No. A20-1344

STATE OF MINNESOTA

IN COURT OF APPEALS

Energy Policy Advocates,

Appellants,

vs.

Keith Ellison, in his official capacity as Attorney General, Office of the Attorney General

Respondents.

BRIEF OF RESPONDENTS KEITH ELLISON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, AND THE OFFICE OF THE ATTORNEY GENERAL

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LEGAL ISSUES

I. Does the work-product privilege continue to shield attorney work product after litigation concludes?

District Court Decision: *The District Court held that the work-product privilege continues to apply to attorney work product even after the termination of litigation, following established state and federal caselaw.*

Most Apposite Authorities:

Minn. Stat. § 13.393
City Pages v. State, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003).

II. Does the Data Practices Act's protection for civil investigative data terminate upon the filing of a related civil action?

District Court Decision: *The District Court held that the Data Practices Act's protections for civil investigative data do not terminate with the filing of a related civil action.*

Most Apposite Authorities:

Minn. Stat. §§ 13.39, 13.65
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III. Does Section 13.65 of the Data Practices Act make Attorney General data on policy, administrative, and inactive civil investigative investigations available only to an individual who is the subject matter of the data?

District Court Decision: *The District Court held that Section 13.65's protection for policy, administrative, and investigative data makes such data available only to an individual who is the subject of the data.*

Most Apposite Authorities:

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IV. Did the District Court abuse its discretion in finding that it had sufficient information to evaluate the Attorney General's data classifications?[1]

District Court Decision: *The District Court held that it had sufficient information to evaluate the AGO's assertions of privilege and data classification.*

Most Apposite Authorities:

Doe v. Archdiocese of St. Paul, 817 N.W.2d 150 (Minn. 2012)
State v. Modtland, 695 N.W.2d 602 (Minn. 2005)

[1] Appellant's statement of the issues is. in certain respects. non-specific and duplicative As a result, it does not track well with its brief. The Appellants' first and third issues – whether the district court erred in holding that the Office of the Attorney General ("AGO") properly classified the data at issue and whether the district court erred in failing to enjoin the AGO's classification of the data – appear indistinguishable, and are not separately briefed. These issues, as stated, are also vague – failing to identify the alleged legal or factual errors in dispute. For these reasons, the AGO has briefed this appeal as involving four issues – whether the work product doctrine survives litigation (App. Br. at 39-50), whether the protection for civil investigative data continues after the filing of a suit (*id.* at 30-37), whether Section 13.65 of the Data Practices applies to the data in question (*id.* at 24-30), and whether the district court clearly erred in holding that it had sufficient data to review the AGO's data classifications (*id.* at 37-39).

INTRODUCTION

This appeal concerns whether the AGO correctly classified certain materials as nonpublic in response to two Data Practices Act requests from Appellant Energy Policy Advocates. The three primary legal issues for this Court to resolve in evaluating whether the documents at issue are public data within the meaning of the Data Practices Act are: (1) whether certain documents are privileged and therefore not publicly available; (2) whether certain documents are civil investigative data and therefore not publicly available; and (3) whether certain documents are communications on policy or administrative matters that do not evidence final public actions, and are therefore not publicly available. Appellants also contend that the district court abused its discretion in finding that it had sufficient information to evaluate the AGO's data classifications.

On the first issue, Appellant argues that work-product protection ends when the litigation ends – citing a fifty-eight-year-old federal case from the Middle District of Pennsylvania that is no longer good law, and hasn't been for more than thirty-five years. Under existing Minnesota and federal law, the work-product privilege survives the litigation that gives rise to it. On the second issue, Appellant primarily argues that the Data Practices Act's protections for civil investigative data are lifted once litigation is filed. This is contrary to the plain language of the act, existing precedent from the Minnesota Supreme Court, and common sense. On the third issue, the Data Practices Act classifies communications concerning policy or administrative matters that do not evidence a final public action as private data not accessible to anyone other than an individual who is the subject matter of the data. Appellant argues that these provisions

do not apply unless the data is about an individual. This argument is contrary to the plain text and structure of the Data Practices Act. Finally, on the evidentiary issue, a district court's determination on the adequacy of evidence is committed to the sound discretion of the court, and will be overturned only upon a showing of an abuse of discretion – a showing Appellant has not made here.

STATEMENT OF THE CASE

Appellant is an advocacy organization based in Spokane, Washington. (Dkt. 2 at 3.) It made two data requests on the AGO that are the subject of this appeal. (Add. 4.) In general, the requests sought communications to or from the AGO that contained certain keywords designed to capture communications between the AGO and other attorneys general on environmental issues. (R. Add. 1 ¶ 3, 2 ¶ 4.) The AGO identified and preserved the documents triggered by the word searches, reviewed them for privilege and classification under the Data Practices Act, and determined that there were no responsive, non-privileged, public data to produce. (*Id.*)

Appellant sued in district court under Section 13.08, subdivision 4 of the Data Practices Act, alleging that the AGO had misclassified the data as nonpublic. (Add. 4.) Appellant sought an order from the district court for production of the documents. (*Id.*) By agreement between the parties, and as contemplated by the Data Practices Act, the matter was submitted to the district court by way of briefing. (Add. 11.) The AGO also

tendered copies of the non-privileged documents to the district court for in camera inspection. (*Id.*)[2]

The district court entered judgment in favor of the AGO, finding that the AGO had properly classified the documents in question as non-public on the bases that they were either privileged, or nonpublic civil investigative data, or nonpublic data on administrative or policy matters that did not evidence a final decision and were not about the Appellant. (Add. 27.)

FACTS

In December 2018, Appellant served two data requests on the AGO which are the subject of the present suit. (Dkt. 2, Compl. Exs. A, B.)

