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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, Office of the Attorney General, Defendants.	Court File No.: 62-CV-19-5899 Case Type: Civil-Other/Misc.

ORDER

This matter came before the undersigned on April 22, 2020, upon the motion of Keith Ellison in his official capacity as the Attorney General of the State of Minnesota (the "Attorney General") for a ruling on the classification of certain data from the Office of the Minnesota Attorney General (the "Office") pursuant to the Minnesota Government Data Practices Act ("MGDPA"). Plaintiff Energy Policy Advocates ("Energy Policy") also moved for a ruling on data classification and moved to compel production of data which had not yet been produced by the Office. The matter was submitted to the court and taken under advisement pursuant to the Administrative Order Suspending Oral Argument in Motions Filed and Fully Briefed in Certain Civil Actions, issued by Chief Judge John Guthmann on March 27, 2020.

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

1. Energy Policy's motion to compel the production of documents which are the subject of its MGDPA requests dated December 20, 2018 and December 26, 2018 to the Office is **DENIED**.

2. The attached Memorandum is incorporated into this Order.

BY THE COURT:

Gilligan, Thomas(Judge)
Jul 16 2020 4:17 PM

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

Dated: July 16, 2020

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MEMORANDUM

This case involves two requests from Energy Policy for the production of certain data from the Office under various provisions of the MGDPA. Energy Policy contends that the data have been improperly withheld. The Office contends that various provisions of the MGDPA make its classification of the data appropriate, or that the data are privileged. As a result, the Office has refused to produce certain data to Energy Policy. The parties stipulated that this court would review certain portions of the disputed data *in camera*, as well as review the Office's assertion of privilege on other disputed data which the court will not review, and determine whether the disputed data is subject to disclosure under the MGDPA. The parties agreed that this court's decision on disclosure will be a final Order, appealable to the Minnesota Court of Appeals under Minn. R. Civ. App. P. 103.03(e).

On December 20, 2018, Energy Policy made a "Request Under the Minnesota Data Practices Act" for certain correspondence from the Office ("December 20 Request"). Energy Policy made a second "Request Under the Minnesota Data Practices Act" for additional correspondence from the Office on December 26, 2018 ("December 26 Request"). The Office responded separately to each Request on January 4, 2019 and claimed that it either had no data responsive to Requests, or that any responsive data it did have was not public data.

On August 15, 2019, Energy Policy filed this lawsuit against the Attorney General and the Office and sought to compel the disclosure of the data it had requested from the Office under Minn. Stat. § 13.08 and various other provisions of the MGDPA. On September 3, 2019, the Attorney General and the Office answered the Complaint. During discovery, the Office produced 52 documents in response to the December 20 Request and 36 documents

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in response to the December 26 Request. The Office also identified documents which it categorized as "non-privileged but not public," "privileged and not public," and "non-responsive and not produced." In connection with this motion, the Office has submitted 80 documents responsive to the December 20 Request and 11 documents responsive to the December 26 Request to this court for *in camera* review. The Office has characterized 13 documents responsive to the December 20 Request and 37 documents responsive to the December 26 Request as privileged. The documents which the Office claimed were privileged were not submitted to the court for *in camera* review.

The Office has created 18 classifications for the documents it has not produced:

- **Category 1** consists of 67 documents – emails and attachments relating to a request to the Office from another state attorney general's office to join a comment letter opposing an appointment of an individual to the Federal Energy Regulatory Commission ("FERC"), which the Office ultimately declined to join. The Office contends that these documents are exempt from disclosure under Minn. Stat. § 13.65, subd. 1(b). These documents were submitted for *in camera* review.
- **Category 2** consists of four documents – emails and attachments relating to a request to the Office from another state attorney general's office to join a comment letter which opposed the appointment of an individual to the Environmental Protection Agency, which the Office ultimately declined to join. The Office contends that these documents are exempt from disclosure under Minn. Stat. § 13.65, subd. 1(b). These documents were submitted for

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in camera review.

