**TO:** Legislative Commission on Data Practices

**FROM:** James V. F. Dickey, Esq.

**DATE:** January 11, 2024

**SUBJECT:** Testimony in Support of HF 2480

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Chair Westlin and Honorable Members of the Commission:

My name is James Dickey, and I am a licensed attorney in Minnesota. In January 2022, I argued the case *Energy Policy Advocates v. Ellison* to the Minnesota Supreme Court on behalf of the Respondent in the case, Energy Policy Advocates. I am testifying today to provide the Commission context related to the Supreme Court's decision in that case, developments since then, and why the Commission should amend Minn. Stat. § 13.65 to clarify that the data this section protects is data that is about individuals, not other data without individual subjects.

Energy Policy Advocates brought its data lawsuit against the Attorney General because it was denied access to documents related to the Attorney General's practice of allowing the New York University State Energy and Environment Impact Center to place "Special Assistant Attorneys General" in the AG's office for the purpose of bringing environmental lawsuits. NYU pays these attorneys, not the state, which may violate state law. Energy Policy Advocates argued that the withheld responsive data which was not "on individuals" should have been released to them because it is not protected by section 13.65.

The Attorney General argued, and the impact of the Supreme Court's decision in *Energy Policy Advocates* is, that the data held by the Attorney General in the categories of data described by section 13.65, subdivision 1, are *only* accessible to an individual *if* there is an individual who is the subject of that data. In other words, if data held by the AG and within the categories of section 13.65 do not have any individual as a subject, then the data are not accessible to *anyone* else.

This is troubling because the categories of data include subdivisions 1(b) and 1(d), which protect "communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions," subd. 1(b), and "investigative data, obtained in anticipation of, or in connection with litigation or an administrative proceeding where the investigation is not currently active," subd. 1(d).

As to subdivision 1(b), the Minnesota Supreme Court has not opined on the definition of "policy matters," but this honorable Commission, made up of legislators who deal with "policy" in their work, can certainly imagine how broadly the term "policy matters" could be interpreted. Further, seizing on the majority's approach under

subdivision 1(d), the Attorney General is on record as arguing that *all* investigative material in its possession, whether active or inactive, is now protected from disclosure. The AG made this point explicitly in data litigation in *Stinson LLP v. Ellison*, No. 62-CV-21-2112, in a memorandum written to Judge Patrick Diamond discussing *Energy Policy Advocates*.[1]

Justice Paul Thissen, the former Speaker of the House, summarized the key problem with the majority's approach, and its shielding of far too much data from the public, in his 3-justice dissent: "I find it hard to understand how data can be "private data on individuals" when it is not data on individuals. Why would the Legislature have used the word "individuals" if it meant for section 13.65 to cover data that was not on individuals? Only a lawyer could take delight in pondering that question and reaching the result the court reaches today; other Minnesotans will be scratching their heads." *Energy Policy Advocates v. Ellison*, 980 N.W.2d 146, 163 (Minn. 2022) (Thissen, J., dissenting).

As Matt Ehling of MNCOGI has correctly stated in his testimony, the approach the *Energy Policy Advocates* majority took is not only confusing and defies plain language, but it is also inconsistent with the time-honored understanding of how the Data Practices Act classification system works. Don Gemberling can tell you far more about its history and implementation than I can, but Justice Thissen's dissent succinctly summarizes how data is classified. It is broken into two main categories: data <u>on</u> individuals and data <u>not on</u> individuals. Those two categories are then each broken into three distinct subsets which only relate to data <u>on</u> individuals and data <u>not on</u> individuals, respectively. *Energy Policy Advocates*, 980 N.W.2d at 164 & 164 n.1 (Thissen, J., dissenting) (citing *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 789 (Minn. 2011) and Donald Gemberling & Gary Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From "A" to "Z"*, 8 Wm. Mitchell L. Rev. 573, 580, 595–96 (1982)).

The majority's position in the *Energy Policy Advocates* decision flies in the face of this time-honored system of classification. It transforms data that is decidedly <u>not</u> on individuals to data that is treated as such.