The first request, dated December 20, sought communications to or from Deputy Attorney General Karen Olson that contained any of the following terms: SherEdling, Sher Edling, DAGA, @democraticags.org, alama@naag.org, or Mike.Firestone @state.ms.us. (Dkt. 2.) The AGO conducted a review of its e-mail and document management systems in response to this request using word searches, and identified and preserved 145 documents. (R. Add. 1 ¶ 3.) All of the identified responsive documents were either e-mails or attachments to e-mails that were sent or received by Massachusetts Assistant Attorney General Mike Firestone. (*Id.*) There were no communications to or from Sher Edling, DAGA, @democraticags.org, or alama@naag.org. (*Id.*) The AGO

[2] As set forth in more detail below, the AGO also produced various documents in litigation that were not responsive to the data request but were responsive to later discovery requests – generally consisting of documents showing the AGO's efforts to locate and segregate potentially responsive documents.

determined that none of the documents were both responsive and classified as public data under the Data Practices Act. (*Id.*)

The second request, dated December 26, sought communications to or from Karen Olson that contained any of the following terms: @googlegroups.com, Google doc, ucsusa.org, dropbox, box.com, or Sharepoint. (*Id.* at 2 ¶ 4.) The AGO conducted a review of its e-mail and document management systems in response to this request using word searches, and identified and preserved 154 documents. (*Id.*) None of the documents concerned communications with other state attorneys general using any of the identified file sharing services. (*Id.*) The AGO determined that none of the documents were both responsive and classified as public data under the MGDPA. (*Id.*)

December 20 Request

The current status of the 145 documents identified in response to the December 20 data request are as follows (R. Add. 3 ¶ 7):

Summary of Documents Assembled in Response to the December 20 Request		
Description	**Number**	**Status**
Documents concerning efforts to respond to the Data Practices Act request	50	Produced in litigation[3]
Non-privileged but not public	80	Submitted in camera
Privileged and not public	13	Not submitted in camera
Non-responsive (artifact documents)	2	Produced in litigation
Total:	145	

[3] Many of the 145 documents originally identified by word searches related to the Office's response to the underlying request. (R. Add. 3 ¶ 7.) These documents were not responsive to the request itself, but were later produced in response to a litigation document request. (*Id.*)

Of these documents, eighty were tendered to the district court for in camera review, consisting of the non-privileged documents the AGO determined were classified as nonpublic under the Data Practices Act. (R. Add. 4 ¶ 9.)

The non-privileged documents submitted for in camera review generally concerned communications from other state attorney general's offices requesting that the AGO join letters opposing the appointments of various federal officials or federal legislative subpoenas, or commenting on the Paris Climate Accord. (*Id.* (Categories 1-4)[4].) There was substantial duplication among these 80 documents, and far fewer unique documents. (*Id.* at 5 ¶ 10.) The AGO did not join any of the letters. (*Id.* at 4 ¶ 9.)

Thirteen privileged documents were not tendered for in camera review, and were instead described by affidavit. (*Id.* at 5 ¶ 11.) These privileged documents may be broadly classified as follows:

- Category 5: Eight documents consisting of multiple copies of a draft and final memorandum prepared by an assistant attorney general and addressed to the Attorney General in the AGO with a recommendation concerning one of the proposed comment letters, or emails from that attorney with substantive comments on the recommendation. (*Id.*) The memorandum reflected the attorney's analysis of issues that might become before FERC, and how the appointment in question might affect the resolution of those issues. (*Id.*) The memorandum was not shared with anyone outside of the AGO. (*Id.*)

- Category 6: Five documents consisting of emails and their attachments concerning communications between Minnesota assistant attorneys general and non-Minnesota attorney generals concerning existing or proposed multi-state litigation challenging federal rule changes on auto and ozone emissions. (*Id.*) The AGO shares a common interest with the other attorneys generals in reviewing federal rule changes on these issues, and where appropriate, bringing litigation to challenge such rule changes. (*Id.*)

[4] To assist the district court, the AGO separated the potentially responsive documents into eighteen categories, described in the district court's opinion. (*See* Add. 5-7.)

December 26 Request

The current status of the 154 documents identified in response to the December 26 data request are as follows (*id.* ¶ 12):

Summary of Documents Assembled in Response to the December 26 Request		
Description	**Number**	**Status**
Documents concerning efforts to respond to the Data Practices Act request	36	Produced in litigation
Board of Medical Practice Documents	70	No longer at issue
Non-privileged but not public	11	Submitted in camera
Privileged and not public	37	Not submitted in camera
Total:	154	

Seventy of the documents concerned communications between the AGO and the State's Board of Medical Practice that had no relevance at all to the AGO's relationship with New York University fellowships or environmental litigation. (*Id.* at 6 ¶ 13.) These were swept up in the search because the Board of Medical Practice sometimes uses Sharepoint or other data sharing services to exchange documents. (*Id.*) The Appellant's data request sought documents with terms like "Sharepoint." (*Id.*) All of the documents were classified as non-public data on a variety of bases, and many were also privileged. (*Id.*) Appellant voluntarily excluded these documents from this lawsuit in order to save the Court the effort of reviewing documents that did not concern a topic of interest to Appellant. (*Id.*)

Of the remaining forty-eight documents (11 non-privileged but not public, 37 privileged), none concerned the AGO's relationship with NYU, and only one concerned or environmental issues – an e-mail from another state's attorney general's office concerning an energy independence executive order. (*Id.*) The AGO took no action in

response to the communication. (*Id.*) All eleven non-privileged documents were tendered to the Court for in camera review. (*Id.*) They may be broadly classified as follows:

- Category 7: There were five documents concerning internal communications about the use of data sharing services like dropbox, box.com, and Sharepoint. (*Id.* at 7 ¶ 15.) Those documents had no information about NYU or environmental litigation.