- **Category 3** consists of five documents – emails and attachments relating to a request to the Office from another state attorney general's office to join a comment letter concerning the Paris Climate Accord, which the Office ultimately declined to join. The Office contends that these documents are exempt from disclosure under Minn. Stat. § 13.65, subd. 1(b). These documents were submitted for *in camera* review.
- **Category 4** consists of four documents – emails and attachments relating to a request from another state attorney general's office to join a comment letter opposing a federal legislative subpoena effort, which the Office ultimately declined to join. The Office contends that these documents are exempt from disclosure under Minn. Stat. § 13.65, subd. 1(b). These documents were submitted for *in camera* review.
- **Category 5** consists of eight documents – drafts and a final version of a memorandum prepared by an attorney in the Office with a recommendation regarding the proposed FERC-appointment comment letter and emails from the attorney with substantive comments on the recommendation. The memorandum reflects the attorney's analysis of issues which might come before FERC and how the subject appointment might affect resolution of those issues. The memorandum was not shared with anyone outside the Office. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.393 and 13.65, subd. 1(b). These

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documents were not provided to the court.

- **Category 6** consists of five documents – emails and their attachments concerning communications with non-Minnesota state attorneys general concerning existing or proposed multi-state litigation challenging federal rule changes on auto and ozone emissions. The Office claims to share a common interest with the attorneys general in other states in their review of federal rule changes and considering litigation to challenge such rule changes. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(d). These documents were not provided to the court.
- **Category 7** consists of five documents concerning internal communications about the use of data sharing services such as dropbox, box.com, and Sharepoint. The Office contends that these documents are exempt from disclosure under Minn. Stat. § 13.65, subd. 1(b). These documents were submitted for *in camera* review.
- **Category 8** consists of one document – an email from another state's attorney general's office concerning an energy independence executive order, about which the Office ultimately declined to act. The Office contends that these documents are exempt from disclosure under Minn. Stat. § 13.65, subd. 1(b). This document was submitted for *in camera* review.
- **Category 9** consists of five documents – which pertain to a Wisconsin State Bar Association listserv and a request for advice from an attorney in the

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Office for advice on the selection of a personal computer. The Office claims that these documents are exempt from disclosure because they are not responsive to the data requests. These documents were submitted for *in camera* review.

- **Category 10** consists of 16 documents – which pertain to communications between the Office, the Minnesota Department of Natural Resources, and attorneys general from other states concerning a request for the Office to join an amicus brief concerning a writ of certiorari to the United States Supreme Court in the *Coachella Valley Water Dist., et al. v. Agua Caliente Band of Cahuilla Indians* matter, which the office ultimately declined to join. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(d). These documents were not provided to the court.
- **Category 11** consists of four documents – which pertain to internal communications between the Office and its document and privilege review vendors in the *Jensen v. Minnesota Dep't. of Human Services* matter. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(d). These documents were not provided to the court.
- **Category 12** consists of seven documents – which pertain to internal communications concerning the Office's representation of the State of Minnesota in the *Cruz-Guzman v. State of Minnesota* matter. The Office

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contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(d). These documents were not provided to the court.

- **Category 13** consists of seven documents – which pertain to internal and multi-state communications concerning the Office's representation of the State of Minnesota in the *In re DRAM Antitrust Litigation* matter. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(d). These documents were not provided to the court.
- **Category 14** consists of three documents – which pertain to internal and multi-state communications concerning the Office's representation of the State of Minnesota in the *In re TFT-LCD (Flat Panel) Antitrust Litigation* matter. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(b). These documents were not provided to the court.
- **Category 15** consists of three documents – emails which pertain to lifting a file-sharing block to allow an attorney to download deposition exhibits or CLE materials. The Office contends that these documents are exempt from disclosure under Minn. Stat. § 13.65, subd. 1(b). These documents were submitted for *in camera* review.
- **Category 16** consists of 19 documents – internal communications to which the Office maintains attorney-client and work-product privilege and which

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relate to fraud investigations on files stored on dropbox by the target of the investigation or third parties. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(d). These documents were not provided to the court.

- **Category 17** consists of 14 documents – internal communications to which the Office maintains attorney-client and work-product privilege on civil antitrust, charities, or consumer fraud matters and which concern discovery on files stored on dropbox by the target of the investigation or third parties. Some of the communications were with the offices of other states' attorneys general because they involved multi-state investigations. The Office contends that these documents are exempt from disclosure under Minn. Stat. §§ 13.39, 13.393 and 13.65, subd. 1(d). These documents were not provided to the court.
- **Category 18** consists of 15 documents – which pertain to discussions on lifting file-sharing blocks in connection with the Office's representation of the Minnesota Board of Medical Practice. The Office claims that these documents are exempt from disclosure because they are not responsive to the data requests. These documents were not provided to the court.

