

TO: Legislative Commission on Data Practices

FROM: James V. F. Dickey, Esq.

DATE: January 19, 2024

SUBJECT: Follow-up Testimony in Support of HF 2480

Chair Westlin and Honorable Members of the Commission:

My name is James Dickey, and I am a licensed attorney in Minnesota. I am testifying in my personal capacity and not on behalf of any organization. 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.

On January 10, I provided written testimony to the Commission generally explaining why the proposed amendment to the Minnesota Government Data Practices Act in HF 2480 corrects the errors of the *Energy Policy Advocates* decision, re-establishes the Legislature's intent in enacting Minn. Stat. § 13.65, and properly balances the needs of the Attorney General's Office and the public's "right to know."

I appreciate the time the Commission gave me to testify in-person on January 11, and I am submitting this in writing so that this honorable Commission has a close approximation to my oral testimony in written format. As you may recall, this testimony provides some factual clarifications that I think are needed in light of the Attorney General's written testimony from January 10.

First, while the Attorney General stated in his testimony that "[t]he Office has never made any effort to conceal its retention of outside counsel" for its lawsuits against energy companies, I think the Commission should know a couple of additional details left out of that testimony related to the arrangement between NYU and the AG.

With respect to the arrangement between NYU and the AG, NYU pays the salaries of "Special Assistant Attorneys General" to use the powers of the Attorney General's Office to bring lawsuits such as those against the energy companies. Attached are copies of the appointment letters to two of these Special Assistant AGs clearly establishing this. Energy Policy Advocates was only able to obtain copies of these appointment letters after filing a second *Energy Policy Advocates* lawsuit in July 2020. The first lawsuit that went to the Minnesota Supreme Court was filed in 2019.

While the Attorney General's Office did produce copies of "secondment" agreements indicating the existence of the NYU-AG relationship in 2019, the Office did not produce these appointment letters. Only several months after Energy Policy Advocates filed its second lawsuit were the appointment letters produced, as part of

the negotiations between the parties, in December 2020. The Office claimed at that time that although the appointment letters pre-dated the second lawsuit, it only obtained those letters after the lawsuit was filed. A copy of that letter is also attached as an exhibit. This back-and-forth that resulted in the production of these documents preceded the Supreme Court's decision, so it is hard to say whether that same spirit of cooperation would still exist in the post-Supreme-Court-decision era.

Likewise, as part of the negotiations in that second lawsuit, the Attorney General's Office produced to Energy Policy Advocates copies of a number of "common-interest agreements" with other state attorneys general to which the Attorney General appears to refer in his testimony. In producing those documents, however, the Office stated that it believes they are classified under the Data Practices Act as "*investigative data*," which is in part subcategory 1(d) in section 13.65. The previously mentioned letter, attached as an exhibit, shows this interpretation. Again, this back-and-forth preceded the Supreme Court's decision, so it is hard to imagine that Energy Policy Advocates could have gotten them in a lawsuit filed today. These common-interest agreements themselves do not contain privileged information, but rather discuss an agreement to keep future information privileged. Importantly, they also show the public the nature of the relationship between the Attorney General's Office and other attorneys general related to environmental and climate-change-related litigation. This seems like important stuff.

Second, the Attorney General claims that Energy Policy Advocates' requests were "particularly broad." Of course, this is what every government agency—and every litigant facing a discovery request from an opposing party—always says about requests for data. But these requests were not broad at all; rather, they were narrowly tailored to get very specific sets of data. Sure, some privileged data could be responsive to these requests, but I don't think it's fair to call them particularly broad. I have also attached copies of the requests at issue in both the 2019 and 2020 lawsuits Energy Policy Advocates filed.

Finally, I think it's important to consider that whatever the Commission or the Legislature does with this bill will have repercussions that affect the Attorney General regardless of whether a Democrat or a Republican is in that office. Given how close the 2022 race was for the Office, I am sure we all recognize that "who" fills that office can easily change in future elections. The data that the Attorney General believes should not be produced is, simply, important for Minnesotans to know. It is important for Minnesotans to know that outside special interests are funding specific types of litigation using the powers of the Attorney General's Office. It is important for Minnesotans to know how their AG is collaborating with other state AGs.

And consider a different hypothetical: what if a Republican were to win the Attorney General race in 2026, and then decide to make an arrangement just like the AG's arrangement with NYU, but with America First Legal, the non-profit law firm whose

president is former Trump policy advisor Stephen Miller, a known immigration hawk. And then let's say that instead of funding lawsuits against energy companies, America First Legal pays the salaries of Special Assistant Attorneys General to work with the federal Immigration and Customs Enforcement (ICE) agency to prioritize deportation of noncitizens illegally present in Minnesota.

Should the Attorney General's office be allowed to refuse to turn over data comprising the details of that relationship, or how the Office is coordinating or collaborating with other state attorneys general? The effect of the Supreme Court's *Energy Policy Advocates* decision may have that effect, unless corrected by HF 2480. The people of Minnesota deserve to know this kind of information.

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

James V. F. Dickey