- Category 8: The one e-mail from another state's attorney general's office concerning an energy independence executive order. (*Id.*)

- Category 9: There were five documents concerning a Wisconsin bar association list serve, and a request for advice from Karen Olson to the Office's systems manager on the selection of a personal computer. (*Id.* at 8 ¶ 17.)[5]

Thirty-seven privileged documents were not tendered for in camera review, and were instead described by affidavit. (*Id.* at 7 ¶ 16.) None of these documents had any information about the AGO's relationship to NYU, and most did not concern environmental litigation. They can be classified as follows:

- Category 10: There were sixteen documents relating to communications between the AGO, the Department of Natural Resources, and other state attorneys general concerning a request for the AGO to join an amicus brief concerning a writ of certiorari to the U.S. Supreme Court in the matter *Coachella Valley Water District, et al. v. Agua Caliente Band of Cahuilla Indians*. (*Id.*) The Office did not join the brief. (*Id.*)

- Category 11: There were four documents relating to internal communications between this Office and vendors assisting it with document and privilege review in the matter *Jensen v. Minnesota Department of Human Services,* D. Minn. 09-cv-1775. (*Id.*) The litigation concerned mental health treatment. (*Id.*)

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[5] Appellant is not appealing the district court's determination on this set of documents.

- Category 12: There were seven documents relating to internal communications concerning this Office's representation of the State in the matter *Cruz-Guzman v. State of Minnesota*, Ramsey County, 27-CV-15-19117. (*Id.*) The litigation concerns access to education. (*Id.*)

- Category 13: There were seven documents relating to internal and multi-state communications concerning this Office's representation of the State in the multijurisdictional *In re DRAM Antitrust Litigation*, N.D. Cal., C-06-6436. (*Id.*) The communications generally concern applications for attorneys' fees submitted by the participating states. (*Id.*)

- Category 14: There were three documents relating to internal and multi-state communications concerning this Office's representation of the State in the multijurisdictional *In re TFT-LCD (Flat Panel) Antitrust Litigation, N.D. Cal. 07-MD-1827*. (*Id.*) The communications generally concern applications for attorneys' fees submitted by the participating states. (*Id.*)

Search for "Dropbox"

One of the search terms included in Appellant's December 26 data request was for all communications to or from Karen Olson that included the word "dropbox." (*Id.* at 8 ¶ 17.) The Office did not initially perform a word search for this term, for reasons that are no longer known. (*Id.*) One explanation is that the word could have been inadvertently omitted from the word search. (*Id.*) Another potential explanation is that the attorneys handling the data request knew that Ms. Olson did not use dropbox, and therefore did not search for this specific term, while including a search for "box.com" and "Sharepoint" because they were aware that the Board of Medical practice sometimes used these services. (*Id.*)

The AGO performed a search of Ms. Olson's e-mails during the district court litigation, and identified twenty-seven e-mails that use the word dropbox, none of which concerned the AGO's relationship with NYU or environmental litigation. (*Id.* at 9 ¶ 20.)

Together with their attachments, there were fifty-one total documents. (*Id.*) These documents can be summarized as follows:

- Category 15: There were three e-mails related to lifting a file-sharing block to allow an assistant attorney general to download deposition exhibits or CLE materials. (*Id.*)

- Category 16:There were nineteen documents consisting of attorney client and work product privileged communications internal to the Office concerning discovery in fraud investigations on files stored by the target of the investigation or third-parties on dropbox. (*Id.*)

- Category 17:There were fourteen documents concerning attorney client and work product privileged communications in civil antitrust, charities, or consumer fraud matters concerning discovery on files stored by the target of the investigation or third-parties on dropbox. (*Id.*) Some of these communications involved multi-state investigations of the targets, and included attorneys from other attorney generals' offices. (*Id.*)

- Category 18:There were fifteen documents concerned discussions of lifting file sharing blocks in connection with representation of the Board of Medical Practice, and are no longer at issue. (*Id.*)

Notably, the purported purpose for Appellant's data request for communications relating to file sharing services is Appellant's contention – repeated on appeal – that attorneys general offices are communicating with one another using these services. (App. Br. at 14.) *None* of the documents the AGO identified in response to this request concern the use of file sharing services for communications among attorney generals. (R. Add. 7 ¶¶ 15-16, 10 ¶¶ 19-20.)

Appellant's Allegations Concerning the Appointments of Special Assistant Attorneys

Appellant devotes substantial space in its brief to various arguments concerning the power of the AGO to appoint fellows affiliated with the NYU as special assistant attorneys general, as well as various theories on allegedly clandestine efforts among state

attorney general's offices to communicate using file sharing services. (App. Br. at 2-12, 15-16, 17-18.) None of this is relevant to the present case, which is limited in scope to determining whether the AGO properly classified certain materials (entirely consisting of e-mails and their attachments) as not publicly available under the Data Practices Act.

Moreover, there were no identified communications of the nature Appellant presumed. There were no identified communications – produced or withheld – between former Deputy Attorney General Karen Olson and the private law firm of SherEdling, or DAGA, or @democraticags.org, or alama.org (the primary targets of the Appellant's December 20 request). (R. Add. 1 ¶ 3.) There were also no communications between Ms. Olson and anyone using any of the file sharing services of interest to Appellant (the target of Appellant's December 26 request). (*Id.* at 2 ¶ 4.) The only identified documents on either request concerning climate change issues are e-mails from a Massachusetts assistant attorney general on policy matters and federal appointments. (*Id.* at 1 ¶ 3, 7 ¶ 15.)