The parties agree that this court need not consider or decide the classification or production of Category 9 data (attorney's listserv exchange or personal computer inquiry) or Category 18 data (documents related to the Minnesota Board of Medical Practice).

The Office contends that there are three primary issues for resolution under the

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MGDPA in connection this matter: (1) whether certain data requested by Energy Policy are privileged and therefore not publicly available; (2) whether certain data are civil investigative data and therefore not publicly available; and (3) whether certain data are communications on policy or administrative matters that do not evidence final public actions, and are therefore not publicly available. Broadly, the Office argues that the subject data, by whatever classification, are not publicly available and therefore not subject to production under the MGDPA.

Energy Policy contends that all of the subject data should be produced under the MGDPA by the Office. It maintains that the Office's descriptions of the documents submitted *in camera* and the privilege log descriptions are inadequate, so that its ability to fairly evaluate them has been hampered. It also claims that: (1) certain data does not pertain to "individuals" and therefore cannot be withheld under Minn. Stat. § 13.65; (2) certain data cannot be withheld because it does not pertain to an active investigation of a pending civil legal action under Minn. Stat. § 13.39; (3) work-product privilege does not extend to data generated in a prior matter which is no longer actively being litigated; (4) the descriptions of privileged information are not specific enough to demonstrate an entitlement to the claimed privilege; and (5) common-interest with other attorney general's offices in litigation communication does not prevent privilege waiver.

After receiving the submitted documents and all of the other written submissions of the parties, the court took the matter under advisement. The court has now carefully reviewed the documents which were submitted *in camera*, as well as the descriptions for the documents to which the Office has claimed privilege.

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ENERGY POLICY'S MOTION TO COMPEL IS DENIED

"The MGDPA regulates all government data collected, created, received maintained or disseminated by a government entity. Further, the MGDPA creates 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." *Harlow v. State Dep't. of Human Services*, 883 N.W.2d 561, 566 (Minn. 2016)(cleaned up). "The purpose of the MGDPA is to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The Act also attempts to balance these competing rights within a context of effective government operation." *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011)(cleaned up).

"Government data are "not public" if they fall within one of several classifications set out by statute in the MGDPA." *Id.* at 788-89. "Generally, government data falls into one of two main categories: (1) 'data on individuals,' meaning government data in which any individual is or can be identified as the subject of that data; and (2) 'data not on individuals,' meaning all other government data. The MGDPA classifies data from each of these two categories into different levels of access. The levels of access for data on individuals are public, private, and confidential. The levels of access for data not on individuals are public, nonpublic, and protected nonpublic." *Harlow*, 883 N.W.2d at 566 (cleaned up).

The Office contends that the operative provisions which bolster its assertions that the data requested by Energy Policy are protected from disclosure are found in Minn. Stat. §§ 13.03, 13.39, 13.393 and 13.65. Energy Policy does not disagree that these are the MGDPA

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provisions which the court should consider when evaluating the Office's non-disclosure of the subject data.

Minn. Stat. § 13.03, subd. 1 provides that "[a]ll government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute…as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential."

Minn. Stat. § 13.39, subd. 2(a) classifies: "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," as "protected nonpublic data…in the case of data not on individuals and confidential…in the case of data on individuals." Subdivision 1 of that same statute defines a "pending civil legal action" as including, but does not limit it to "judicial, administrative or arbitration proceedings."

Minn. Stat. § 13.393 provides that the: "dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents…and professional responsibility…"

Minn. Stat. § 13.65 provides that: "[t]he following data created, collected and maintained by the Office of the Attorney General are private data on individuals:

* * *

(b) communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions;

* * *

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> (d) investigation data, obtained in anticipation of, or in connection with litigation or an administrative proceeding where the investigation is not currently active…"

The court will first analyze the Office's claimed statutory classifications, and then will address the classification's application to each category of documents at issue.

The Office's broadest classification in support of non-disclosure of data is under Minn. Stat. § 13.65, subds. 1(b) and 1(d). It claims an MGDPA exemption under Minn. Stat. § 13.65, subd. 1(b)("communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions") for Categories 1-5, 7-8, 15. It claims an MGDPA exemption Minn. Stat. § 13.65, subd. 1(d)("investigation data, obtained in anticipation of, or in connection with litigation or an administrative proceeding where the investigation is not currently active…") for Categories 6, 10-14, 16-17.

