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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Energy Policy Advocates, Plaintiff, vs. Keith Ellison, in his official capacity as Attorney General, and Office of the Attorney General, Defendants.	Court File No.: 62-CV-20-3985 Case Type: Civil – Other

ORDER & MEMORANDUM

This matter came before the undersigned on September 27, 2021, upon Plaintiff's motion to compel and Defendants' motion for data classification. Plaintiff was represented by Attorney James Dickey. Defendants were represented by Assistant Attorney General Oliver Larson.

Based on the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. Plaintiff's motion to compel is hereby **DENIED IN PART and GRANTED IN PART.**

2. Defendants' motion for data classification is hereby **DENIED IN PART and GRANTED IN PART.**

3. The attached Memorandum shall be incorporated into this Order.

BY THE COURT:

Gilligan, Thomas(Judge)
Dec 8 2021 11:10 AM

Dated: December 8, 2021

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

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MEMORANDUM

This matter concerns a request for government data by Plaintiff Energy Policy Advocates ("Plaintiff") under the Minnesota Government Data Practices Act (the "DPA"), Minnesota Statutes Chapter 13. In dispute are four emails received by members of the Office of the Attorney General ("OAG").

Defendants Keith Ellison and the OAG (collectively, "Defendants") contend all the emails in question are exempt from disclosure under the DPA as civil investigative data under Section 13.39, and three of the emails contain privileged work product under Section 13.393. Plaintiff contends the emails must be disclosed because: (1) there is no related active investigation; (2) even if the emails are privileged as civil investigative data, the benefits of disclosure outweigh the harms; and (3) the emails are not protected as attorney work product because the common interest doctrine does not apply. Defendants maintain this court should not rule on the application of the common interest doctrine before the Minnesota Supreme Court issues its decision in *Energy Policy Advocates v. Ellison I* (No. A20-1344).

This court heard oral arguments on the motions on September 27, 2021 and took this matter under advisement at the conclusion of the hearing. (ECF No. 35)

FACTUAL BACKGROUND

The relevant facts are undisputed. On March 7, 2020, Plaintiff served a DPA request on the OAG for all emails to or from Oliver Larson ("Larson"), Leigh Currie ("Currie"), and Pete Surdo ("Surdo"), all of the Minnesota OAG,[1] which included the terms "Bachmann" or

[1] Plaintiff makes much of the fact that Currie and Surdo's titles are Special Assistant Attorney General ("SAAG"), and that their salaries are paid by the New York University School of Law's State Energy & Environmental Impact Center ("SEEIC"), which Plaintiff contends is in violation of Minnesota state law. This court will not consider the nature of Plaintiff's interest in the requested data; the sole inquiry is whether there is a statutory basis for a classification that negates

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"Goffman." (ECF No. 24) The OAG identified four emails which are the subject of this dispute (the "subject emails"). Claiming the subject emails were exempt from disclosure under the DPA as civil investigative data, and in part, attorney work product, Defendants did not disclose the emails to Plaintiff. Nevertheless, Plaintiff obtained portions of the subject emails from other sources. (ECF No. 30)

The subject emails were sent by Steve Novick ("Novick"), Special Assistant Attorney General in the Oregon Department of Justice, on January 6, 2020, December 2, 2019, and November 18, 2019, and by Michael Myers, Senior Counsel at the New York State Attorney General's office, on November 5, 2019. The subject emails were sent to various members of states' attorneys general offices and relate to "legal challenges to federal administrative rules related to carbon emissions and climate change." (ECF No. 24)

One such federal administrative rule is the Affordable Clean Energy ("ACE") rule, which the OAG challenged. The ACE rule was struck down by the D.C. Circuit in January 2021. *Am. Lung Ass'n v. Envtl. Prot. Agency*, 985 F.3d 914, 995 (D.C. Cir. 2021). This court takes judicial notice that the Supreme Court granted certiorari on October 29, 2021. *Am. Lung Ass'n v. Envtl. Prot. Agency*, *sub nom. Westmoreland Mining Holdings v. EPA*, 142 S. Ct. 418 (2021); *see also U.S. Bank, N.A. v. Ofor*, 2013 WL 1187968, at *3 (Minn. Ct. App. Mar. 25, 2013) ("we may take judicial notice that the Supreme Court has now denied review in Ofor's initial federal lawsuit; therefore, his claims in that proceeding are no longer pending").

the presumption that government data are generally accessible to the public at large. *Energy Policy Advocates v. Ellison*, 963 N.W.2d 485, 498 (Minn. Ct. App. 2021) ("*EPA I*").

