the Court should reverse and instruct OAG to add detail so that EPA can identify whether the data described in Category 6 relate to a pending action or to an inactive, already-started, or completed action.

4. Category 10 Appears to Relate to Inactive Civil Investigative Data.

OAG identifies the documents in Category 10 as related to a *potential* amicus brief to the U.S. Supreme Court in *Coachella Valley Water District, et al. v Agua Caliente Band*

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https://www.merriam-webster.com/dictionary/pending, and this Court has definitively rejected OAG's definition of "pending" in the context of section 13.39. *Star Tribune*.

of Cahuilla Indians. (Index #22, OAG Mem. at 13). The key word in that Category appears to be "potential." The Larson Declaration notes that the OAG did not join the amicus brief. (Index #23, Larson Decl. ¶ 16). In that case, Coachella Valley Water District filed a petition for *certiorari* to the U.S. Supreme Court in 2017. (Index #35, Dickey Aff. Ex. 4). The petition for a writ was denied on November 27, 2017. *Id.* The amicus brief that OAG considered and declined to join was filed more than a year before the request to which Category 10 relates was made on December 26, 2018. The documents described by Category 10 are either inactive and therefore public, or are not related to a pending civil legal action. Either way, they are not protected under section 13.39.

5. OAG Does Not Provide Enough Information to Analyze Categories 16 and 17.

Because a key issue in determining whether section 13.39 protects documents is whether they relate to a "pending civil legal action," and that is determined based on the timing of the action and whether it is still ongoing, OAG needs to provide that information for EPA to be able to fairly evaluate Categories 16 and 17. Absent that information, OAG cannot carry its burden to show that the data are protected under section 13.39.

At the same time, if the Court can see from the *in camera* documents that these actions are no longer ongoing or had already begun at the time of the communications, the Court should rule that section 13.39 does not protect the documents and compel production. The same is true for criminal investigative data. Minn. Stat. § 13.82, subd. 7 ("Inactive investigative data are public unless the release of the data would jeopardize another

ongoing investigation or would reveal the identity of individuals protected under subdivision 17.").

If the Court believes that the documents in Categories 16 and 17 it sees *in camera* may be protected by section 13.39, it should order OAG to provide clarifying information so that EPA can more precisely analyze these documents.

C. OAG Has Not Provided Sufficient Information to Show the Attorney-Client Privilege Attaches, and the Documents Identified by OAG as Privileged Are Either Not Privileged or Not Within the Work Product Doctrine As It Applies to OAG.

Minn. Stat. § 13.393 simply provides that OAG is subject to the same professional standards applicable to all attorneys when "acting in a professional capacity for a government entity." Thus, it applies the attorney-client privilege and work-product doctrines where OAG is "acting in a professional capacity for a government entity." *Id.* However, "a bare claim of privilege" will not suffice. *See Benson v. ISD 273*, No. 27-CV-19-14679, 2020 WL 958722, at *6 (Minn. Dist. Ct. Jan. 17, 2020). Important as well, "[T]he party resisting disclosure bears the burden of presenting facts to establish the privilege's existence. . . . [A] court should decide, as a threshold matter, whether the contested document embodies a communication in which legal advice is sought or rendered." *City Pages v. State*, 655 N.W.2d 839, 845 (Minn. Ct. App. 2003) (quoting *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436 (Minn. 1998)) (alterations in original).

OAG claimed that Categories 5-6, 10-14, 16, and 17 are protected by attorney-client privilege and the work product doctrine. (Index #23, Larson Decl. ¶¶ 11, 16, 20). The District Court erroneously held that some form of privilege applies, though it is not clear

whether the District Court distinguished the attorney-client privilege from the work product doctrine. Add. 23. The District Court also erred by applying a “common-interest exception” to the waiver-of-privilege rule for communications shared with other attorneys general in other states, merely stating that it “makes sense.” Add. 25.

Categories 5 and 6, again, refer to data that are responsive to the December 20, 2018 request asking for information about i) SherEdling, ii) Sher Edling, iii) DAGA, iv) @democraticags.org, v) alama@naag.org, and/or vi) Mike.Firestone@state.ma.us. Categories 10-14, 16, and 17 refer to data than are responsive to the December 26, 2018 request asking for information about i) @Googlegroups.com, ii) "Google doc" (including also in "Google Docs", iii) @ucsusa.org, iv) Dropbox, v) box.com (including as used in any url containing box.com), and/or vi) SharePoint.

