No. A20-1344

State of Minnesota in the Court of Appeals

ENERGY POLICY ADVOCATES,

Appellants,

v.

KEITH ELLISON, in his official capacity as Attorney General, Office of Attorney General,

Respondent.

On Appeal from the Ramsey County District Court, Second Judicial District, State of Minnesota. Case No.: 62-CV-19-5899.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

As it did in the District Court, Respondent Attorney General's Office ("AGO") claims a right to shield its activities that cannot be squared with the presumption of public access to public data. By putting its imprimatur on AGO's counter-intuitive and unworkable interpretations of the relevant provisions of the Minnesota Government Data Practices Act ("MGDPA" or "DPA"), the District Court erred as a matter of law.

As it also did in the District Court, AGO fails to substantiate its privilege claims. AGO hides behind the District Court's "discretion" in resolving privilege disputes, but that discretion has limits. Relevant here, the District Court's privilege determinations must be based on an adequate factual record, which did not exist below. The District Court thus erred by (i) accepting AGO's deficient showing with respect to AGO's claims of attorney-client privilege and work-product, and (ii) failing to scrutinize AGO's sweeping assertion that it had some undefined "common legal interest" with unnamed third parties.

The order approving each disputed category withheld by AGO (on DPA or privilege grounds) should be reversed or, at a minimum, the matter should be remanded for further review based on the correct legal standards and a proper record.

REPLY FACTS

AGO's brief recites certain "facts" that are mere deflections but still require a response from Appellant Energy Policy Advocates ("Appellant").

First, AGO complains that Appellant has not proven that it "needs" certain communications. Resp't Br. 21. AGO's attitude reveals a fundamental problem with its method of data practices compliance—it judges responsiveness by what *it* believes would

be of interest to the requester (or even what AGO itself feels is relevant), not by the objective terms of the request itself:

- "Of the remaining forty-eight documents . . . only one concerned or [sic] environmental issues . . . .";
- "None of these documents had any information about the AGO's relationship to NYU, and most did not concern environmental litigation";
- "[A]ll 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"; and
- "[T]he identified documents have nothing to do with climate change issues, or Michael Bloomberg, or NYU fellows".

Resp't Br. at 8-9, 12. AGO's approach is troubling. It reveals that AGO may be applying a "relevance" filter when processing public data requests—a practice without support in the DPA's text.

Second, AGO seeks to distract from its noncompliance—and to marginalize Appellant's statutory right to public data—by suggesting Appellant is pursuing unfounded "conspiracy theories." Resp't Br. 13, 20-21. But AGO and others have produced documents showing that NYU's State Energy & Environmental Impact Center *is* in fact paying Pete Surdo and Leigh Currie to work as "Special Assistant Attorneys General." Appellant's Br. 8-9. AGO does not deny this. And AGO is, based on widely known public records, currently suing Exxon-Mobil and others in climate litigation spearheaded by Surdo and Currie. *Id.* There are no "conspiracy theories" in play here, and neither the requestor's nor the responding agency's motive has any place in AGO's compliance with DPA disclosure obligations.

REPLY ARGUMENT AND AUTHORITIES

I. THE ATTORNEY GENERAL'S WORK PRODUCT DATA SHOULD NOT BE SHIELDED FROM PUBLIC VIEW AFTER THE CONCLUSION OF ITS CASES.

Appellant has no issue with applying attorney work-product protections to data created during an existing case—as AGO is actively representing the state or an agency. *See* Appellant's Br. 38 ("Minn. Stat. §13.393 simply provides that [AGO] is subject to the same professional standards applicable to all attorneys when 'acting in a professional capacity for a government entity.'").

However, there are two prerequisites to the application of Minn. Stat. §13.393. First, the data must actually be "work product" or "privileged," which Appellant addresses later in this brief. Second, the Attorney General must be "acting in a professional capacity for a government entity." Minn. Stat. §13.393. Where AGO is not actively representing a state agency or the state, it is not "acting in a professional capacity for a government entity." Appellant submits that any purported civil investigative data kept by AGO which relates to a case that is no longer active is not protected by the work-product doctrine by virtue of Minn. Stat. §13.393.

