No. A20-1344

STATE OF MINNESOTA
IN SUPREME COURT

Energy Policy Advocates, Respondent, v. Keith Ellison, et al., Petitioners.	**Energy Policy Advocates' Response to Petition for Review** Appellate Case No.: **A20-1344** Court of Appeals Decision Filed: **June 1, 2021**

Energy Policy Advocates ("Respondent" or "EPA") submits this response to Petitioners' ("AG") petition for review of the Court of Appeals' June 1, 2021 decision.

Statement of Legal Issues and Resolution by the Court of Appeals

Petitioners' statement of the issues lacks important detail. The issues are more accurately stated, in context, as follows:

1. **Even though not substantiated by the AG in the record below, should Minnesota recognize a common-interest exception to the waiver of the attorney-client privilege for documents and communications (i) requested from the Attorney General under the DPA, and (ii) communicated to unidentified third parties whose legal interests are unknown?**

The Court of Appeals held that because neither this Court nor the legislature has adopted the common-interest exception to waiver of the attorney-client privilege based on communications with third parties, it would not do so. Add. 26. But the Court of Appeals repeatedly noted that, even if common interest could apply, the AG's incomplete document

descriptions and the District Court's failure to conduct *in camera* review require a remand for further development in the District Court. Add. 27 ("In this case, it is impossible to determine whether the [challenged-but-withheld documents] satisfy these requirements because the descriptions…are very general and because the documents have not been submitted for *in camera* review.").

2. **Can "purely internal communications" that a public agency claims to be privileged but that are not shown to reflect or relate to client communications, be withheld under the attorney-client privilege?**

The AG vaguely identified certain withheld documents as "internal communications." Add. 23. Based on the AG's cursory descriptions, the Court of Appeals held that the attorney-client privilege does not attach to such purely "internal communications" among lawyers, as opposed to "a conversation between the client and the attorney." Add. 23-24. The Court of Appeals distinguished *Kobluk v. University of Minnesota*, 574 N.W.2d 436, 438, 442 (Minn. 1998), because there the exchanges were "preliminary drafts of a document, exchanged between a client and a lawyer," and were properly considered "a conversation between the client and the attorney." Add. 23-24. Here, the AG identified no client for whom or to whom such "internal communications" were intended.

3. **Does Section 13.65, subd. 1 of the Data Practices Act permit withholding of documents where an individual is not or cannot be identified as the subject of those documents?**

The Court of Appeals held that Minn. Stat. §13.65, subd. 1 only protects data where an individual is or can be identified as the subject of that data. Add. 11-13; *KSTP-TV v. Ramsey County*, 806 N.W.2d 785 (Minn. 2011). In *KSTP-TV*, this Court held that "all government data falls into one of two main categories . . . (1) data on individuals, or . . .

(2) data not on individuals." Add. 4-5, 12 (quoting and citing *KSTP-TV*, 806 N.W.2d at 789). The decision therefore properly applied the statute to require the AG, as a DPA-responding agency, to identify which—if any—individuals were subjects of the data. The AG failed to do this.

Criteria Governing Review

Petitioners assert that the criteria governing review are Minn. R. App. P. 117, subd. 2 (a), (c), and (d). *See* Pet. 2. Under these criteria, this Court should not grant review on issues 2 and 3. Issue 1 may present an option to adopt and articulate standards for a new extension of the attorney-client privilege in Minnesota, but because the AG failed to substantiate privilege and no *in camera* review was performed in the District Court, even adopting the common-interest doctrine does not alter the outcome below. Remand is still required to test the adequacy of the AG's over-broad and unsupported claims.

Petitioners also argue that the Court of Appeals broke new ground related to issue 1, by "destroying" the common-interest exception to privilege waiver. Pet. 2. This hyperbole distorts the decision below, which merely applied the law as it stands in Minnesota to a poor record created by the AG. Add. 26. Requiring remand on a poor record and refusing to create new law in an error-correcting court is not a "departure from the accepted and usual course of justice." Minn. R. App. P. 117, subd. 2(c).

Further, the Court of Appeals' decision on issues 2 and 3 raised by Petitioners related to whether privilege attaches to purely "internal communications" and whether Section 13.65's application requires data "on individuals," is straightforward. These issues

do not require additional development in the law, have ample case law support, and are not of major importance, as they have already been settled.

Statement of the Case

The Minnesota Government Data Practices Act ("DPA") presumes the publicity of data created by government agencies like the AG. Unless an exception to this presumption applies, government agencies must produce data after request by the public.

Respondent made two separate data requests, each with specific keyword searches. Petitioners asserted overlapping protections from production, broadly and vaguely claiming that the responsive documents were privileged or related to policy matters or civil investigations. Respondent then brought this lawsuit to compel production.

Even in litigation, Petitioners failed to substantiate any basis for withholding public data and failed to turn over numerous documents claimed to be privileged to the District Court for *in camera* review. The District Court nonetheless held that Petitioners did not have to produce the responsive documents. Add. 3. The Court of Appeals reversed and remanded the case for *in camera* review and further development of the record, and in doing so required the AG produce a privilege log for withheld documents to enable proper analysis of whether Petitioners complied with the DPA. Add. 28-29.

Argument

I. The Court of Appeals' Holdings Corrected Errors and Maintained the *Status Quo* in Minnesota.

The Court of Appeals' decision was far more mundane and record-driven than the AG's petition suggests. The AG editorializes the decision in broad and vague terms that

make it appear a stronger vehicle for review than it is.