Moreover, all but one of the documents identified in response to the December 26 request are irrelevant to the Appellant's professed interest in NYU and environmental litigation. Outside of the one e-mail on energy independence, the identified documents have nothing to do with climate change issues, or Michael Bloomberg, or NYU fellows, and instead involve the AGO's defense of non-climate litigation on subjects like mental health treatment requirements and Medicare fraud. (*Id.* at 7 ¶¶ 15-16.) They were identified in response to Appellant's data request largely because they are emails discussing discovery efforts made on data sharing services used by the targets of the

AGO's investigations. (*Id.*) The one document identified in response to Appellant's December 26 request that does touch upon a climate issue (the e-mail that comprises Category 8) was tendered for in camera inspection. (*Id.* at ¶ 14.)

Appellant also alleges that other organizations have produced far more documents in response to similar requests. (*E.g.* App. Br. at 15-16.) It is unclear what relevance this has to the present case. Beyond the fact that state laws vary on the subject of access to government documents, much of the explanation for why other states produced more documents is that they had more documents to produce. For example, the reason that the AGO did not produce communications between Karen Olson and SherEdling, or DAGA, or @democraticags.org, or alama.org was not because of any data classification issue, it was because there were no such documents. (R. Add. 1 ¶ 3.)

In sum, Appellants' twenty-some-page recitation of its various conspiracy theories is not supported by the documents, and is irrelevant to the issues before this Court.

ARGUMENT

The Court should affirm the district court's holdings that: (1) the work-product privilege continues to protect attorney work product even after the termination of litigation; (2) the Data Practices Act's protections for civil investigative data continue through the end of a related civil legal action, not its filing; (3) the protections for Attorney General data on policy, administrative, and investigative data under Section 13.65 make that data only available to individuals who are subject to the data; and (4) there was sufficient information to evaluate the AGO's data classifications.

I. OVERVIEW OF THE DATA PRACTICES ACT.

The Data Practices Act, generally contained in chapter 13, is a detailed statute establishing data classifications and specifying what data is publicly available and what data is not, as well as the obligations of government agencies in responding to public requests for such data. As a general matter, the Data Practices Act requires agencies to provide access to data where that data is public. Minn. Stat. §§ 13.01, subd. 3, 13.03, subd. 1.

For present purposes, the key inquiry is into whether the data the AGO declined to produce in response to Appellants' data requests was public. For this inquiry, the most relevant portions of the Data Practices Act are:

- Section 13.393, which exempts the privileged data attorneys hold related to their representation of the State or its agencies from the Data Practices Act.
- Section 13.39, which classifies any data collected during or in anticipation of civil litigation as either "protected nonpublic" or "confidential" while the civil investigation is active.
- Section 13.65, subd. 1(d), which classifies inactive civil investigation data in the possession of the AGO as "private data on individuals."
- Section 13.65, subd. 1(b) which classifies certain communications to or from the Office concerning policy or administrative matters as "private data on individuals."
- Section 13.03, subd. 1, which provides that government data classified as "protected nonpublic," "confidential," or "private data on individuals" is not available to the general public through the Data Practices Act.

As set forth above and below, many of the documents at issue consist of attorney-client or work-product privileged communications that are not public under the Data Practices Act. Much of the data was also related to civil litigation, and was properly

classified as not publicly available on that basis. Still other data, consisting of communications on policy or administrative matters without a final action from the Office, was properly classified as private data on individuals. Much of the data fell within more than one nonpublic category. As a result, this data was not publicly available.

II. THE AGO PROPERLY CLASSIFIED ATTORNEY-CLIENT PRIVILEGED AND WORK-PRODUCT PRIVILEGED DOCUMENTS AS NONPUBLIC.

Appellant concedes that materials protected by the attorney-client and work-product privileges are exempt from disclosure under the Data Practices Act pursuant to Section 13.393. (App. Br. at 38.) Appellant's primary legal argument focuses on the work-product privilege, where Appellant argues the privilege ceases to exist once the litigation that gives rise to it concludes, making these documents publicly accessible. (*Id.* at 40-42.) For this proposition it cites a fifty-eight-year-old, abrogated case from the Middle District of Pennsylvania – *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962).

Even if *Hanover* was still good law, which it is not, it is not controlling precedent here. Minnesota recognizes the work product doctrine, and applies it even after the termination of litigation. *See e.g. City Pages v. State*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003). In *City Pages*, this Court held that the bills of the State's outside counsel in the tobacco litigation (which settled in 1998) would be work product privileged (even in 2003) if they met the other conditions for application of the work product doctrine. *Id.* It then remanded for that that determination. *Id.*

Moreover, *Hanover* is not good law even in the Middle District of Pennsylvania, having been abrogated by the U.S. Supreme Court in *FTC v. Grolier Inc.*, 462 U.S. 19, 27 (1983). *Grolier* is on all fours with the present case. In *Grolier*, the plaintiff made a federal freedom of information act request on the FTC for production of attorney work product material from litigation that had terminated, and then sued when the FTC refused to produce it. *Id.* at 21-22. FOIA, like the Minnesota government data practices act, classifies work product privileged materials as exempt from disclosure. *Id.* The district court held that the materials in question were work product privileged and exempt from FOIA. *Id.* at 22. The D.C. Circuit reversed after finding a split in the federal case law on the application of the work product privilege after the conclusion of litigation, and held that it would adopt a hybrid approach in which the privilege would apply after the termination of litigation only if there was a threat of similar future litigation. *Id.* at 22-23; *see also Grolier Inc. v. FTC*, 671 F.2d 553, 556 (D.D.C. 1982).