AGO assumes that Minn. Stat. §13.393 applies to data no matter the timeframe, and argues that the work product doctrine applies to private lawyers, and that, as a matter of policy, it *should* be interpreted to apply to AGO. *See* Resp't Br. 15-22. In this respect, AGO is merely arguing the opposite policy position as Appellant—there is no binding case law supporting its position. To the contrary, AGO cites federal case law applying FOIA to data requests on the federal government. *See N.Y. Times Co. v. U.S. Dep't of Justice*, 282 F.

Supp. 3d 234, 239-40 (D.D.C. 2017). But Minnesota's DPA is "fundamentally different" from FOIA. *KSTP-TV v. Ramsey Cty.*, 806 N.W.2d 785, 789 n.1 (Minn. 2011). Thus, Minnesota courts "have not relied on federal courts' interpretation of FOIA as an aid to interpreting the MGDPA." *Webster v. Hennepin Cty.*, No. A16-0736, 2017 WL 1316109, at *6 (Minn. Ct. App. Apr. 10, 2017), *aff'd in part, rev'd in part on other grounds*, 910 N.W.2d 420 (Minn. 2018).

Moreover, the Attorney General is subject to different requirements than a private attorney. Minnesota Statutes Section 13.393 states in its second clause:

> [T]his section shall not be construed to affect the applicability of any statute, other than this chapter and section 15.17, which specifically requires or prohibits disclosure of specific information by the attorney, nor shall this section be construed to relieve any responsible authority, other than the attorney, from duties and responsibilities pursuant to this chapter and section 15.17.

Minn. Stat. §13.393.

Private attorneys working for private clients do not have any obligation to create records pursuant to the Minnesota Open Records Act. Not only does AGO have that obligation, failure to keep records gives rise to a cause of action against it under the DPA. *Halva v. Minn. St. Colleges & Univs.*, No. A19-0481, 2021 WL 191711, at *8 (Minn. Jan. 20, 2021). The purpose of requiring AGO to keep records that include data protected by the work-product doctrine is to allow the public to view those records when they are no longer relevant to an ongoing matter.

The AGO cites no law from Minnesota holding that the Minnesota Attorney General has the same interests and needs the same privacy protections as a private lawyer. In

contrast, the Minnesota Supreme Court has recognized key differences between the Attorney General and private lawyers:

> It appears to us that the attorney-client relationship is subtly different for the government attorney. ***He or she has for a client the public, a client that includes the general populace*** even though this client assumes its immediate identity through its various governmental agencies . . . For example, the preamble states that lawyers on an attorney general's staff "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." In short, in the public attorney-public client relationship, ***there is a quality of disinterested interest not usually found in the private sector***.

Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987) (emphasis added). In other words, AGO is beholden to the people of Minnesota, not to special interests.

This "disinterested interest" supports the non-application of the work-product doctrine after AGO closes a case. This is a large reason why, despite AGO's protestations, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962), is more applicable to Minnesota's Attorney General than federal case law interpreting FOIA, just like the "abrogated" *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is more applicable to the Minnesota Rules of Evidence than *Daubert*. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 809-14 (Minn. 2000) (explaining why *Frye-Mack* is a more appropriate standard than *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), for evaluating novel scientific expert testimony under the Minnesota Rules of Evidence).

The Court should therefore reverse the District Court and hold that the work-product doctrine does not apply to data created or collected by AGO after the conclusion of litigation in which it was involved as counsel. This requires re-consideration on remand of

the data and documents withheld in categories 5-6, 10-14, and 16-17. *See* Appellant's Br. 42-47; R.Add. 11-13 (Table).

II. THE ATTORNEY GENERAL CANNOT SHIELD ALL DOCUMENTS IT EVER TOUCHES FROM PUBLIC VIEW.

AGO is wrong about the classification of data as "civil investigative data" ("CID") for three reasons: (1) the Supreme Court and the Commissioner of Administration disagree with AGO's definition of when data is "on individuals"; (2) even if data could be classified as CID if acquired before the case, it is not CID if acquired during a case; and (3) the Supreme Court has held that Minn. Stat. §13.39 makes civil investigative data—even that held by the Attorney General—public after an investigation becomes inactive.

A. "Data on Individuals" Can Only Be Data in Which Any Individual Is or Can Be Identified as the Subject of That Data.

The AGO's position related to whether subsets of its CID files are "on individuals" contradicts the Minnesota Supreme Court's holding in *KSTP-TV v. Ramsey County*, 806 N.W.2d 785 (Minn. 2011). In its brief, AGO posits: "Data does not need to be *about* an individual to be classified as private data on an individual." Resp't Br. 27 (emphasis in original). In contrast, the Minnesota Supreme Court stated:

> ***[A]ll*** government data falls into one of two main categories based on the type of information included in the data: (1) data on individuals, or "government data in which any individual is or can be identified as the subject of that data," Minn. Stat. §13.02, subd. 5, and (2) data not on individuals, which is all other government data, Minn. Stat. §13.02, subd. 4.