Minn. Stat. § 13.65 applies to "Attorney General Data." Under subdivision 1, five different types of data which are "created, collected and maintained by the Office of the Attorney General" are classified as "private data on individuals." "[P]rivate data on individuals" is defined as "data made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data."

The Office contends that subdivision 1(b) classifies all communications on matters of policy or administrative issues that do not evidence a final public action as "private data on individuals" whether or not they are about an individual. Similarly, it contends that subdivision 1(d) classifies active and inactive civil investigative data as "private data on individuals" whether or not they are about an individual. The Office argues that under the language of this statutory provision, the Legislature placed certain documents into the protected "private data

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on individuals" classification, rather than limit the data covered by the statute to be about individuals. In support of this contention, the Office contrasts the Legislature's treatment of welfare data in Minn. Stat. § 13.46, subd. 2 which classifies "[d]ata on individuals" as "private data on individuals," with Minn. Stat. § 13.65, subd. 1 which does not contain a similar limitation.

Energy Policy argues that the documents contained in the subject categories cannot be classified under Minn. Stat. § 13.65, subd. 1, because they don't pertain to "data on individuals." As support for this contention, Energy Policy cites Minn. Stat. § 13.02, subd. 5, which says that: "'Data on individuals' means all government data in which any individual is or can be identified as the subject of that data, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual." Energy Policy contends that the Office's construction of the statute to exempt data under Minn. Stat. § 13.65, subd. 1 whether they pertain to individuals or not would eliminate "data on individuals" from the MGDPA.

When interpreting a statute, this court's purpose "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16; *see also State v. Struzyk*, 869 N.W.2d 280, 284 (Minn. 2015). A statute's words and phrases must be given their plain and ordinary meaning. *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). To determine the plain meaning of statutory language, a court may refer to canons of interpretation, such as common usage, dictionary definitions, and grammatical rules. Minn. Stat. § 645.08.; *see also Struzyk*, 869 N.W.2d at 287 (applying rules of grammar to interpret plain language of statute). If the

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"words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16; *State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015). If, however, a statute is ambiguous, a court may consider canons of construction to determine the legislature's intent while construing the meaning of the statute. A statute is ambiguous if it is subject to more than one reasonable interpretation. *State v. Mauer*, 741 N.W.2d 107, 111 (Minn. 2007).

What is clear from the MGDPA is that "private data on individuals" and "data on individuals" have distinct meanings because they are separately defined.

Energy Policy's argument has some superficial appeal. After all, why would the Legislature have included the word "individuals" in Minn. Stat. § 13.65, subd. 1 if it didn't apply exclusively to individuals? The first problem with Energy Policy's contention is that it effectively rewrites the subdivision 1 by eliminating the word "private." If the Legislature wanted the definition of "data on individuals" to apply to this provision, it could have said so explicitly.

The second problem with Energy Policy's contention is that the Legislature chose the placement of the word "individual" to render Energy Policy's construction of Minn. Stat. § 13.65, subd. 1 untenable. If the Legislature had intended the provision to apply exclusively to "data on individuals," it could have said, for example, "[t]the following data *on individuals* created, collected and maintained by the Office of the Attorney General are private data." Instead, it placed a defined phrase "*private data on individuals*" at the end of the first clause of Minn. Stat. § 13.65, subd. 1. By referring to a defined phrase and focusing on the classification

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of the data, rather than a characterization of the subject of the data, the Legislature signified that it was treating data "created, collected and maintained by the Office of the Attorney General" in the manner defined by Minn. Stat. § 13.03, subd. 12. Accordingly, if the data fit within the types and classifications of Minn. Stat. § 13.65, subd. 1(a) through (e) and "created, collected and maintained by the Office of the Attorney General," it would be treated and classified as "private data on individuals."

In the end, this court does not find Minn. Stat. § 13.65, subd. 1 ambiguous. Data which are created and maintained by the Office and fall within the types enumerated in (a) through (e) of Subdivision 1 are classified as "private data on individuals" and merit protection from disclosure.

Even if this court were to adopt Energy Policy's construction of Minn. Stat. § 13.65, subd. 1, Categories 1, 2 and 5 all pertain to proposed comment letters opposing the appointment of specific individuals to positions in the federal government. The data in those categories would certainly be "data on individuals" and therefore classified as private.