The Supreme Court grated certiorari to resolve the circuit split, and reversed, holding that the work product privilege continues to apply even after the termination of litigation. *Id.* at 24-26, 30. The Supreme Court noted that to hold otherwise would frustrate the purposes of the work product privilege:

> In performing his various duties, ... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.... This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly but roughly termed ... the 'work product of the lawyer.' Were

> such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id., *citing Hickman v. Taylor*, 329 U.S. 495 (1947); *see also City Pages*, 655 N.W.2d at 846 (noting that Minnesota has adopted the work product rationale of *Hickman*). *Grolier*'s logic applies with equal force here. Making the work product of the AGO public under the Data Practices Act at the conclusion of litigation would substantially hamper the ability of AGO attorneys to provide the same type of candid and able representation every other party in the State can secure. *Id.*

This Court should also take particular note of Appellant's problematic citation to *Hanover*. As an initial matter, Appellant's citation to an obscure fifty-eight-year-old district court case from the Middle District Pennsylvania raises an obvious red flag. Even a modest shepardizing effort reveals that *Hanover* is not good law. *Hanover* was most recently cited on the issue for which Appellant uses it in 1985 in *Levingston v. Allis-Chalmers Corp.*, 109 F.R.D. 546, 552 (S.D. Miss. 1985) – which explicitly discusses the split in authority that was ultimately resolved by *Grolier*. *Id.* Appellant simply ignores that *Grolier* abrogated *Hanover*.[6]

[6] Appellant discusses *Grolier*, but does so without acknowledging that *Grollier* abrogated *Hanover.* (App. Br. at 40-41.) Appellant instead suggests that maybe the Minnesota Supreme Court will choose not to follow *Grolier*, and instead follow the cases *Grolier* overruled to decide that work product protections terminate with the related litigation. (*Id.*) But even if the Minnesota Supreme Court decides to chart a different path than the U.S. Supreme Court on the work product doctrine, *Hanover* is

Appellant also argues, incorrectly, that communications internal to the AGO cannot be attorney-client privileged because they were not sent to a client. (*See*, *e.g.*, App. Br. at 43, 44, 45.) Appellant fails to recognize that much of the work of the AGO consists of assistant attorneys general providing legal advice to the Attorney General or more senior members of the office concerning decisions they are tasked with making. The attorney-client privilege clearly protects this type of internal legal analysis within a government organization. *Kobluk v. University of Minnesota*, 574 N.W.2d 436, 444 (Minn. 1998) (holding that drafts of a tenure denial letter reflecting legal analysis of an attorney were covered by the attorney client privilege). The fact that such legal analysis is provided internally does not alter its privileged status. *Id.* The attorney client privilege also protects more than just communications from the client to the attorney, it protects communications of legal advice from the attorney to the client. *City Pages*, 655 N.W.2d at 845.

Appellant's focus on a mechanical analysis of the attorney client privilege – who sent the document to whom, and when – is also misplaced. The Minnesota Supreme Court has warned against needlessly mechanical applications of the attorney client privilege. *Kobluk*, 574 N.W.2d at 444. Instead, courts must examine whether "the contested document embodies a communication in which legal advice is sought or rendered." *Id.* This involves reviewing "the nature and form of the document and the

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still a dead letter. It is not good law. And Appellant has an obligation to acknowledge to the Court that the case it is relying on is not good law even in the jurisdiction from which it originates.

circumstances of the exchange." *Id.* Here, the nature of the documents over which the AGO asserted privilege clearly reflect that they were created for the purpose of rendering and communicating legal advice from attorneys working for the AGO to the Attorney General or the external clients of the AGO.

This Court should also affirm the district court's application of the common interest doctrine. As this Court recently observed, no Minnesota case has explicitly adopted or rejected the common-interest doctrine, leaving the issue open. *Walmart Inc. v. Anoka Cty.*, No. A19-1926, 2020 WL 5507884, at *2 (Minn. Ct. App. Sept. 14, 2020), *review denied* (Nov. 25, 2020). The common interest doctrine is sufficiently well-established, however, to be included in the relevant restatement of the law and a host of federal decisions, including decisions in the Eighth Circuit. *See*, *e.g.*, Restatement (Third) of the Law Governing Lawyers § 76 (2000); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997). Minnesota would be an outlier in rejecting the common interest doctrine. *Id.*

Appellant misstates the nature of the common interest doctrine and its application here. The AGO has not asserted that through the common interest doctrine the attorney general offices of other states become the AGO's clients. That is not how the common interest doctrine works. Rather, the common interest doctrine allows parties to maintain the attorney client and/or work product privileges for communications shared between them if there is a sufficient identity of interests between those parties. *Walmart*, 2020 WL 5507884 at *3. Notably, it can apply to maintain the attorney client privilege even in the absence of litigation. Restatement (Third) of the Law Governing Lawyers § 76

(holding doctrine applies to "a litigated or nonlitigated matter"); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 922 (same).

Here, the AGO has cited the common interest doctrine to preserve the work product privilege that attaches to communications between the AGO and other state attorneys general about filed or contemplated matters in which they are co-plaintiffs, or where another state requested joint participation in an amicus brief.[7] These were all situations involving litigation and communications among attorneys with aligned interests discussing the merits of their cases, or making joint filings. The Court should affirm the district court's holding on application of the common interest doctrine.[8]

Finally, on this and other issues, Appellant urges the Court to adopt a narrow interpretation of the work product privilege or the Data Practices Act protections for civil investigative data on the basis that the public interest would be served by disclosure. These arguments are without merit. Here, for example, Appellant disingenuously argues

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[7] The categories involving assertions of the common interest doctrine include Category 6 (communications concerning potential legal challenges to federal rules changes on auto and ozone emissions), Category 10 (concerning a proposed amicus to be filed by aligned states in *Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians*, an important federal case concerning the Clean Water Act), Category 13 (in which Minnesota joined other states as co-plaintiffs in suing various makers of DRAM computer memory for price fixing), and Category 14 (in which Minnesota joined other states in suing various makers of flat panel displays for price fixing).