KSTP-TV, 806 N.W.2d at 789 (emphasis added). "All" means all. AGO notably fails to distinguish the Supreme Court's binding position on the matter.

In its opening brief, EPA demonstrated why the District Court's endorsement of AGO's reading of Section 13.65, Subd. 1 is both illogical and unworkable. Appellant's Br. 24-28. The AGO's approach continues to beg the question: When is some individual "the subject of" the data? The AGO's non-answer is that its information need not even be "about" any individual to qualify and be withheld as "private data on individuals." By approving that approach, the District Court went beyond drawing an arbitrary line for deciding when Section 13.65, Subd. 1, warrants withholding data that is "about" any individuals. The result below rests on effectively reading the term "individual" out of the statutory definition in Section 13.02, Subd. 12.

The Commissioner of Administration has also rejected the Attorney General's position. Advisory Opinion 94-047, 1994 WL 17119861, at *3. There, an individual sought data directly from the AGO, who withheld it arguing that Minn. Stat. §13.65, Subd. 1(b) prohibited disclosure of that data, even if it had nothing to do with individuals. *Id.* The Commissioner of Administration rejected the AGO's position then:

> The Attorney General's position is that any correspondence it received about the production of this report was a communication about a policy project and that all correspondence are classified as private under Section 13.65 . . .
>
> Generally, correspondence from a corporation, from non-profit organizations or from another government agency are not data on individuals. (See the definition of individual and data on individuals in Section 13.02, subdivisions 8 and 5 of the Act.) Section 13.65, subdivision 1(b), does not state that communications that are received by the Attorney General that are data not on individuals are classified as anything other than public and, absent a specific classification for the data, the presumption of Minnesota Statutes Section 13.03, subdivision 1, operates to make communications received from corporations and other entities that are not individuals, public data.

Id. at *3. Likewise, the Attorney General's position here would condone an absurd but wide-ranging definition of "data on individuals" for information in which the subjects are multiple groups of individuals or indeed the public at large. The Legislature does not intend absurd results. Minn. Stat. §645.17(1).

AGO's brief merely confirms that the District Court's reading of Section 13.65 is an untenable bar to otherwise responsive public information. Resp't Br. at 29-30. After positing that the term "private data on individuals" must mean something, AGO conveniently posits that "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." Resp't Br. at 29. "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***." *Id*. (emphasis added). This "sometimes" approach would make AGO, facing a DPA request with which it would rather not comply, the sole arbiter of when a document is about any individual(s) and who qualifies as the "subject of the data," even if the requested data "concerns the public at large." Such an approach, condoned by the District Court here, vests too much self-interested discretion in the Attorney General, who is supposed to be the chief legal officer for the State of Minnesota and represent all of its state agencies, boards, and commissions. And, as noted above, AGO is supposed to have a "disinterested interest" that favors the people, not its own policy agenda. *Humphrey*, 402 N.W.2d at 543.

The "we know it when we see it" standard by which AGO wishes to wield self-protection under section 13.65, subd. 1 flies in the face of other Minnesota decisions. For

example, in *Burks v. Metropolitan Council*, 884 N.W.2d 338 (Minn. 2016), an individual transit rider requested, under the DPA, a video of his single encounter with a Transit Bus driver. 884 N.W.2d at 340. The agency refused, contending that the video was "private" personnel data on the driver. *Id.* The Supreme Court disagreed, holding that just because the data is developed or maintained in one category (in that case, for personnel purposes) does not override other statutory rights of access to the data, such as for the bus rider who was also the subject of the data. *Id*. at 341-42. The Minnesota Supreme Court held that the use of the plural (individuals) shows that the data (a video of bus driver, the requesting rider, and numerous passengers) can have more than one subject. *Id*. The common-sense application of the DPA in *Burks* avoids an incongruous and potentially arbitrary regime, especially without clear judicial standards and oversight.