The second step of the application of Minn. Stat. § 13.65, subd. 1 is whether the data fall within one of the five categories of documents referenced in subsections (a)-(e) and therefore exempt from disclosure. The Office contends that the documents in Categories 1-5, 7-8, 15 are all "communications and non-investigative files regarding administrative or policy matters which do not evidence final public actions." *See* Minn. Stat. § 13.65, subd. 1(b). Specifically, the Office contends that the documents in Category 1-5 and 8 all pertain to communications regarding policy matters (the position of the Office on the appointments of certain individuals to jobs in the federal government (Categories 1, 2 and 5), the position

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of the Office regarding support for the Paris Climate Accord (Category 3), the position of the Office on the propriety of Congressional subpoenas issued to state attorneys general (Category 4), and a transcript of a White House briefing on an Executive Order regarding energy independence (Category 8)), none of which led to final public actions by the Office. The Office contends that Categories 7 (regarding the use of file sharing services) and 15 (regarding removal of a file-sharing service block to allow an attorney to download deposition exhibits or CLE materials) are communications about administrative matters.

Energy Policy does not address the Office's specific contentions regarding the application of subdivision 1(b); instead, as stated above, it simply argues that these documents are not "data on individuals." Since the court has already resolved that issue, and since Energy Policy does not contend that these documents do not fall under Subdivision 1(b), the classification of the Office is appropriate and the Office does not have to disclose the data in Categories 1-5, 7-8 and 15.

The Office next contends that Categories 6, 10-14, 16-17 are "investigation data, obtained in anticipation of, or in connection with litigation or an administrative proceeding where the investigation is not currently active…" and therefore protected from disclosure by Minn. Stat. § 13.65, subd. 1(d) or are "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," and therefore protected under Minn. Stat. § 13.39, subd. 2. Specifically, the Office contends that the documents in Category 6 are protected because they are: "privileged e-mails with attachments concerning multi-state litigation around federal rule changes on auto and ozone emissions"

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and which it alternatively describes as multi-state, "AG communications concerning NAAQS, Clean Cars litigation." The Office contends that the documents in Categories 10-14 pertain to privileged internal and multi-state communications regarding four matters. Since the Office has included case captions for the matters in each category, and for the matters in three categories it provided the case number, it seems clear that each of these matters was or is being litigated. The descriptions provided by the Office, however, do not reveal the stage of the litigation for any of the matters. Categories 16 and 17 pertain to communications on various investigations and related searches of files stored on dropbox, which were stored there by the target of the investigation or third parties. The Office does not indicate whether the investigations in those categories have been concluded or not. As indicated above, the Office reads Minn. Stat. §§ 13.65, subd. 1(d)(data pertaining to inactive investigation on litigated matters) and 13.39, subd. 2 (data pertaining to active investigation on civil litigated matters) together to provide protection to the data in these Categories. The Office contends that when these two provisions are read together, they "classify virtually all civil investigative data held by the Office as not public."

Much like its arguments about Minn. Stat. § 13.65, subdivision 1(b), Energy Policy does not address the Office's specific contentions regarding the application of Subdivision 1(d); instead, it argues that these documents are not "data on individuals." The arguments it does make about any protection claimed by the Office relate to the application of Minn. Stat. § 13.39 and turn upon whether the investigation is "active" or "inactive" and whether the data pertain to a "pending civil litigation."

To be considered "private data on individuals" under Minn. Stat. § 13.65, subd. 1(d),

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the data must be created, collected, and maintained by the Office. Energy Policy does not dispute that any of this data was "created, collected and maintained" by the Office. In order fall within subdivision 1(d), the data must also: (1) be investigative data; (2) be obtained in anticipation of or in connection with litigation; and (3) the investigation must not be currently active. *Id.*

Minn. Stat. § 13.39, subd. 2 classifies data on individuals as "confidential" and data not on individuals as "protected nonpublic data," which is "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 were retained in anticipation of a pending civil legal action…" Subdivision 1 of that same provision defines a "pending civil legal action" as including "judicial" or "administrative" proceedings. "The legislature's principal purpose in adopting Minn. Stat. § 13.39 was to prevent government agencies from being at a continual disadvantage in litigation by having to prematurely disclose their investigative work product to opposing parties or the public." *Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 298 (Minn. Ct. App. 2003)(citations omitted). Subdivisions 2(a) and 3 "provide specific circumstances under which civil investigative data may be made public: where a governmental entity determines that disclosure is required for one of three enumerated reasons; where the data are presented in court or made part of a court record; and where a civil investigation becomes inactive." Minn. Stat. § 13.39, subd. 2(a), 3. Civil investigative data becomes "inactive" when the government entity decides "not to pursue the civil action," the time expires to file a complaint under the statute of limitations or by agreement, or by exhaustion of or expiration of the rights of appeal. Minn. Stat. § 13.39, subd. 3(1)-(3).