1. Privilege.

Attorney-client privilege attaches to a communication as follows:

> An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Minn. Stat. § 595.02, subd. 1(b).

“When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall . . . describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Minn. R. Civ. P. 26.02(f)(1).

2. Work Product.

As for the work-product doctrine, the provisions of Minn. R. Civ. P. 26.02(d) apply. Pursuant to that doctrine, "materials prepared in anticipation of litigation that do not contain opinions, conclusions, legal theories, or mental impressions of counsel are not work product." *City Pages*, 655 N.W.2d at 845-46 (quoting *Dennie v. Metro. Med. Ctr.,* 387 N.W.2d 401, 406 (Minn. 1986)). It is unclear whether the AG's documents allegedly protected by section 13.393 fall within that definition. Also important,

> There is nothing in the Hickman case which extends the work product principle to preclude discovery of a lawyer's memorandum, prepared during a prior case, in a subsequent action between different parties.

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 207 F. Supp. 407, 410 (M.D. Pa. 1962) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)) (as cited in 35 A.L.R.3d 412 (Originally published in 1971)).

Below, OAG sharply criticized Appellant for citing *Hanover Shoe* on the ground that it was "abrogated" by *F.T.C. v. Grolier*, 462 U.S. 19 (1983). The District Court accepted this argument, which Appellant had no opportunity to rebut in a hearing or subsequent brief. Add. 26. However, *Grolier* addressed an exemption to the Freedom of Information Act. It held that "under [FOIA] Exemption 5, attorney-work product is exempt from mandatory disclosure without regard to the status of litigation for which it was prepared," but that holding would only apply to requests for work-product information classified as such under a federal FOIA request. *Id.* at 28. The only Minnesota court to cite *Grolier* in a published decision was this Court, and this Court did not have opportunity to apply *Grolier* to Minn. R. Civ. P. 26.02. While the Minnesota Tax Court in *Equitable Life*

Assur. Soc. of U.S. v. County of Hennepin, 1994 WL 475075, * 3 (Minn. Tax Ct. Aug. 30, 1994) said *Grolier* was helpful, that court did not apply *Grolier* to attorney work product. *Id.*

There is good reason to believe that the Minnesota Supreme Court would deviate from SCOTUS on such an issue. The Minnesota Supreme Court has deviated from SCOTUS where its law differs from federal law. For example, the Minnesota Supreme Court deviated from SCOTUS' *Iqbal/Twombly* standards applicable to Rule 12 motions in *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598 (Minn. 2014). Further, the Minnesota Supreme Court declined to adopt the federal *Daubert* standard, instead sticking with the *Frye-Mack* standard for evaluating expert testimony in *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000).

Especially in the context of Minn. Stat. § 13.393 and the Office of Attorney General, transparency and the presumption of publicity in the MGDPA militate in favor of this Court applying the *Hanover Shoe* rule to internal OAG communications. Unlike in the private sector, the OAG is beholden to the citizens of Minnesota, not private businesses. The people of Minnesota have a right to understand the actions of their Attorney General. There is no reason to believe that government efficiency would be undermined by allowing insight into whether OAG is fulfilling its constitutional duties—or whether it is allowing outside special interests to plant SAAGs in its office to dictate its priorities. After all, it is quite conceivable that a future OAG could intentionally publish each document requested by Appellant in this case to shed light on OAG's arguably illegal relationship with the SEEIC.

Under this reasoning, the work product doctrine does not apply to OAG materials unless the protection is sought in an ongoing case in which OAG is involved as a litigant. This Court strongly implied the same in the *Star Tribune* case, where it held that the purpose of section 13.39 is to "prevent government agencies from being disadvantaged in litigation by having to ***prematurely*** disclose their investigative work product to opposing parties and the public." 659 N.W.2d at 298 (emphasis added). The concept that disclosure of work product might be premature indicates that there are later times in which disclosure would be proper. The District Court erroneously held to the contrary.

3. Application to the Categories.

A review of OAG's descriptions reveals that Section 13.393 does not apply to any of the listed categories. The District Court erred by applying that statute, though it is unclear to which Categories work product versus privilege attach.