The Court also should not be distracted by arguments regarding a separate section of the DPA (Minn. Stat. §13.46) regarding "Welfare Data." Resp't Br. at 27-28. This is a straw-man. First, there was no Welfare Data even implicated by either of EPA's DPA requests, and AGO did not cite §13.46 as a basis for withholding any of its documents. Second, given the unique nature the welfare system—addressed to serving individual recipients and tracking both individual and collective information—Section 13.46, subd. 2, sets out in excruciating detail, covering 34 sub-sections, how Welfare Data can and cannot be accessed and disclosed. There is no danger, in deciding this case, of rendering "redundant" a provision of a separate portion of the statute. *Id.* at 28.

Because of the District Court's error of law in unduly expanding the scope of what data and documents AGO can withhold under Section 13.65, Subd. 1, the case should be

remanded for a further review of the withheld documents in Categories 1-8 and 10-17. *See KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 350 (Minn. 2016) (reversing and remanding to the ALJ for further proceedings and factual findings).[1]

B. Civil Investigative Data Only Refers to Data Collected Before a Case.

Only data collected *during* an investigation—that is, before a case begins—can be classified as Civil Investigative Data ("CID"). That data is "active" until a later commenced case ends or an investigation is closed with no action taken, or if the time to file a complaint elapses. Then, it is "inactive." Appellant's position is not that data "loses" its CID label once a case commences—rather, Appellant's position is that the data created, collected, and maintained *after the case begins* is not CID. Appellant's chart from its principal brief explains these clear distinctions. Appellant's Br. at 33.

Star Tribune requires this result, which AGO fails to distinguish in any meaningful way. AGO instead calls the Court of Appeals' holding an "obvious misreading of the word 'pending.'" Resp't Br. 25. But *Star Tribune* held:

> The commission did not obtain the CD–ROM as part of an active investigation for the purpose of ***the commencement of*** a pending civil legal action, nor did it retain the CD–ROM ***in anticipation*** of a pending civil action. The commission obtained the CD–ROM through discovery after it commenced this civil action against the Twins and MLB. Thus, the CD–

[1] Where individuals *are* demonstrably the subjects of data created, collected, or maintained by AGO, AGO does not have the right to simply withhold entire *documents* based on section 13.65; rather, the Supreme Court has noted that there can be many "data" within "documents." *KSTP-TV*, 806 N.W.2d at 789 ([T]he MGDPA protects *data*, not *documents*. . . . A single document may contain data that is data on individuals and data not on individuals."). Redaction in those circumstances might be appropriate, as AGO seems to concede in page 29 of its brief, but whether redaction should occur should be a subject for argument in the District Court on remand depending on what the data within each document says.

> ROM was not collected for the purpose of ***the commencement or in anticipation of a pending civil action because the civil action had already commenced***.

Star Tribune v. Minn. Twins P'ship, 659 N.W.2d 287, 298 (Minn. Ct. App. 2003) (emphasis added).

The District Court's adoption of AGO's alternative definition of "pending" simply contradicts *Star Tribune*. Thus, to the extent AGO claims it may classify as CID collected after a case begins, it is wrong based on this Court's on-point holding in *Star Tribune*. The AGO therefore improperly withheld all documents in categories 1-4, 7-8, and 15, as detailed in Appellant's principal brief. This Court should reverse the District Court's decision because it applied the wrong legal standard.

C. <u>The Supreme Court Defines Civil Investigative Data as Public Once It Becomes Inactive, No Matter Who Possesses It.</u>

AGO argues, and the District Court held, that while CID is "active," it is protected by Minn. Stat. §13.39, and after CID becomes "inactive," it is still protected from disclosure because of §13.65, Subd. 1. As Appellant noted before, this is an incredibly broad view of an *exception* to the express presumption[2] of publicity in the DPA, and it is not supported by the text of the law or judicial precedent.

Most importantly, the Supreme Court's holding in *GlaxoSmithKline* defeats AGO's argument here. In that case, "[t]he Minnesota Attorney General (the state) served a civil

[2] "At the heart of the act is the provision that all "government data" shall be public unless otherwise classified by statute, by temporary classification under the MGDPA or by federal law." *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991).

investigative demand on GlaxoSmithKline plc (GSK), requesting certain documents." *In re GlaxoSmithKline plc*, 732 N.W.2d 257, 261 (Minn. 2007). Documents were provided to AGO as part of an investigation and before a case commenced. *Id.* Thus, they were CID. They became inactive. Crucial here, the Supreme Court did not apply Minn. Stat. §13.65 to the documents *at all*, even though they were collected as a result of a Civil Investigative Demand. Rather, the Court applied Minn. Stat. §13.39, and noted that "[c]ivil investigative data become inactive if the government decides not to pursue a civil action, the time to file a civil action has expired, or the rights of appeal of either party in the civil action have been exhausted or expired." *Id.* at 265.

