

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1344**

Energy Policy Advocates,
Appellant,

vs.

Keith Ellison, et al.,
Respondents.

**Filed June 1, 2021
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Ramsey County District Court
File No. 62-CV-19-5899

Douglas P. Seaton, James V.F. Dickey, Upper Midwest Law Center, Golden Valley,
Minnesota (for appellant)

Keith Ellison, Attorney General, Oliver J. Larson, Assistant Attorney General, St. Paul,
Minnesota (for respondents)

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Hooten,
Judge.

SYLLABUS

1. Data may be classified as “private data on individuals” pursuant to section 13.65, subdivision 1(b), of the Minnesota Statutes only if the data are data on one or more individuals.

2. Because the common-interest doctrine is not recognized in Minnesota as an exception to the general rule that the attorney-client privilege is waived if a privileged communication is disclosed to a third party, the common-interest doctrine does not apply

pursuant to section 13.393 of the Minnesota Statutes to data possessed by an attorney acting in a professional capacity for a government entity.

OPINION

JOHNSON, Judge

A non-profit corporation requested certain data from the Office of the Attorney General pursuant to the Minnesota Government Data Practice Act. An assistant attorney general identified numerous documents that are responsive to the request but did not provide access to any of the documents based on multiple provisions of the act. The non-profit corporation commenced an action in the district court to obtain access to the responsive documents. The district court ruled in favor of the attorney general. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

In December 2018, Energy Policy Advocates, a non-profit corporation in the state of Washington, requested by letter certain data from the Office of the Attorney General (OAG). Specifically, Energy Policy Advocates requested all correspondence during a six-month period to or from a particular person within OAG that contains any of eleven search terms, which refer to certain persons, organizations, websites, or software applications. In January 2019, an assistant attorney general responded by letter, stating that, based on various provisions of the Minnesota Government Data Practice Act (MGDPA), OAG has no responsive data that is classified “public” and, thus, no data to provide in response to the request.

In August 2019, Energy Policy Advocates commenced this action against OAG and the attorney general in his official capacity to compel compliance with the MGDPA. *See* Minn. Stat. § 13.08, subd. 4 (2020). In March 2020, the parties stipulated that they would resolve the case by motion practice. The stipulation stated that the defendants would serve and file an affidavit with descriptions of non-privileged responsive documents and a privilege log for privileged responsive documents. The stipulation also stated that the defendants “shall” submit documents to the district court for an *in camera* review.

In April 2020, the defendants moved for judgment in their favor and requested an order that they had properly classified the documents responsive to Energy Policy Advocates’s request and had properly determined that the documents are “not publicly available to” Energy Policy Advocates. Similarly, Energy Policy Advocates moved for judgment in its favor and requested an order compelling the defendants to provide access to all responsive documents. In July 2020, the district court filed an order and memorandum in which it granted the defendants’ motion and denied Energy Policy Advocates’s motion. In October 2020, the district court entered judgment in favor of the defendants. Energy Policy Advocates appeals from the judgment.

ISSUES

I. May data possessed by the Office of the Attorney General be classified as “private data on individuals” pursuant to Minnesota Statutes section 13.65, subdivision 1(b), even if the data are not data on an individual?

II. Are responsive documents possessed by the Office of the Attorney General containing data about investigations properly classified as “private data on individuals”

pursuant to Minnesota Statutes section 13.65, subdivision 1(d), or “protected nonpublic” pursuant to Minnesota Statutes section 13.39, subdivision 2(a)?

III. Are responsive documents possessed by the Office of the Attorney General within the exception to public access in Minnesota Statutes section 13.393 for data that are protected by the work-product doctrine, the attorney-client privilege, or the common-interest doctrine?

ANALYSIS

“The MGDPA regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities.” *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011) (quotation omitted). The MGDPA’s purpose is “to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing” and “to balance these competing rights within a context of effective government operation.” *Id.* (quotation omitted).

The MGDPA “establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” Minn. Stat. § 13.01, subd. 3 (2020); *see also* Minn. Stat. § 13.03, subd. 1 (2020). “[G]overnment data are ‘not public’ if they fall within one of several classifications set out by statute in the MGDPA.” *KSTP-TV v. Ramsey County*, 806 N.W.2d at 788-89.