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Category 6 documents, according to the Office, are three emails which address communications by other non-Minnesota attorneys general with the Office "concerning existing or proposed multi-state litigation challenging rules on auto and ozone emissions." It appears from the Office's description, that the subject documents are investigative data which were obtained in anticipation of or in connection with litigation which may or has challenged rule changes on auto or ozone emissions. It is not clear from the description the Office provided that the investigations are "active" or "inactive." In either circumstance, however, the investigative data described in Category 6 is protected from disclosure under Minn. Stat. § 13.65, subd. 1(d) if the investigation is inactive or by Minn. Stat. § 13.39, subd. 2 if the investigation is active.

Categories 10 through 14 pertain to data representing internal communications within the Office, between the Office and its vendors, or between the Office and attorneys general in other states regarding four litigated matters. While it appears that the Office did not ultimately join the litigation described in Category 10, it appears from the provided descriptions that the Office represented the State of Minnesota or its various agencies in the matters described in Categories 11 through 14. It appears from the descriptions that the documents would constitute investigative data "obtained in anticipation of, or in connection with litigation (e.g., Category 10 (should the Office join in an amicus brief?), Category 11 (should documents be produced or are they privileged?), Category 13 and 14 (how should applications for attorney's fees between litigating states be evaluated?)). Though the Office's Category 12 description does not frame the specific topic of the data, it seems clear from the description that the data relates to the Office's representation of the state in that litigated

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matter.

It also seems clear from the descriptions provided by the Office, or from the supplemental information provided by Energy Policy, that Categories 10, 13 and 14 have been resolved and closed, or the Office's involvement in the matters has been resolved. For these reasons, those matters are "inactive" and the data is protected from disclosure by Minn. Stat. § 13.65, subd. 1(d). Publicly accessible information concerning Categories 11 and 12 reflect that they are in the midst of "active" civil litigation, and therefore the investigative data in those categories are protected from disclosure by Minn. Stat. § 13.39, subd. 2.

Categories 16 and 17 pertain to dropbox file searches concerning targets of various investigations or third-parties in civil matters by the Office. Clearly, these documents pertain to investigative data under both Minn. Stat. §§ 13.65, subd. 1(d) and 13.39, subd. 2. The descriptions provided by the Office do not indicate whether the investigations are "active" or "inactive." Like the data in Category 6, in either circumstance, the investigative data described in Categories 16 and 17 is protected from disclosure under Minn. Stat. § 13.65, subd. 1(d) if the investigations are inactive or by Minn. Stat. § 13.39, subd. 2 if the investigations are active.

Energy Policy argues that an investigation no longer "active" in a "pending civil legal action" once the civil legal action is commenced. This reading of Minn. Stat. § 13.39 is contradicted by a simple reading of subdivisions 1 and 3 of that statute. First, subdivision 1 provides that "pending civil legal action" includes judicial proceedings. Since matters filed with the court are part of "judicial proceedings," the Legislature intended to protect investigative data being used in matters currently pending before a court. Second, 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, such as the data being used as evidence in court, being made part of a court record, or after exhaustion or expiration of rights of appeal by either party to the civil action. *Id.* at subds. 3 and 3(3). *See also In re GlaxoSmithKline plc*, 732 N.W.2d 257, 266 (Minn. 2007)("Under the MGDPA, civil investigative data are private until the investigation is no longer active, the data are presented as evidence in court, or the data are made part of a judicial record. Minn. Stat. § 13.39, subd. 3. Any investigative data that are not filed with the court remain protected nonpublic data until the investigation becomes inactive, which occurs when the state agency either decides not to pursue a civil action or the time to file a complaint or an appeal expires."). Investigative data, therefore, does not lose its protection once litigation is commenced.

The final basis for protection from disclosure of the requested documents advanced by the Office is that certain data is work-product privileged and therefore not publicly available under Minn. Stat. § 13.393. The Office claims work-product privilege for Categories 5-6, 10-14 and 16-17. While Energy Policy agrees that Minn. Stat. § 13.393 applies to protect documents which are attorney work-product when the Office's attorneys are "acting in a professional capacity for a government entity," however, it contends still that the documents in those categories are not protected by work-product privilege. Energy Policy argues that the Office has made an insufficient "bare claim of privilege," improperly claimed privilege based on the "common-interest exception" for documents which were exchanged with attorneys general from other states, and that work-product protection is unavailable for cases which are not ongoing.