The Attorney General's Office itself does not really believe what the *Energy Policy Advocates* majority said about the meaning of data on individuals. The AG also believes that "data on individuals" only refers to data "about" individuals as subjects. In *Jensen v. Ellison*, the AG argued to the Court that data retrieved based on searching for Scott Jensen's name is not "data on individuals" to which he was entitled under section 13.65 because "[t]he subjects of such data are the complainants and the entities, persons, or matters complained <u>about</u>. Plaintiff would have the Court believe these are documents <u>about</u> him and that he is therefore entitled to

[1] A copy of that memorandum is attached as Exhibit 1.

access their contents. But he is *not* the subject of these data . . . ." *Jensen v. Ellison*, No. 10-CV-23-565, *Memorandum in Support of Defendants' Motion for Summary Judgment*, Aug. 18, 2023, at p. 23 (underlining added; italics in original).[2] The meaning of "data on individuals" is clear to everyone, and declaring that data not on individuals should be treated as data on individuals simply doesn't make sense.

The *Energy Policy Advocates* majority's decision cries out for legislative correction. And the majority provided examples from the Data Practices Act as models for how the Legislature could "fix" this interpretive problem. They quoted Minn. Stat. § 13.46, subd. 2, which states "[d]ata *on individuals* collected, maintained, used, or disseminated by the welfare system are private data on individuals." *Energy Policy Advocates*, 980 N.W.2d at 159 (majority). That is the approach the authors of this bill have chosen, and it makes sense. To be abundantly clear as to which data this covers, the law should be amended to add the proposed language.

At bottom, this change would shed more sunlight on the Attorney General's actions. Where the privacy interests of individuals and other confidentiality restrictions are not imposed by statute, more Attorney General data will be available for public review and consideration. That coheres with the central premise of the DPA: all government data is presumed public unless otherwise classified. Minn. Stat. § 13.03, subd. 1.

I thank the Commission for its time and, again, urge the Commission to support the proposed bill.

James V. F. Dickey

[2] A copy of the relevant excerpt is attached as Exhibit 2, and the remainder is publicly available on MCRO.

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The Office of
**Minnesota Attorney General Keith Ellison**
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October 7, 2022

The Honorable Patrick Diamond
Ramsey County Courthouse
15 W. Kellogg Blvd.
Saint Paul, Minnesota 55102

**Re: *Stinson LLP v. Keith Ellison***
**Court File No.: 62-CV-21-2112**

Dear Judge Diamond:

Pursuant to your instructions, the Office of the Minnesota Attorney General ("AGO") submits this three-page letter analyzing the Minnesota Supreme Court's recent decision in *Energy Policy Advocates* (citations herein to "*EPA*") and its impact on your consideration of Stinson's motion to compel production of documents pursuant to its MGDPA request.

Because of the Court of Appeals decision in *Energy Policy Advocates*, which was in place at the time of briefing for Stinson's motion to compel, the AGO did not assert common interest under Section 13.393 as a ground for withholding production of third-party communications in its briefing. For the same reason, the AGO also did not assert that Minn. Stat. § 13.65, subdivision 1 applied.[1] The Supreme Court's decision in *EPA* establishes that both types of data (Section 13.393 common-interest data and Section 13.65 attorney general data) are protected from disclosure. These bases are now additional independent grounds for the Court to find that the documents Stinson requests are not subject to disclosure, and greatly simplify the approach that the Court should take in its analysis.

**Common-Interest Communications are not Public Data**

As is more fully discussed in the Index to the AGO's withholding log, (Surdo Ex. D ¶ 1[2]), Minnesota is (or was) involved in several multistate efforts that are governed by common-interest arrangements. The AGO relied on the existence of its common-interest relationships as a basis for arguing that work-product protection should apply because the AGO had a reasonable expectation that its communications disclosing underlying work product would not be revealed to an adverse party. AGO Br. at 17-18, fn6.

In *EPA*, the Minnesota Supreme Court explicitly recognized the existence of the common-interest doctrine. And it applied the doctrine to the very same types of documents that at issue here. *EPA* at *8-*10. Thus, a common interest protection applies, meaning that third-party

[1] The AGO footnoted both issues and observed that the Supreme Court decision in *EPA* could change the analysis.
[2] These agreements are available for in camera review.



EXHIBIT 1

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communications disclosing both attorney-client communications and attorney work product do not operate as a waiver. *Id*. The Supreme Court also confirmed that a common-interest-protected "legal interest" is not limited to litigation proceedings—it is broader than that. *Id*. And the Supreme Court also ruled that the common-interest doctrine is not subject to any balancing test for disclosure. *EPA* at *11-*12. All of these holdings are directly relevant to the pending motion to compel, and make nondisclosure all the more appropriate:

- Stinson argued that the AGO's communications with third parties waived work-product or attorney-client protections. Mem at 13-16. But the Supreme Court's recognition of the common-interest doctrine abrogates Stinson's claim of waiver.[3] *EPA* at *8-*10.
- Stinson also argued that work-product protections did not apply because the legal interest was limited to actual litigation. Mem. at 8-9, 20. *EPA* abrogates that argument, explicitly noting that a shared legal interest is much broader than that. *EPA* at *8-*10.
- Stinson also argued that the balance of harms under Section 13.39, subdivision 2a, favored disclosure. But the balancing test does not apply to information otherwise protected from disclosure under Section 13.393. *EPA* at *20-*21.