The decision below largely concerned the District Court's incorrect methodology (failure to perform *in camera* review and making unsupported assumptions about documents) resulting from the AG's tactical decision to withhold adequate document descriptions in the District Court (vague and conclusory descriptions that did not satisfy work-product and privilege requirements). *E.g.,* Add. 15-16, 19, 21, 24. Thus, the Court of Appeals did not reverse for entry of judgment, but instead remanded for further development.

In addition, the Court of Appeals applied the *status quo* in Minnesota jurisprudence. The decision applied relevant statutory language and is consistent with this Court's past precedents. The Court of Appeals chose, despite the AG's urging, not to change the meaning of "data on individuals" under Minn. Stat. §13.65 and this Court's holding in *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 789 (Minn. 2011). The court also merely applied the *Kobluk* decision to internal communications, while the AG seeks to extend *Kobluk* on a wholly inadequate record. Finally, the Court did not adopt any heretofore unrecognized doctrine or exception.

II. This Case Presents a Poor Vehicle for Adoption of the Common-Interest Exception to Waiver of the Attorney-Client Privilege.

While this Court holds the keys to the common-interest doctrine's potential future application in Minnesota, this case's poor factual record and context dooms any chance for the AG to prevail on the merits even if review were granted.

Assuming, *arguendo*, that in the future this Court recognizes a common-interest extension of attorney-client privilege (beyond the joint defense privilege[1]) in Minnesota law that is applicable to this case, there is no way to know—based on the current record—whether the documents at issue satisfy any test this Court may adopt to apply such a doctrine. The Court of Appeals remanded because the AG's descriptions of documents were cursory and precluded thorough review in nearly every instance and because *in camera* review was lacking. Add. 26-27. Even important issues should not be entertained on a poor record. *See State v. Marquardt*, 496 N.W.2d 806 (Minn. 1993) (failure of support in the record for reversal supports denial of petition for review).

Further, the Court should view this case in the context of the DPA's presumption that government data is public. Even if a common-interest exception applies to private litigants, the AG is in a different position than private litigants. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 737–38 (Minn. 2002) ("Although the attorney-client privilege is available both to public bodies and to private clients, public bodies are subject to the Open Meeting Law whereas private clients are not. The attorney-client privilege is, therefore, available to public bodies as constrained by the Open Meeting Law."). Minnesotans have a statutory right under the DPA to know what their constitutional officer is doing with his substantial power.

This strong, countervailing public interest makes the AG's broad attempts at secrecy untenable, and should be considered by the Court if it is to fashion a common-interest

[1] *Schmitt v. Emery*, 2 N.W.2d 413, 416 (Minn. 1942).

exception in Minnesota. Thus, even if this Court grants review to determine the contours and requirements of a Minnesota common-interest privilege extension, it should also affirm the Court of Appeals' rejection of the AG's shoddy showing.

III. The Court of Appeals Properly Held That the Attorney-Client Privilege Does Not Apply to Purely Internal Communications.

The AG forced the Court of Appeals to rely on vague descriptions of the documents at issue as "internal communications." The Court of Appeals straightforwardly applied *Kobluk* based on the AG's own descriptions. Add. 24 (citing *Kobluk*, 574 N.W.2d at 438, 442). Under the standard applicable to any private litigant, the AG's document descriptions fail to substantiate privilege.

The Petition claims that, under Minn. Stat. §13.393, all internal AG communications must be privileged and protected from public data requests because—based on the AG's own speculation and without any evidence applicable to this case—such internal data will eventually get to a decision maker. *See* Pet. 6. The AG's position would shield all AG data from any DPA request for disclosure, which runs contrary to the purpose of the DPA. The Court should deny review.

IV. The DPA Makes All Data Either on Individuals or Not on Individuals, as This Court Already Held in *KSTP-TV v. Ramsey County*.

"All government data falls into one of two main categories . . . (1) data on individuals, or . . . (2) data not on individuals." *KSTP-TV v. Ramsey County*, 806 N.W.2d 785 (Minn. 2011). The Court of Appeals simply applied this Court's precedent in *KSTP-TV* to data claimed to be protected under Minn. Stat. §13.65. Add. 4-5; 12. Because Minn. Stat. §13.65, subd. 1 only protects data on individuals, and not policy documents or

investigative documents not related to individuals, the Court of Appeals reversed the District Court. Add. 12.

The AG essentially argues that any AG "communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions" and any AG "investigative data, obtained in anticipation of, or in connection with litigation on an administrative proceeding where the investigation is not currently active," should all be exempt from disclosure under the DPA—even if no individual is identified as the subject of the data. Pet. 7-8; Minn. Stat. §13.65, subd. 1(b), (d). The AG would have this Court adopt the self-contradictory position that "private data on individuals" makes data that is not about individuals also exempt from disclosure. It would also require the Court to overrule *KSTP-TV v. Ramsey County*, decided just 10 years ago, which established the dual categories: data is either on individuals or not.

Further, to adopt the AG's position would be a major blow to the presumption of publicity in the DPA and create a shield of secrecy around the Attorney General's office—the people's law firm. None of these are desirable outcomes.

Conclusion

For the reasons stated above, Respondent Energy Policy Advocates asks the Court to deny review in this matter. In the event review is granted, it should be limited to Issue 1 as EPA describes it above.

Respectfully submitted,

Dated: July 14, 2021 */s/ James V. F. Dickey*

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 117, SUBD. 3 & 4

The undersigned certifies that this document, Energy Policy Advocates' Response to the Petition for Review, contains 1,999 words (exclusive of the captions, signature block, and certificate). This word count includes all footnotes and headings, and is derived from the count created by the word processor, Microsoft Word Version 2105. This Response also complies with the type/volume limitations of Minn. R. App. P. 132 and was prepared using a proportionally spaced font size of 13 point.

Dated: July 14, 2021

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