[8] While the AGO believes this case would be an appropriate one to take up the question of whether Minnesota applies the common interest doctrine, the documents at issue here that are subject to the common interest privilege (Categories 6, 10, 13, and 14) all also concern actual or contemplated civil legal actions and would separately be classified as civil investigative data. If this Court affirms the district court on the legal issues relating to civil investigative data classification, it does not need to address the common interest doctrine.

that access to the withheld documents would shed light on whether the AGO is "allowing outside special interests to plant SAAGs in its office to dictate its priorities" – presumably referring to Appellants' conspiracy theories involving Michael Bloomberg. (App. Br. at 6, 41.) But only a handful of documents even concern multistate environmental issues (Categories 8, 10), and none concern Michael Bloomberg. Appellant fails to explain why it needs communications concerning, for example, the AGO's defense or prosecution of suits concerning mental health treatment requirements and Medicare fraud (*see* Categories 7 and 17) to shed light on the AGO's appointment of special assistant attorneys on environmental issues.

Government actors also need access to able representation, and the attorney-client and work-product privileges promote such representation. As many courts have recognized, if government lawyers cannot provide the same assurances of confidentiality to their clients that are afforded to other parties one likely result is that government actors will stop seeking out legal advice or stop documenting it – leading to government actors receiving less useful advice, and becoming less likely to follow to the law. *See*, *e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)*; New York Times Co. v. U.S. Dep't of Justice*, 282 F. Supp. 3d 234, 239–40 (D.D.C. 2017). The issue was succinctly described by the *New York Times* court:

> Without a guarantee of confidentiality, executive branch agencies, like all legal clients, would hesitate to share private details about planned agency actions with the Attorney General when seeking legal advice. And without such confidentiality, executive branch agencies might choose to forgo seeking legal advice altogether and thereby risk public disclosure of private, confidential details about their activities. This would undermine the public interests that buttress the attorney-client privilege, since executive agencies

> seeking out legal advice concerning their planned activities helps ensure their actions conform to the law and the Constitution.

New York Times Co., 282 F. Supp. 3d at 239–40.

The Minnesota Supreme Court has likewise recognized the utility of affording confidentiality to communications between government actors and their attorneys, emphasizing the value of confidentiality in promoting the free flow of information between government actors and their counsel:

> Otherwise, the client and lawyer might avoid drafts entirely, relying instead upon discussion to develop the details of the document. We see no reason to draw an illusory distinction between a face-to-face conversation and a non-oral exchange of essentially the same information. Such a holding would contravene the very essence of the privilege: to encourage the free flow of information between client and counsel, thereby promoting effective legal representation.

Kobluk, 574 N.W.2d at 444.

The Court should affirm the district court's holding that the AGO properly classified documents the documents in question as privileged, that the documents retain those privilege protections, and that the documents are not public pursuant to Section 13.393 of the Data Practices Act.

III. THE DATA PRACTICES ACT'S PROTECTION FOR CIVIL INVESTIGATIVE DATA CONTINUES BEYOND THE FILING OF A CIVIL ACTION.

In Sections 13.39 and 13.65, subd. 1(d), the Data Practices Act classifies most AGO civil investigative data as not public. Section 13.39 applies generally to all investigative data held by any State entity and provides as follows:

> [D]ata 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, are classified as protected nonpublic data pursuant to section 13.02, subdivision 13, in the case of data not on individuals and confidential pursuant to section 13.02, subdivision 3, in the case of data on individuals.

Minn. Stat. § 13.39, subd. 1.

Similarly, Section 13.65, subd. 1(d) (applicable only to the AGO) further classifies even inactive civil investigative data held by AGO as not generally available to the public, providing:

> The following data created, collected and maintained by the Office of the Attorney General are private data on individuals:
>
> ***
>
> (d) investigative data, obtained in anticipation of, or in connection with litigation or an administrative proceeding where the investigation is not currently active;

Read together, Sections 13.39 and 13.65, subd. 1(d) classify virtually all civil investigative data held by the AGO as not public – excepting inactive civil investigative data made available to the subject individuals.

With respect to Section 13.39, Appellant responds with a novel legal argument that the protection for civil investigative data ends not when the investigation becomes *inactive*, and instead ends when litigation is *filed*. This is contrary to the plain language of the Data Practices Act, existing precedent, and common sense. With respect to Section 13.65, Appellant argues that this section applies only to data about individuals, rather than all investigative data. This argument is addressed in Section IV below.

Section 13.39 of the Data Practices Act is plain in providing that data classified as civil investigative data remains so classified until any "pending civil legal action"

becomes "inactive," and not before. It does this at least two ways. First, the act defines a "pending civil legal action" to include any "judicial, administrative or arbitration proceedings." Minn. Stat. § 13.39, subd. 1. The only reasonable reading of this language is that an ongoing civil judicial proceeding is a "pending" legal action within the meaning of the act. Second, the act identifies the events that result in a civil action becoming "inactive" in ways that preclude Appellant's argument. In particular, Section 13.39 provides that a matter becomes inactive, and the civil investigative data potentially public, upon the "exhaustion of or expiration of rights of appeal by either party to the civil action." Minn. Stat. § 13.39, subd. 3(3). This confirms the obvious reading of Section 13.39 – that civil investigative data related to a matter in litigation remains classified as civil investigative data until the litigation terminates. If the legislature intended for the civil investigative classification to end with the *filing* of litigation rather than the *end* of that litigation, it would have so provided.