Minn. Stat. § 13.393 provides: "[n]otwithstanding the provisions of this chapter…the

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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 concerning…production of documents…and professional responsibility…" The work-product doctrine is codified in Minn. R. Civ. P. 26.02(c), which protects against disclosing "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *See also Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986)("'Work product' is defined as an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial. * * * However, materials prepared in anticipation of litigation that do not contain opinions, conclusions, legal theories, or mental impressions of counsel are not work product * * *."). Minnesota has adopted the rationale of *Hickman v. Taylor*, 329 U.S. 495 (1947), which strikes a balance between protecting the work product of an attorney and the public policy interest in allowing reasonable and necessary inquiries into factual matters. *See City Pages v. State*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003).

The descriptions provided to the court by the Office are sufficient for this court to evaluate the applicability of the work-product doctrine. As evident from the descriptions, the data in the subject categories pertain to communications between attorneys within the Office, between the Office's attorneys and their vendors, between the Office's attorneys and their clients, or between the Office's attorneys and attorneys from other attorney general's offices, regarding matters in anticipation of litigation or giving legal advice, or concerning pending litigated matters. In addition, this court has already concluded that these data are investigative data, which is inherently the work-product of attorneys.

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The Office claims work-product protection, not only for work-product communications with its own attorneys, but also for work-product communications with attorneys general in other states regarding litigation in which each are involved or in which they each have an interest. Energy Policy contends that Minnesota has not recognized a privilege which protects communications across the attorneys general from multiple states.

Although the parties do not discuss it as such, the Office is claiming protection of the common interest privilege for work-product exchanged with other attorneys general. The common interest privilege is defined by the Restatement (Third) of the Law Governing Lawyers, § 76 as follows:

> If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged…that relates to the matter is privileged as against third persons.

Comment d to this section provides further: "Under the privilege, any member of a client set…[including] the client's lawyer…can exchange communications with members of a similar client set."

The Court of Appeals for the Eighth Circuit has adopted the common interest privilege. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997). It has also been applied by Minnesota federal courts. *UltiMed, Inc. v. Becton, Dickson and Co.*, 2008 WL 4849034 at *3 (D. Minn., Nov. 6, 2008); *Tekstar Comm'ns, Inc. v. Sprint Comm'ns Co. L.P.*, 2009 WL 1071188 at *4 (May 14, 2009). In practical effect, common interest privilege protects confidential communications made by a client's lawyer to a lawyer representing another in a matter of common interest. *See Tekstar*, 2009 WL 1071188 at *4. A common interest can

be legal, factual or strategic in nature. *In re Grand Jury*, 112 F.3d at 922.

The 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. Energy Policy has not advanced a convincing argument to counter the application of the common interest privilege to the data at issue.

Energy Policy's reliance on *Hanover Shoe, Inc. v. United Shoe Mach. Corp*., 207 F. Supp. 407 (M.D. Pa. 1962) for the proposition that work-product protection only extends as far as the termination of litigation, is misplaced. The *Hanover Shoe* holding finds no support in Minnesota jurisprudence. As the Office points out, *Hanover Shoe* was effectively abrogated by the United States Supreme Court in *FTC v. Grolier Inc.*, 462 U.S. 19 (1983). *Grolier* held that under the Freedom of Information Act, "attorney-work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared." *Id.* at 28. *See also Equitable Life Assur. Soc. of U.S. v. County of Hennepin*, 1994 WL 475075, * 3 (Minn. Tax Ct. Aug. 30, 1994)("We find the United States Supreme Court decision in [*Grolier*] helpful. * * * The Supreme Court looked at the discovery rules and found that 'the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to subsequent litigation.'")(citation omitted, emphasis in original). It would not make sense for work-product materials to lose their protection at litigation's end.

The Office does not have to produce data in Categories 5-6, 10-14 and 16-17 under Minn. Stat. § 13.393.

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CONCLUSION

In the end, the Office appropriately classified the data in Categories 1-8 and 10-17. As a result, the data is protected from disclosure under the MGDPA. For those reasons, Energy Policy's motion to compel is denied.

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