The same is true here—Appellant's position mirrors that of the Minnesota Supreme Court. Section 13.65, Subd. 1 does not provide blanket protection for data not on individuals that is part of an inactive investigation. AGO improperly withheld all documents in categories 1-8, 10-14, and 16-17. That should be reversed.

III. THE DISTRICT COURT'S DISCRETION DOES NOT EXCUSE AGO'S FAILURE TO SUPPORT ITS PRIVILEGE CLAIMS.

In its Opening Brief, Appellant provided a category-by-category refutation of the District Court's conclusion that broad-ranging communications were privileged or work-product. Appellant's Br. at 42-48. Appellants also identified the many ways that AGO's factual showing for privilege fell short. *Id*. In response, AGO argues that whether it adequately supported its privilege claims is a matter within the District Court's discretion. Resp't Br. at 30. But AGO misses the point. The question is not whether the District Court has discretion when resolving privilege disputes. Instead, the question is whether the

District Court abused that discretion by sustaining, without scrutiny, the AGO's thinly-supported privilege claims.

As explained in Appellant's opening brief, AGO's conclusory privilege assertions failed to establish the elements of the attorney-client privilege or the "common interest" doctrine. Rather than hold AGO to its burden, the District Court upheld AGO's privilege claims without meaningful analysis of either the factual record or the governing legal standard. The record on appeal thus supports only two possible outcomes: an order reversing the District Court's findings and compelling production of each category of responsive documents, or an order vacating those findings and clarifying the standard to be applied on remand.

A. It Is an Abuse of Discretion to Sustain a Privilege Claim Without Adequate Support in the Record.

The scope of a privilege or protection under the DPA presents a question of law that is reviewed *de novo*. *Kobluk v. Univ. of Minn.*, 556 N.W.2d 573, 576 (Minn. App. 1996), *rev'd on other grounds*, 574 N.W.2d 436 (Minn. 1998). This Court reviews specific privilege determinations for abuse of discretion. *In re Paul Abbott Co.*, 767 N.W.2d 14, 18 (Minn. 2009).

Under the abuse of discretion standard, a district court's privilege decision must be set aside if the court: (i) made findings unsupported by the evidence; or (ii) improperly applied the law. *Id.* at 18. In *In re Lawrence*, for example, this Court granted a writ of prohibition overturning a district court's blanket finding of waiver. No. A20-0382, 2020 WL 7484656, at *5 (Minn. Ct. App. Dec. 21, 2020). The problem in *Lawrence* was legal

error: the district court erroneously held that one party to a joint representation could waive privilege for all parties. *Id.* In *In re Bank of America Securities Litigation*, by contrast, the Eighth Circuit vacated a privilege determination due to insufficient facts. There, the court reviewed a trial court's finding that eleven documents fell under the crime-fraud exception to attorney-client privilege. 270 F.3d 639, 641 (8th Cir. 2001). Citing "shortcomings" with the plaintiffs' "threshold showing of fraud," the Eighth Circuit held that the trial court "abused its discretion in ordering disclosure without *in camera* review of the eleven documents." *Id.* at 643-44.

As set forth below, this case is more akin to *Bank of America*. To be sure, it is possible that the District Court erred legally by sustaining AGO's privilege claims. But the facts necessary to resolve that question are nowhere in the record. Because a trial court's discretion is not absolute, the law required the District Court below to exercise its discretion based on facts and evidence, not "generalities and conclusory testimony." *Amster v. Baker*, 160 A.3d 580, 589, 590 (Md. 2017) (holding that state agency failed to carry its burden of demonstrating exemption to disclosure under Maryland Public Information Act). The District Court's failure to do so here was an abuse of discretion.

B. AGO Did Not Proffer Evidence or Facts Supporting Its Claims of Privilege.

AGO's only proffer was an affidavit from an attorney on its own staff. R.Add. at 1. The affidavit contained no dates, no author/recipient names, no individual document descriptors, and no particularized descriptions; there were just blanket asserted privileges. *Id*. at 5, ¶¶ 11, 7, 16. For example, the affiant describes "Category 13" as follows: "There

are 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. The communications generally concern applications for attorneys' fees submitted by the participating states." R.Add. at 8.