The Court should apply *EPA* to Stinson's motion to compel. The Court should find that the requested data relating to the AGO's third-party communications on multistate matters advancing a legal interest (including administrative efforts) are protected from disclosure under the MGDPA Section 13.393 because the common-interest doctrine applies.

**To the Extent that Section 13.39 does not Apply, the AGO's Administrative, Policy, and Investigative Work is not Public under Section 13.65**

As the AGO has already advanced, its active civil investigations are not subject to disclosure under Section 13.39 because they fall under the "pending civil legal action" definition. (And also because such data remains subject to Section 13.393 protections under the work-product doctrine, attorney-client privilege, and now the common-interest privilege.) The *EPA* decision further clarifies that the AGO's non-legal policy work and its inactive investigations are private data protected from disclosure under Section 13.65, subdivisions 1(b) and 1(d). Applied here, that holding from *EPA* resolves many of the disputes in the motion papers. Specifically, Stinson disputed whether (1) the AGO's work was adequately tied to litigation (versus policy and administrative matters) to be protected, and (2) whether the AGO's work related to "active" investigations. *E.g.*, Mem. at fn4, 7-9, 19-20; AGO Br. at 12-23; Surreply at 3-5.[4]

Section 13.39 applies to active investigations and is fully briefed in the motion papers. The *EPA* decision's holding on Section 13.65, subdivision 1, resolves Stinson's other arguments and eliminates the Court's need to delve into the nature of the AGO's work or the active status of an investigation. That is because Subdivision 1(b) classifies as private data the AGO's administrative

[3] The AGO cannot find any authority that limits the number of participants to a common-interest agreement.

[4] The AGO observed that Minn. Stat. § 13.65 could apply to classify even nonlitigation policy-related work as private depending on the outcome in *EPA*. AGO Br. at fn2, fn7. And the AGO also specifically raised the potential application of 13.65 to the AGO's investigative materials. *E.g.*, Complaint ¶ 34; Answer ¶ 34, Ex. B.

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and policy communications and noninvestigative files (except for final public action). *EPA* at *28-29. And also because Subdivision 1(d) classifies the AGO's investigations (including both litigation and administrative work) as private data when the matter is no longer active. *Id.* Moreover, Unlike Section 13.39, private data under Section 13.65 is not subject to any balancing test for disclosure. *Compare* Minn. Stat. §§ 13.39, subd. 2a *with* 13.65; *see also, cf., EPA* at *20-*21 (balancing test is limited to Section 13.39 matters).

The Court should apply *EPA*'s analysis of Section 13.65 to Stinson's motion. Subdivision 1(b) applies to any of the materials that Stinson contends relate to mere administrative and policy work, and subdivision 1(d) applies to any of the materials that Stinson contends relate to litigation and administrative investigations that are not currently active. The Court should therefore find that these materials are protected as "private data" under the MGDPA Section 13.65.

**Conclusion**

There are two aspects of *EPA* decision that control. First, the common-interest doctrine applies to protect communications made between the AGO and other states pursuant to a common interest. Second, Section 13.65 protects disclosure of the AGO's noninvestigative and inactive investigative files. *EPA* therefore applies in the following way:

| Data Type | Authority | | |
|---|---|---|---|
| | 13.39 | 13.393 | 13.65 |
| Active investigations including litigation and administrative matters | ✓ | ✓ | |
| Administrative and policy communications and noninvestigative files | | ✓ | ✓ |
| Inactive investigations including litigation and administrative matters | | ✓ | ✓ |

The Court should deny Stinson's motion to compel.

Sincerely yours,

/s/ *Peter Surdo*

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
Case type: Other-Civil

Dr. Scott Jensen,

Plaintiff,

v.

Keith Ellison, in his official capacity as responsible authority for the Office of the Minnesota Attorney General;

Office of the Minnesota Attorney General,

Defendants.