It is also unclear to Appellant how privilege applies to the documents at issue based on OAG's descriptions. Either such privilege does not exist, or OAG has not met its burden of proof to establish that a privilege attached to each and every specific document at issue. These descriptions are not sufficient to determine whether privilege attaches, and OAG did not provide the District Court in its reply with an indication of how they were sufficient, except to broadly say that they "consist of e-mails among assistant attorneys general, and in some cases their agency clients, discussing the Office's efforts in representing the State or its agencies in litigation." (Index #41, OAG Reply Mem. 6). Which agency clients, and on which matters? What kind of efforts? Did the State undertake representation or not, and of whom? What was the nature of the advice, not just the broad category describing the

case? Appellant does not know, and the District Court should have required more detailed descriptions or made specific factual findings which could be reviewed on appeal.

Thus, although the District Court accepted the bare descriptions provided by OAG and did not analyze the individual categories to determine whether privilege or work product attaches to each, Appellant will consider them *seriatim* and using the descriptions provided by the Larson Declaration below.

a. Category 5.

OAG claimed below that Category 5 is protected by attorney-client privilege and the work-product doctrine. (Index #22, OAG Mem. at 15). Category 5 includes legal analysis of the jurisdiction of FERC and an appointee's impact on the resolution of issues under FERC's jurisdiction. *Id.*; (Index #23, Larson Decl. ¶ 11). This information might be work product if it related to an ongoing case, but it would not be privileged in any circumstance unless it was provided to a client. OAG states that it was not provided to anyone outside OAG. (Index #23, Larson Decl. ¶ 11). However, this information is not work product protected in this case because the OAG did not join the FERC letter, as OAG notes. (Index #23, Larson Decl. ¶¶ 9, 11). Thus, because the work product principle does not "preclude discovery of a lawyer's memorandum, prepared during a prior case, in a subsequent action between different parties," the work product exception does not apply to Category 5. OAG has failed to carry its burden to establish privilege or work product protection.

b. Category 6.

Likewise with Category 6, it is unclear who might be the "client" receiving advice about federal rule changes on auto and ozone emissions. (Index #23, Larson Decl. ¶ 11); Minn. Stat. § 595.02. Further, as described these records are exceedingly unlikely to relate to multistate litigation pertaining to auto and/or ozone emissions. They do, however, quite likely relate to other litigation OAG is pursuing (*State of Minnesota v. American Petroleum Institute, et. al*, Case No. 20-cv-1636-JRT-HB), which OAG goes to great lengths to characterize as not at all pertaining to regulation or diminution of emissions, from autos or otherwise, but instead only to alleged consumer fraud and failure to warn. *Id*., Memorandum of Law in Support of Plaintiff State of Minnesota's Motion to Remand to State Court, 12, ECF No. 35. If in fact these records pertain to that matter, then there seems to be no question that waiver of any applicable privilege has occurred through sharing with these outside parties.

It is hard to imagine how another state's AG would be OAG's "client" in the first place, as OAG has no duty to provide advice to other states. *See* Minn. Stat. § 8.01 ("The attorney general shall appear for the state in all causes . . . ."). OAG states that there is "existing or proposed" multi-state litigation that is the subject of these documents. *Id.* However, there is no indication as to OAG's role in any such litigation and how it was providing or would be providing advice to a client or receiving information from a client in any such litigation. The attorney-client privilege does not apply.

Neither does the work-product doctrine appear to apply. OAG has not identified any protective order that would relate to the communications in Category 6. OAG has not

identified any "work product" at all; it only states that there is existing or proposed litigation. OAG does not state whether OAG is involved in the litigation representing Minnesota. OAG does not state whether the litigation has been proposed and then initiated, proposed and then dropped, and so on. OAG does not even give an inkling as to the subject of the purported work product conversations so that they can be fairly analyzed.

OAG cannot just shield any conversations it has with another state's AG because they might discuss the theoretical potential for or existence of a lawsuit. OAG has failed to carry its burden to show that the attorney-client privilege or work-product doctrine applies, and thus this Court should require disclosure of the documents in Category 6.

c. Category 10 Relates to an Inactive Request for Amicus Participation, So No Privilege Can Apply.

Category 10 relates to an amicus request related to a U.S. Supreme Court petition that was denied in 2017. (Index #23, Larson Decl. ¶ 16); (Index #35, Dickey Aff. Ex. 4). OAG did not write any such brief. *Id.* OAG did not provide much more than that description. There is no indication that any advice was provided or that a Minnesota agency asked for it. There is no indication as to the role OAG had in any of these communications. There is no indication that OAG's mental impressions, opinions, conclusions, or legal theories were discussed. In addition, because the matter is no longer active and was not active at the time of EPA's request, there is no "work product" to protect. *Hanover Shoe*, 207 F. Supp. at 410 ("There is nothing in the Hickman case which extends the work product principle to preclude discovery of a lawyer's memorandum, prepared during a prior case,

in a subsequent action between different parties."). Category 10 is protected by neither the attorney-client privilege nor the work-product doctrine.

d. Category 11 Does Not Involve Privileged or Work Product Communications.