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THE DATA SHALL BE DISCLOSED IN PART

Defendants contend all four subject emails are exempt from disclosure as civil investigative data, and that the January 6, November 18, and November 5 emails are exempt from disclosure as attorney work product, which Plaintiff disputes. The parties further dispute whether the common interest doctrine applies to attorney work product. Thus, the issues before the court are (1) whether the subject emails qualify as civil investigative data under Minnesota Statutes Section 13.39, (2) whether the subject emails represent attorney work product under Section 13.393, and (3) whether the common interest doctrine provides an exception to attorney work product.

I. Civil Investigative Data

The DPA creates a presumption of publicity. Minn. Stat. § 13.01, subd. 3. However, data collected by a government entity as part of an active investigation "undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action" is classified as nonpublic data exempt from disclosure under the DPA. *St. Peter Herald v. City of St. Peter*, 496 N.W.2d 812, 814 (Minn. 1993) (citing § 13.39, subd. 2). The court may nevertheless order such data disclosed after considering "whether the benefit to the person bringing the action or to the public outweighs any harm to the public, the government entity, or any person identified in the data." § 13.39, subd. 2a.

Inactive civil investigative data are not protected "unless the release of the data would jeopardize another pending civil legal action . . . ." *Id.* subd. 3. Data become inactive upon

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(1) a decision by the government not to pursue the action; (2) expiration of the statute of limitations; or (3) exhaustion or expiration of the right to appeal by either party. *Id.*

Defendants classified the subject emails as "nonpublic data" because they contain information relating to "active consideration of multi-state legal challenges to federal administrative rules." Plaintiff claims this characterization of the action to which the data relate is too vague for Defendants to avoid disclosure under Section 13.39. Plaintiff further contends litigation of the ACE rule is inactive because the rule was vacated by the D.C. Circuit in February 2021.[2] Finally, Plaintiff contends that even if the subject emails do contain civil investigative data, disclosure of their contents in light of the SEEIC's involvement in the OAG through SAAGs benefits the public more than it would cause harm.

Plaintiff contends Defendants' description of the subject emails is too vague under Section 13.39 because it does not describe which administrative rule Defendants are considering challenging, whether the investigation is ongoing, or how the court would know the investigation is ongoing. Plaintiff contends this same issue was the reason for the court of appeals' remand in *EPA I*, 963 N.W.2d at 498. In that case, the court remanded so that the district court could conduct "an *in camera* review to determine whether the documents contain data collected in an active investigation . . . or data collected in an inactive investigation . . . ." *Id.* The court of appeals did not remand so that Defendants could amend their description of the data, or so that the district court could reconsider the description Defendants provided. Not only does Defendants' description here indicate the data pertains

[2] This argument is moot. The ACE rule litigation remains active because the Supreme Court accepted certiorari. *Westmoreland Mining Holdings*, 142 S. Ct. 418.

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to "*active* consideration of multi-state legal challenges" (emphasis added), contrary to Plaintiff's contention, but the court here is conducting an *in camera* review. The court of appeals' holding in *EPA I* indicates that the court's *in camera* review, not the government agency's description of the data, is conclusive of the question presented under Section 13.39. Accordingly, this court turns to its *in camera* review of the subject emails.

Beyond its argument that the investigation is inactive, Plaintiff does not contend that the emails fail to meet the statutory definition of "civil investigative data." This court must therefore consider whether disclosure would benefit Plaintiff or the public, outweighing any harm to the public, the OAG, or anyone identified in the data. § 13.39, subd. 2a. As this court will later discuss, the January 6, 2020, November 18, 2019, and November 5, 2019 emails contain attorney work product. Plaintiff contends the public has an "extreme interest" in the OAG "bringing lawsuits using SAAGs paid for by outside special interests." After its *in camera* review of the emails, however, this court concludes those emails are not revelatory to Plaintiff's claimed topic of interest. Because those three emails contain legal theories about potential litigation, the benefit to Plaintiff and the public would not outweigh the harm to the OAG in the event of disclosure.

However, the December 2, 2019 email relates to coordinating a regular, standing meeting, and technological difficulties with an emailed event invitation. The email contains nothing substantive related to the litigation matters. The contents of the email are as mundane as the unredacted subject line implies: "Affirmative Climate Litigation – calls cancelled / technology problem." Because there is nothing proprietary in that email, and the DPA creates

a presumption of publicity, the benefit to the public and Plaintiff outweighs any harm to the OAG. Therefore, the December 2, 2019 email should be disclosed.