Case law also supports this obvious reading of Section 13.39. *See*, *e.g.*, *In re GlaxoSmithKline plc*, 732 N.W.2d 257, 266 (Minn. 2007). In *In re GlaxoSmithKline* the Minnesota Supreme Court weighed in on the issue of the interaction between the filing of a civil action and the classification of data as protected civil investigative data. *Id.* It held:

> 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.*

Id. (emphasis added). As a matter of Supreme Court precedent, civil investigative data therefore retains its classification during the pendency of a civil action unless and until the matter is either resolved, or the data in question is made part of the judicial record. The mere filing of a complaint does not affect the classification.

Appellant argues for a contrary result, citing this Court's decision in *Star Tribune v. Minnesota Twins P'ship*, 659 N.W.2d 287, 298 (Minn. Ct. App. 2003). Appellant argues that *Star Tribune* held that once an action is filed, all data classified as civil investigative data loses that classification because the action is no longer "pending," but is instead active. (App. Br. at 31.) Beyond the obvious misreading of the word "pending," *Star Tribune* contains no such holding.[9] The issue in *Star Tribune* was very different and concerned how to classify data a government agency collected through the discovery process in an actively litigated matter. *Star Tribune*, 659 N.W.2d at 298-99. The *Star Tribune* court held this type of data should not be classified as civil investigative data because the purpose animating Section 13.39 did not apply to data obtained from an opposing party in discovery. The purpose of Section 13.39 is "to prevent government agencies from being at a continual disadvantage in litigation by having to prematurely

[9] As the Court is doubtless aware, it is both common and natural to use the word "pending" to refer to an active lawsuit. *See e.g. Mr. Steak, Inc. v. Sandquist Steaks, Inc.*, 245 N.W.2d 837, 837 (1976) (discussing the dismissal of a "pending lawsuit" – meaning a lawsuit that had already been filed and was active.); *see also* www.Merriam- Webster.com/dictionary/pending (last visited January 4, 2021)(defining pending as "not yet decided:being in continuance // the case is still pending"). Appellant appears to be arguing that the word "pending" can only be read to mean a lawsuit that has not yet been filed. The word Appellant is searching for is "impending" not "pending."

disclose their investigative work product to opposing parties or the public." *Id.* at 298. This Court found that the logic did not apply when the data in question was a discovery response the agency had received *from* the opposing party, and therefore held that it was not civil investigative data.[10] This Court did not hold that the filing of a complaint rendered any other data publicly available. And the *GlaxoSmithKline* decision from the Minnesota Supreme Court directly precludes any such argument.

As for Appellant's argument that much of the data in question relates to inactive litigation, the special provisions of Section 13.65 for Attorney General materials continue to apply and classify this data as not available to Appellant. In particular, Section 13.65, subd. 1(d), provides that even inactive attorney general civil investigative data is not available to anyone other than an individual who is the subject matter of the data. This issue is discussed in detail below.

IV. SECTION 13.65 CLASSIFIES ALL DATA CONCERNING POLICY OR ADMINISTRATIVE MATTERS, AND INACTIVE CIVIL INVESTIGATIVE DATA, AS AVAILABLE ONLY TO AN INDIVIDUAL WHO IS THE SUBJECT MATTER OF THE DATA.

The Data Practices Act contains a provision specific to the Attorney General's Office in Section 13.65 that is relevant here for two reasons. First, it classifies all communications on matters of policy or administrative issues that do not evidence a final public action as "private data on individuals." Second, it also classifies inactive civil investigative data as "private data on individuals." The significance of these

[10] Notably, the *Star Tribune* Court ultimately determined that the data at issue was *not* publicly available under the Data Practices Act. The court held that because the data was never active civil investigative data, it never became inactive civil investigative data, and was therefore not subject to production under the Data Practices Act.

classifications is that the data so classified is only available to an individual who is the subject matter of that data. Appellant concedes that it is not the subject matter of the data here.

Appellant responds by arguing that only data *about* an individual can be classified as "private data on individuals," and therefore any data that is not *about* an individual is publicly available. Appellant misreads the plain language of the Data Practices Act and its mechanics.

The Data Practices Act classifies data into various buckets, which it then uses to define who (if anyone) can access that data. Where, as in Section 13.65, the legislature wants to make certain data available only to an individual who is the subject matter of the data, it classifies the data as "private data on individuals." Data does not need to be *about* an individual to be classified as private data on an individual. Any data that is not publicly available as a general matter can meet the definition of private data on individuals if it would be accessible to an individual who is the subject matter of the data. Put another way, the legislature did not define "private data on individuals" to be data on individuals that is private. It defined it to be any data that is normally not public, but is accessible to an individual who is the subject matter of the data.

This distinction can be seen in the act's treatment of welfare data. Welfare data is covered by Section 13.46, which includes the following provision concerning data on welfare recipients:

> *Data on individuals* collected, maintained, used, or disseminated by the welfare system are *private data on individuals*, and shall not be disclosed except . . .

Minn. Stat. § 13.46, subd. 2 (emphasis added). In contrast, Section 13.65 provides contains no similar restriction:

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

Minn. Stat. § 13.65, subd. 1. As can be seen, while the welfare provision specifically provides that only welfare "[d]ata on individuals" is classified as "private data on individuals," Section 13.65 contains no similar limitation.