Category 11 only concerns "communications between this Office and vendors assisting it with document and privilege review in the matter *Jensen v. Minnesota Department of Human Services*." (Index #23, Larson Decl. ¶ 16). OAG does not state the topic of any of the conversations and whether they included the provision of advice to a client or information from a client. Additionally, OAG states that the litigation "concern*ed*" mental health treatment. *Id.* (emphasis added). If the litigation has ended, the work product privilege cannot apply. OAG has not provided enough information to claim privilege or work product protection, and the information provided indicates that neither apply.

e. There Is No Description of Client Advice or the Type of Mental Impressions Covered by Category 12.

OAG describes Category 12 as simply "internal communications" related to an ongoing case. This is a bare assertion of privilege. OAG has failed to show that any privilege or work product protection might attach to Category 12.

f. Categories 13 and 14 Relate to Closed Cases and Do Not Identify Any Information to Which Privilege Could Attach.

First, for cases that have already closed, such as those listed in Categories 13 and 14, the work product doctrine does not apply. *Hanover Shoe,* 207 F. Supp. at 410. Second, the description provided by OAG only describes the communications as "internal and multi-state communications concerning this Office's representation of the State," and

"concern[ing] applications for attorneys' fees submitted by the participating states." (Index #23, Larson Decl. ¶ 16). Nothing in this description indicates that there is a client requesting advice, or that advice is being given. Third, the communications are admittedly "multi-state"—because there is no privilege concerning communications across state attorneys general, the attorney-client privilege would not apply to Categories 13-14. OAG has failed to carry its burden to establish privilege for these documents.

g. Category 16 Only Identifies "Discovery in Fraud Investigations" As a Reason for Privilege.

Simply put, the fact that documents relate to discovery does not make them privileged. In fact, it appears that the communications in Category 16 only relate to conversations about a target of investigation, not communications with a client-agency. (Index #23, Larson Decl. ¶ 20). In addition, there is no indication that these investigations are ongoing, so the work product protection would not apply. OAG has failed to carry its burden to show that Category 16 is protected from disclosure.

h. Category 17, Like Category 16, Involves Discussions of Discovery, Not Client Communications.

Again, the fact that documents relate to discovery does not make them privileged. Again, the discussions identified by OAG do not appear to be with a client. (Index #23, Larson Decl. ¶ 20). And again, there is no indication that these investigations are ongoing, so the work product protection would not apply. Finally, there is no privilege related to statements to non-clients from other states, so the description of these documents as "multi-state" means that those portions of the documents are not privileged. OAG has failed to carry its burden to show that Category 17 is protected from disclosure.

4. The Common-Interest Exception Does Not Apply to OAG's Multi-State Communications.

The District Court also erred by applying a "common-interest exception" to the waiver-of-privilege rule for communications shared with other attorneys general in other states, merely stating that it "makes sense." Add. 26. The undersigned is not aware of any Minnesota state court that has applied a "common-interest exception" to save a party from waiver of attorney-client privilege by communicating across parties—much less the Minnesota Attorney General, regardless of its interest in the matter—or to confer attorney-client privilege or work product protection on OAG because it was communicating with another AG about litigation that the other AG was involved in. No case citing Minn. Stat. § 13.393 contemplates such a broad privilege. In addition, OAG failed to adequately identify and argue that any common-interest agreement it has covers the data at issue.

In fact, in *Walmart Inc. v. Anoka County,* No. A19-1926, 2020 WL 5507884, at *2 (Minn. Ct. App. Sept. 14, 2020), this Court just noted that "[t]he common-interest doctrine is an exception to work-product waiver that has been adopted in some jurisdictions, but not expressly in Minnesota, and that applies when the protected material is disclosed to individuals who share a 'common interest.'" In *Walmart Inc.*, this Court went on to hold that where county attorneys shared CLE materials with other county attorneys tasked with defending tax appeals, and some retired county attorneys attended the presentation, the common-interest exception, even if it existed, would not apply. *Id.* at *3.