Disclosure of the January 6, 2020, November 18, 2019, and November 5, 2019 emails would cause harm to the OAG outweighing any benefit to Plaintiff or the public because they contain attorney work product. It is undisputed that the December 2, 2019 email is not work product under Section 13.393, and therefore the balance of harms tips in favor of disclosure. Accordingly, Defendants shall disclose the December 2, 2019 email in its entirety. *Westrom v. Minn. Dep't of Labor and Indus.*, 686 N.W.2d 27, 35 (Minn. 2004). This court turns next to its analysis of work product under Section 13.393 for the remainder of the subject emails.

II. Attorney Work Product[3]

"Notwithstanding the provisions of [the DPA] and section 15.17, the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards . . . ." Minn. Stat. § 13.393. "The effect of section 13.393 is to make the [ ]DPA inapplicable to any data that are protected by the work-product doctrine or the attorney-client privilege." *EPA I*, 963 N.W.2d at 498. Here, Defendants' claim is limited to the work-product doctrine, which "protects an attorney's mental impressions, trial strategy, and legal theories in anticipation of litigation." *Id.* (cleaned up).

[3] Defendants urge this court not to reach this issue until the supreme court issues its opinion in *EPA I*. *See* 963 N.W.2d at 500–501, *review granted* (Minn. Aug. 10, 2021). However, "district courts must 'stand by things decided' by [the court of appeals] until a different decision is made by the supreme court." *State v. Chauvin*, 955 N.W.2d 684, 690 (Minn. Ct. App. 2021). The supreme court has not indicated district courts should wait to apply precedential opinions of the court of appeals until the supreme court reviews the opinions. *Id.*

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Plaintiff disputes that the emails contain any mental impressions, trial strategy, or legal theories. Plaintiff contends the work-product doctrine cannot apply because the documents were disclosed to other states' attorneys general. If, however, the court concludes the work-product doctrine applies, Plaintiff contends the court should apply a narrow privilege under the DPA's presumption of publicity.

After *in camera* review, this court agrees with Defendants that the emails contain mental impressions and legal theories developed in anticipation of litigation. Accordingly, this court turns to whether the work-product doctrine is waived because the emails were disclosed to other states' attorneys general.

Plaintiff cites *Walmart Inc. v. Anoka County* for the proposition that waiver of work-product doctrine cannot apply "in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain" the sought-after data. 2020 WL 5507884, at *2 (Minn. Ct. App. Sept. 14, 2020) (citing Restatement (Third) of the Law Governing Lawyers § 91(4) (2000)). Moreover, work product, "including opinion work product, may generally be disclosed to . . . associated lawyers and other professionals working for the client, or persons similarly aligned on a matter of common interest." Restatement (Third) of the Law Governing Lawyers § 91, cmt. b.

Plaintiff contends other states' attorneys general are potential adversaries of Defendants because most state attorneys general hold office subject to election every two, four, or eight years. Defendants contend Plaintiff's concern about adversity is speculative, and that at the time of the emails, all email recipients shared an interest in the email subjects.

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Defendants further contend all relevant attorney general offices signed a common interest agreement requiring confidentiality.

This court agrees with Defendants that *Walmart Inc. v. Anoka County* is factually distinct from the situation here. In that case, the court noted that the county allowed the document at issue—a CLE presentation—to be accessed by those without the common interest at stake, and the county did not install safeguards to prevent the presentation's disclosure. 2020 WL 5507884, at *3. Here, the emails were sent only to those who shared an interest in challenging the federal administrative rules. Although attorney general offices may change political hands, the parties to the emails took confidentiality measures by signing on to a common interest agreement. If the political nature of attorney general offices meant that all attorney general offices were one another's potential adversaries, no office could ever collaborate with another for multi-state litigation without risking disclosure via data requests. The facts here do not lead the court to conclude the emails were disclosed to a potential adversary. Accordingly, Defendants are not required to disclose the January 6, 2020, November 18, 2019, or November 5, 2019 emails.

III. Common Interest Doctrine

The common interest doctrine is an "exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party, and it applies if the privilege-holder discloses privileged documents to a third party with which it shared a common interest." *EPA I*, 963 N.W.2d at 500 (citation omitted). The court of appeals declined to recognize the common interest doctrine in *EPA I*. *Id.* at 501. However, the court of appeals clarified that, "[t]o the extent that the common-interest doctrine is recognized, it

applies only" to attorney-client privilege, not work product doctrine. *Id.* at 502 (citing Restatement (Third) of the Law Governing Lawyers § 76 cmt. d). Accordingly, the common interest doctrine does not apply here.

CONCLUSION

In sum, Defendants shall disclose to Plaintiff the December 2, 2019 email in its entirety, and may retain the January 6, 2020, November 18, 2019, and November 5, 2019 emails.

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