To illustrate the insufficiency of this showing, one can simply convert the affiant's description into a standard privilege log format. The result speaks volumes:

Doc. ID	**Doc Type**	**Date**	**Author**	**Recipient(s) (cc:ed)**	**Privilege Type**	**Description and Factual Basis**
NONE	Unspecified	NONE	NONE	NONE	NONE	documents "generally concern applications for attorney's fees…"

R.Add. at 8, ¶ 16. No *private* litigant could produce such a log with a straight face. Yet here, the District Court accepted this paltry showing as a basis to allow AGO—a government agency serving the *public*—to shield responsive data from public scrutiny.

The District Court should have required more. Under the DPA, the AGO "acting in a professional capacity for a government entity" has the express obligation to abide and satisfy the "statutes, rules and professional standards concerning discovery [and] production of documents . . . ." Minn. Stat. §13.393. Thus, to withhold documents on the basis of privilege or work product, AGO must comply with Minnesota Rule of Civil Procedure 26.02, which governs privilege claims in Minnesota courts. Rule 26.02 requires a party withholding a document on the basis of privilege to "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." Minn. R. Civ. P. 26.02(f). Litigants commonly satisfy this requirement by producing a log identifying each document and providing enabling information: who wrote the document, when it was created, who received the document, what privileges are being claimed, and a summary description explaining the privilege claim. *See* Advisory Committee Comment, 2000 Amendment, Minn. R. Civ. P. 26.01 ("Privilege logs have been in use for years and are routinely required when a dispute arises."). But even if a formal "privilege log" is not employed, litigants must provide information sufficient to enable opposing parties to evaluate whether, in fact, the claimed privilege is valid. *See* Fed. R. Civ. P. 26, Advisory Committee Note, 1993 Amendment (noting that the information provided must be "sufficient . . . to enable other parties to evaluate the applicability of the claimed privilege or protection").

These requirements for privilege claims are not just make-work. They exist "to enable other parties to assess the claim." Minn. R. Civ. P. 26.02(f). "As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts and must be strictly construed." *Kahl v. Minn. Wood Specialty, Inc.*, 277 N.W.2d 395, 399 (Minn. 1979). Failure to enable parties or courts to assess the factual basis for the privilege frustrates both the rule and the reason behind it. Minn. R. Civ. P. 26.02(f) (requiring a factual description that will enable the court and other parties to assess the reason for withholding documents).

The AGO does not seriously contest these principles. Instead, citing the Minnesota Supreme Court's decision in *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Minn.

1998), AGO suggests that the Supreme Court has "warned against needlessly mechanical applications of the attorney-client privilege." Resp't Br. at 18. But the relevant teaching of *Kobluk*, ignored by both the District Court and the AGO here, is that "the party resisting disclosure bears the burden of presenting ***facts*** to establish the privilege's existence." *Kobluk*, 574 N.W.2d at 440 (emphasis added).

If anything, *Kobluk* underscores the deficiency in AGO's showing below. Unlike here, the respondent agency in *Kobluk* offered evidence substantiating its privilege claims. The agency, the University of Minnesota, identified the attorney who provided the legal advice; the dean who requested and received the advice; the dates of each privileged communication; the document types; and the nature of the privilege. *Kobluk*, 556 N.W.2d at 575 (Court of Appeals). Moreover, the university tendered the two disputed drafts for *in camera* review. *Kobluk*, 574 N.W.2d at 442. Here, by contrast, AGO chose not to provide a sufficient factual foundation and not to submit the documents for review. AGO instead proffered a chart with no parties or dates, and using boilerplate descriptions of whole categories of documents, such as: "privileged communications, internal. . .;" "privileged communications, internal and with other attorneys general . . . ." R.Add. at 11-12.

The District Court abused its discretion by accepting AGO's cursory presentation of facts to establish the privilege's existence for each document withheld. This Court should reverse the District Court's order and remand with instructions requiring AGO to produce all documents previously withheld as privileged.