Appellant does not know whether the materials withheld by OAG were treated similarly (because OAG has withheld them and describes them in threadbare or categorical

fashion). Appellant is aware of a purported common-interest agreement between offices of attorneys general across the United States about an exceedingly broad subject matter that includes potential multistate administrative or judicial proceedings, against a government or private party, to compel regulation or private activity, statutory or common law, under state or federal law, to force action or block it, and indeed anything so long as it involves greenhouse gases. But many of those attorneys general have disclosed to Appellant data allegedly protected by this and other such purported common-interest agreements, and the agreements themselves (although Appellant has seen no other purported common interest agreement with such sweeping claims of coverage, undermining the claim to being a valid common legal interest, as this greenhouse gas document). Appellant might be able to identify whether such confidentiality agreements might apply to the data withheld by OAG, but OAG's current descriptions make that impossible.

And, the District Court did not inquire as to the nature of any common-interest agreement protecting the documents OAG is withholding. The District Court merely stated, "[t]he extension of privilege to communication between attorneys general who are sharing litigation work-product in matters where their state clients share common interest makes sense." Add. 26. This begs questions, including whether all records sought also reflect exempt "work product," and pertain to matters in which other attorneys generals' state clients share a cognizable *common legal interest* with OAG. Perhaps most important in the context of the *Walmart Inc.* case, OAG did not describe the confidentiality provisions allegedly applying to any documents shared across offices. Appellant is also unaware of

OAG providing any confidentiality agreement to the Court to show its application to the data at issue.

Simply put, this Court should hold that the common-interest exception to the privilege-waiver doctrine does not apply to the Office of Attorney General's discussion of multistate litigation with other offices of attorneys general across the country, especially where Minnesota has not demonstrated a cognizable common interest applying to those data. And, specifically, that the District Court's allowance of withholding these records under a claim of common illegal interest because AGs claiming such common legal interests over correspondence "makes sense". For any category of documents in which OAG has identified multistate communications, the Court should hold that any potential attorney-client privilege was waived, and the documents requested must be produced.

CONCLUSION

OAG's construction of the various statutes it claims protection under should give the Court pause. OAG would essentially turn any document that an attorney in its office looked at into a non-public document shielded from public disclosure. That presumptively excludes OAG from the MGDPA, which the legislature plainly did not do. Further, the presumption of the MGDPA is one of access and OAG has an obligation to fairly and openly disclose documents that do not fall within an exception to the MGDPA's presumption of disclosure. OAG has failed to do that, and EPA thus asks this Court to reverse the District Court and order it to compel the production of the documents identified by OAG, and award EPA its reasonable costs and attorney fees incurred in this action and the appeal under Minn. Stat. § 13.08, subd. 4.

STATEMENT REGARDING PRECEDENCE

Appellant believes that the Court's opinion on this matter should be precedential. This Court's opinion could establish a new principle of law or clarify existing caselaw related to (1) whether Minnesota recognizes a common-interest exception to the waiver-of-privilege rule upon sharing documents with non-clients, and (2) whether, under Minnesota law, the work-product doctrine continues to protect documents generated by the attorney general or other government agencies after the close of litigation. In addition, this Court's opinion could decide a novel issue related to the breadth of the application of Minn. Stat. §§ 13.39 and 13.65 in tandem, as they relate to the Attorney General's treatment of data as public or not public.

UPPER MIDWEST LAW CENTER

Date: November 25, 2020

By: /s/ James V. F. Dickey
Douglas P. Seaton, ID No. 127759
James V. F. Dickey, ID No. 393613
8421 Wayzata Blvd., Suite 105
Golden Valley, MN 55426
Telephone: 612-428-7002
doug.seaton@umwlc.org
james.dickey@umwlc.org

ATTORNEYS FOR APPELLANT

STATE OF MINNESOTA
IN THE COURT OF APPEALS

CASE TITLE:

Energy Policy Advocates,

v.

Keith Ellison.

CERTIFICATION OF LENGTH OF DOCUMENT

APPELLATE COURT CASE NUMBER: A20-1344

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Date: November 25, 2020

/s/ James V. F. Dickey
Douglas P. Seaton (#127759)
James V. F. Dickey (#393613)
UPPER MIDWEST LAW CENTER
8421 Wayzata Boulevard, Suite 105
Golden Valley, MN 55426
(612) 428-7000
doug.seaton@umwlc.org
james.dickey@umwlc.org

Counsel for Appellant
Energy Policy Advocates