If Appellant is correct that data must be *about* an individual in order to be classified as "private data on individuals," there would have been no need for the legislature to have specified that only welfare data on individuals was protected as "private data on individuals" in Section 13.46 – because the legislature's mere use of the subsequent term "private data on individuals" would have sufficed. Appellant is therefore arguing for an interpretation of the term "private data on individuals" that would render the language in Section 13.46, subd. 1 redundant. This Court should not apply an interpretation of "private data on individuals" that would make other language in the act redundant. *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) ("a statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant").

The placement of broad classes of mixed data into the "private data on individuals" category also makes sense because it will not always be immediately apparent upon the collection of data whether or not it is data on individuals, and who those individuals are. For example, in *Burks v. Metropolitan Council*, 884 N.W.2d 338 (Minn. 2016), the issue was whether video recordings from public buses should be classified as private data on individuals accessible to the passengers on camera. *Id.* The Supreme Court ultimately held that it was, even if there were multiple individuals in the footage. *Id.* As seen in *Burks*, the same data might be public or private, or private but accessible to someone in frame, depending on what the video shows. *Id. see also KSTP-TV v. Metro. Council*, 884 N.W.2d 342 (Minn. 2016). A passenger would, for example, be entitled to access the video when that person is in frame, but not when only other people are in frame. *Id.*

There can also be disputes about who is the subject of the data, and some data sets must be parsed on this basis. For example, when an individual makes a complaint about an employer, there is a question about whether the employee or the employer is the subject of the data. *See In re Kokesch*, 411 N.W.2d 559, 562 (Minn. Ct. App. 1987). In *Kokesch*, the court resolved this question by holding that the employer is generally the subject matter of the data, except with respect to the names of the complaining employees, which the court held was data on the employees. *Id.*

Similarly, civil investigative material and communications the Attorney General's Office has on policy or administrative matters sometimes concern a narrow group of people, and sometimes concern the public at large. The purpose of Section 13.65 is to

classify such communications as not publicly available except to the people who are the subjects of the communications – presumably reflecting a policy decision that the special interest those people might have in the materials merits disclosure. Here, Appellant is not the subject of the data, and has no right of access under the data practices act.

This Court should affirm the district court's interpretation of Section 13.65, holding that Appellants is not the subject of the data withheld under this section, and therefore has no right of access to it.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING IT HAD SUFFICIENT INFORMATION TO REVIEW THE AGO'S DATA CLASSIFICATIONS.

Appellants assert that the district court lacked sufficient information to evaluate the AGO's assertions of privileged and data classifications. (App. Br. at 37-38, 42.) A district court's determination concerning the adequacy of the evidence used to make its determinations is committed to the sound discretion of the district court. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163-64; (Minn. 2012); *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005). As a result, district courts determinations concerning the adequacy of the evidence will only be overturned for an abuse of discretion. *Id.*

Contrary to Appellants' assertions, the AGO provided the district court with a sufficient basis to evaluate the work product privilege, as the district court acknowledged. (Add. at 24.) The documents in categories 6, 10-14, and 16-17 all consist of e-mails among assistant attorneys general, and in some cases their agency clients, discussing the AGO's efforts in representing the State or its agencies in litigation. (R. Add. at 5 ¶ 11, 7 ¶ 16, 9 ¶ 20.) As the district court held, there is sufficient information to conclude these

are the sort of communications among attorneys and staff representing the State that would naturally give rise to a work product protection. (Add. 24.) They reflect the legal theories and litigation strategies of the assistant attorneys general. As such they are work product. *See Grolier*, 462 U.S. at 26, *citing Hickman v. Taylor*, 329 U.S. 495 (1947); *see also City Pages*, 655 N.W.2d at 846.

Neither applicable caselaw nor the related rules of civil procedure specify the exact information that a party must tender to defend an assertion or privilege, with the rules only requiring that the party "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *See* Minn. R. Civ. Proc. 26.01(f). Here, the district court found that burden was met, and the Appellant fails to provide any reasonable basis for concluding the evidence was inadequate.

The AGO also notes that it did not assert work-product protection over all communications involving its attorneys, instead producing many such communications for in camera inspection by the district court for review on other bases – further demonstrating that the AGO did not simply make blanket assertions of work-product protection. (*See e.g.* Categories 1-4, 8.) And with respect to the non-privileged documents, the AGO tendered all of those documents to the Court for in camera review. (R. Add. 4 ¶ 9, 7 ¶ 15.) The Court was therefore able to review the actual documents in conjunction with the parties' arguments, which were largely legal in nature.

In sum, the Court should affirm the thoughtful and well-reasoned conclusion of the district court concerning the privilege and data classification issues the Appellants' appeal.

CONCLUSION

For the reasons set forth above, the Court should affirm the district court in all respects.

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Respectfully submitted,

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STATEMENT CONCERNING PUBLICATION

The AGO does not believe that an opinion in this case would generally meet the criteria for publication under Minn. R. Civ. App. P. 136.1. Of the legal issues presented on appeal, only one is not controlled by the plain readings of the statutes or existing precedent (or both) – whether Minnesota applies the common interest doctrine.

To the extent this Court chooses to take this issue up, the decision would merit publication on the basis that it would resolve a significant, recurring legal issue. *See* Minn. R. Civ. App. P. 136.1(b)(3). However, the data subject to the AGO's assertion of the common interest doctrine is also subject to the AGO's assertion that it is nonpublic because it is civil investigative data. As a result, if the Court affirms the district court on the issues of data classification, it is not required to address application of the common interest doctrine. The remaining issues concerning the work-product privilege and whether civil investigative data classifications survive the filing of a civil action are resolved by existing precedent.

/s/ Oliver J. Larson
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