C. In the Alternative, the Court Should Remand for a Proper Consideration of the Privilege Claims.

On the record presented, the District Court erred in upholding AGO's privilege claims. This Court, upon a finding that the scope of privileged materials withheld was wrongly decided, has the option of ordering wholesale production or remanding for a further finding of which data or documents are protected. *See, e.g.*, *City Pages v. State*, 655 N.W.2d 839, 847 (Minn. Ct. App. 2003) (remanding and directing party claiming privilege to identify for district court's *in camera* review what, exactly, it claimed to be privileged in joint counsel's billing descriptions). If remanded, AGO should be first ordered to prepare and present, document-by-document, a factual showing that satisfies its obligations under Rule 26.02(f) and permits EPA and the District Court to assess that showing. Any still-disputed documents can then be tendered for *in camera* review if needed.

IV. THERE WAS NO REASONABLE BASIS FOR APPLYING THE "COMMON INTEREST" EXCEPTION.

The District Court similarly erred by sustaining AGO's privilege claims over communications with other state attorneys general. Even assuming that Minnesota courts would recognize the common-interest exception to privilege waiver, an order reversing or vacating the District Court is necessary here. As the case law makes clear, a party invoking the common interest exception to privilege waiver must establish both (i) that the contested documents were subject to an underlying claim of privilege; and (ii) that the privilege can be extended by the presence of a common legal interest. Because AGO did neither below, the District Court abused its discretion by sustaining AGO's common interest claim.

A. AGO Was Required to Establish Both a Valid Privilege and a Cognizable "Common Interest" for Each Disputed Document.

Evidentiary privileges "constitute barriers to the ascertainment of truth and are therefore to be disfavored and narrowly limited to their purposes." *Larson v. Montpetit*, 147 N.W.2d 580, 586 (Minn. 1966). To prevent abuse of the privilege, Minnesota courts have long recognized that a document loses its privileged status if shared outside the attorney-client relationship. *See State v. Rhodes*, 627 N.W.2d 74, 85 (Minn. 2001) ("The attorney-client privilege does not apply to confidences given in the presence of third parties."). The common interest doctrine is an exception to the rule of waiver.[3] And, as a device for expanding the scope of the attorney-client privilege, it is uniquely susceptible to abuse.

The Eighth Circuit's analysis in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), is instructive. There, the Office of Independent Counsel sought records of White House counsel previously obtained via a grand jury subpoena in the Whitewater investigation. *Id.* at 913-14. The court rejected the suggestion that these notes from meetings with the President's wife in her personal capacity were protected because of a

[3] In response to Appellant's suggestion that records AGO is refusing to withhold, or identify, are possibly records already released by other Offices, *e.g.* Appellant's Br. at 15-16, the AGO responded, "It is unclear what relevance this has to the present case." Resp. Br. at 13. The relevance is quite clear: waiver of privilege by those claiming to hold it is a key issue in this appeal. In addition, if other Offices have released the same supposedly privileged documents, this shows the impropriety of the AGO's failure to provide any factual information about the records withheld in full, so that Appellant and the District Court could assess whether waiver occurred when other Offices released supposedly privileged documents. This is yet another reason why the District Court's failure to require a more detailed record related to privilege was an abuse of discretion.

shared a common interest between Mrs. Clinton and the White House: "One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interests." *Id.* at 922. The court also rejected the proposition that an actor's subjective belief that her conversations were part of a joint privilege among shared counsel warrants extending the privilege. *Id*. at 923-24. Moreover, on the claim of common protection for the government's work product, the White House could not point to any real or threatened litigation to which it was actually a party. *Id*. Its concerns regarding any future congressional hearings also fell short of protecting its counsel's notes of meetings with Mrs. Clinton: "[W]e decline to endorse the position of the White House where it is based on nothing more than political concerns." *Id*. at 925.

Given the potential for abuse, courts have applied a similar degree of scrutiny as the Eighth Circuit did in *In re Grand Jury*, and have developed safeguards to ensure that the common interest doctrine applies only to legitimately privileged communications.

First, courts have held that a joint defense or common interest does not create some new privilege or protection where none otherwise exists. *See*, *e.g.*, *Walmart, Inc. v. Anoka Cnty.*, No. A19-1926, 2020 WL 5507884 at *2-3 (Minn. Ct. App. Sept. 14, 2020); *Shukh v. Seagate Tech. LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (determining that there was no common interest where one party lacked any ownership or interest in patent being prosecuted). Shared documents and communications must be otherwise privileged in the first place. This principle applies equally to claims for privilege and work-product. *In re Grand Jury Subpoenas*, 112 F.3d at 924 (rejecting potential political harm from future congressional investigation as a reason sufficient to trigger work-product protection).