Court File No. 10-CV-23-565

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

Defendants Keith Ellison, in his official capacity as responsible authority, and the Office of the Minnesota Attorney General's Office ("the OAG," collectively) ask the Court to grant the OAG's Motion for Summary Judgment and dismiss Plaintiff Scott Jensen's Amended Complaint with prejudice. Summary judgment is appropriate because the disputed data were properly withheld following Plaintiff's data request, because the OAG's procedures ensured an appropriate and prompt response, and because Plaintiff's retention claim fails as a matter of law. Even if the Court does not dismiss Plaintiff's Complaint in its entirety, the Court should dismiss Plaintiff's claims for damages, fees, costs, disbursements, and/or penalties because the OAG acted in conformity with opinions issued by the Commissioner of Administration.

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Ct. App. 1997) ("Gentling was not the subject of the data. To the degree that the data identified Gentling, it was incidental to the factual focus of the inquiry."). An individual's status as a subject of data is necessarily tied to the purpose for which data exist. *See KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 345 (Minn. 2016) ("The purpose of the recordings . . . is to keep a record of the events occurring in and around public buses *and the identity of the individuals involved* in those events."). The commissioner has likewise explained that the inclusion of a name does not render data about that individual if they are not the focus of the data. *See* Op. Comm'r Admin. 07-021 (Oct. 17, 2007); Op. Comm'r Admin. 00-065 (Dec. 5, 2000). The two criteria of the *exception* are relevant only if the data could plausibly satisfy the general definition in the first instance. Data withheld from Plaintiff do not meet the general definition.

A cursory analysis of a few withheld documents demonstrates as much. One consumer complaint, for instance, concerned executive orders and was responsive only because the consumer listed Plaintiff in his capacity as a senator as an "agency contacted." MGDPA Log, Row 10. A separate letter from the OAG responding to a consumer complaint regarding unemployment benefits referenced Plaintiff as the senator to which the complainant (a constituent of then-Senator Jensen) could address additional concerns. *Id.*, Row 28. The subjects of such data are the complainants and the entities, persons, or matters complained about. Plaintiff would have the Court believe these are documents about him and that he is therefore entitled to access their contents. But he is *not* the subject of these data and affording him access would frustrate the privacy interests actually contemplated by the MGDPA.

Plaintiff's theory also conflates the manner in which data "are accessed" with how electronically searchable data are *accessible*. The statute contemplates routine access to data on the basis of the individual's identifying information, *not* special accessibility through a data search.

*See, e.g.*, *Seeber v. Weiers*, No. A04-288, 2004 WL 2283489, at *1 (Minn. Ct. App. Oct. 12, 2004) (explaining that social services agency's file was data on mother regardless of incidental mentions of child in file); Op. Comm'r Admin. 01-075 (Sept. 27, 2001) (explaining "it is likely that many of the data on a given employee's PC or laptop are data in which the appearance of the employee's name or other identifying data are only incidental" and citing Minn. Stat. § 13.02, subd. 5).

Plaintiff's position works absurd results. For instance, Plaintiff's theory would suggest that: (1) Minn. Stat. § 13.02, subd. 5, is essentially meaningless as to *all* electronically searchable data; (2) the subject of data would change based on the format of its storage (*e.g.*, paper files being scanned to text-searchable PDFs); (3) every email sent with a signature line *is data about the sender*; (4) every OAG email or letter with the phrase "Office of the Minnesota Attorney General Keith Ellison" *is data about the Attorney General personally*; (5) any digital data identifying an individual is automatically data about the individual regardless of its obviously incidental nature. These conclusions are against law and logic.

The Court should reject Plaintiff's legally flawed and logically unsound position. The data submitted for the Court's *in camera* review fully substantiate the OAG's position that Plaintiff is *not* the subject of various data withheld as private data about other data subjects. There is no genuine issue of material fact, and the OAG is entitled to judgment as a matter of law.

**F. The OAG Properly Withheld Data as Security Information.**

The OAG withheld a small subset of data in five documents as "security information" based on its determination that Plaintiff's republication of data "would likely substantially jeopardize the security of individuals and subject staff to harassment and/or threats." Am. Compl., Ex. 4; Index No. 12. Plaintiff contends that the OAG's concerns were unsubstantiated, and that

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## CONCLUSION

The record fully substantiates the OAG's withholding of data in response to Plaintiff's data requests. The OAG's procedures ensured, and the OAG's response evidenced, full compliance with the MGDPA. Plaintiff's claims regarding Teams messages are meritless. The OAG respectfully requests that the Court grant the OAG's motion for summary judgment and dismiss Plaintiff's Amended Complaint with prejudice.

Dated: **August 18, 2023**

Respectfully submitted,

KEITH ELLISON
Attorney General, State of Minnesota

***/s/ Michael D. McSherry***
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