Second, courts require sufficient facts to show the same legal interests are present. *See, e.g.*, *Ronald A. Katz, Tech. Licensing L.P. v. AT&T Corp*., 191 F.R.D. 433, 437-38 (E.D. Pa. 2000) (rejecting an assertion of common interest privilege because the existence and scope of agreement was undeterminable before parties executed written common interest agreement).

Third, the bar is high to show that the legal interests of those who are trying to expand the protection are closely aligned. Merely sharing broad economic or political goals does not suffice. *See In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) ("A shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception."); *In re Grand Jury Subpoenas*, 112 F.3d at 923 ("Because, however, the White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests, the attempt must fail.").

B. The District Court Should Not Have Condoned AGO's Reliance on Vague Common Political Interests to Expand Privilege and Withhold Documents.

AGO did not remotely establish the elements of the common interest doctrine, and the District Court abused its discretion by finding otherwise. To cloak its communications with unnamed attorney general offices from undisclosed states, AGO merely told the District Court, for example, that it was withholding "three privileged emails and their attachments" that "concern communications by other non-Minnesota attorney generals with the [AGO's] Office concerning existing or proposed multi-state litigation challenging rule changes on auto and ozone emissions." R.Add. at 5, ¶ 11. Then, without explanation,

AGO stated, "The Office 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*. at 5-6, ¶11.

These conclusory statements tell us nothing about whether the documents are subject to a claim of privilege, much less whether AGO shared a valid "common [legal] interest" with the other states' attorneys general. Indeed, AGO's submission raises more questions than answers. Which personnel in AGO's office were involved? What entity was AGO's client? Which other states are joined to this same legal interest? Which actual (as opposed to potential) federal emissions rule changes were at issue? Covering what period of time? Did the litigation ever even exist or come to fruition? To which pending or even planned litigation were the communications addressed? What agreements were in place for maintaining confidentiality? What was the common legal—as opposed to political—interest shared by Minnesota and all these other states?

As part of its DPA analysis, the District Court itself had several unanswered questions based on AGO's proffer:

- "The descriptions provided by the Office, however, do not reveal the stage of the litigation for any of the matters." Add. 19.
- "The Office does not indicate whether the investigations in those categories have been concluded or not." *Id*.
- "It appears from the Office's description, that the subject documents are investigative data . . . 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. Add. 21.
- "Though the Office's Category 12 description does not frame the specific topic of the data . . . ." *Id.*

The AGO, as the party asserting the "common [legal] interest," wholly failed to support it by providing none or only a few of the necessary facts. The District Court's one-sentence analysis said only that extending privilege "in matters where their state clients share common interest makes sense." Add. 26. It did not hold AGO to the required showing to substantiate the claim. It did not even ask for answers to the predicate "common interest" questions or have the benefit of *in camera* review. In short, it abused its discretion.[4]

CONCLUSION

This Court should not condone the vague, blanket assertions presented by AGO in support of withholding documents and data responsive to Appellant EPA's DPA requests. AGO has twisted section 13.65, and the District Court wrongly construed it to effectively permit AGO to use that statutory exception to disclosure as a means of withholding records of political efforts and activities carried out within AGO on the grounds that they "relate to" or "involve" individuals who are not EPA. Nor should this Court—as the District Court did—let AGO off the hook from presenting sufficient and specific facts when withholding documents on grounds of privilege, work product, or especially the "common interest" exception to waiver of those protections.

[4] In *Tekstar Communications, Inc. v. Sprint Communications Co.* (cited by the district court at Add. 25), the court had the benefit of both a Rule 26-compliant privilege log and its own *in camera* review when evaluating work product protection. No. CV-08-1130 (JNE/RLE), 2009 WL 10711788, at *7 ("The Plaintiff has proffered the disputed legal memorandum for our in camera review and, after that review, we find that the memorandum is entitled to protection under both the attorney-client privilege, and the work product doctrine.").

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STATE OF MINNESOTA
IN THE COURT OF APPEALS

CASE TITLE:

Energy Policy Advocates,	**CERTIFICATION OF LENGTH OF DOCUMENT**
v.	
Keith Ellison.	**APPELLATE COURT CASE NUMBER: A20-1344**

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Date: February 2, 2021

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