[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. The MGDPA classifies data from each of these two categories into different levels of access. The levels of access for data on individuals are “public,” “private,” and “confidential,” and the levels of access for data not on individuals are “public,” “nonpublic,” and “protected nonpublic.” “Public data” is government data that is accessible to the general public. Minn. Stat. § 13.02, subds. 14, 15. In contrast, “not public data” is all other government data, and the MGDPA does not permit public access to not public data, *see* Minn. Stat. § 13.03, subd. 1. “Private data on individuals” and “nonpublic data”⁴ are two types of not public data; both are accessible only to the individual subject of the data, if any. Minn. Stat. § 13.02, subds. 9, 12.

Id. at 789 (footnotes omitted).

In this case, respondents identified 192 documents that are responsive to appellant’s request. Respondents placed the documents into 18 categories, which they described as follows:

Category 1: There are sixty-seven documents consisting of e-mails and attachments that related to a request the Office received from another attorney general’s office to join a comment letter opposing an appointment to the Federal Energy Regulatory Commission. The Office did not join the letter. These documents are assembled in chronological order under Exhibit A of the documents tendered for *in camera* inspection.

Category 2: There are four documents consisting of e-mails and attachments that related to a request the Office received from another attorney general’s office to join a comment letter opposing an appointment to the Environmental Protection Agency. The Office did not join the letter. These documents are assembled in reverse chronological order under Exhibit B of the documents tendered for *in camera* inspection.

Category 3: There are five documents consisting of e-mails and attachments that related to a request the Office received from another attorney general's office to join a comment letter concerning the Paris Climate Accord. The Office did not join the letter. These documents are assembled in reverse chronological order under Exhibit C of the documents tendered for *in camera* inspection.

Category 4: There are four documents consisting of e-mails and attachments that related to a request the Office received from another attorney general's office to join a comment letter opposing a federal legislative subpoena effort. The Office did not join the letter. These documents are assembled in reverse chronological order under Exhibit D of the documents tendered for *in camera* inspection.

Category 5: There are eight documents consisting of multiple copies of a draft and final memorandum prepared by an assistant attorney general in our Office with a recommendation concerning the FERC appointment letter, or emails from that attorney with substantive comments on the recommendation. Non-substantive communications transmitting the memorandum have been included in the documents for *in camera* review. The memorandum reflects the attorney's analysis of issues that might become before FERC, and how the appointment in question might affect the resolution of those issues. The memorandum was not shared with anyone outside of the Office. There is also a redaction on an e-mail with control number 312.001 for privilege on the same basis.

Category 6: There are five documents consisting of three privileged emails and their attachments. All three e-mails concern communications by other non-Minnesota attorney generals with the Office concerning existing or proposed multi-state litigation challenging rule changes on auto and ozone emissions. The Office shares a common interest with the other attorneys general[] in reviewing federal rule changes on these issues, and where appropriate, bringing litigation to challenge such rule changes.

Category 7: There are five documents concerning internal communications about the use of data sharing services

like dropbox, box.com, and Sharepoint. These documents are assembled under Exhibit E of the documents tendered for *in camera* inspection.

Category 8: There is one e-mail from another state's attorney general's office concerning an energy independence executive order. This Office took no action in response to the communication. This document is under Exhibit F of the documents tendered for *in camera* inspection.

[Category 9 omitted.]

Category 10: There are sixteen documents relating to communications between this Office, the Department of Natural Resources, and other state attorneys general concerning a request for the Office 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*. The Office did not join the brief.

Category 11: There are 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*. The litigation concerned mental health treatment.

Category 12: There are 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. The litigation concerns access to education.

Category 13: 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.

Category 14: There are 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. The communications generally concern applications for attorneys' fees submitted by the participating states.

Category 15: There are three e-mails related to lifting a file-sharing block to allow an assistant attorney general to download deposition exhibits or CLE materials. These documents are assembled under Exhibit H of the documents tendered for *in camera* inspection.

Category 16: There are nineteen documents consist[ing] 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.

Category 17: There are fourteen documents concern[ing] 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. Some of these communications involved multi-state investigations of the targets, and included attorneys from other attorney generals' offices.

[Category 18 omitted.]

Respondents submitted the 89 documents in categories 1, 2, 3, 4, 7, 8, and 15 to the district court for *in camera* review. Respondents did not submit the 83 documents in categories 5, 6, 10, 11, 12, 13, 14, 16, and 17 to the district court for *in camera* review. Respondents did not prepare a privilege log for the documents that they claim are privileged. The parties agree that the 20 documents in categories 9 and 18 no longer are at issue.

Appellant argues that the district court erred in its ruling in multiple ways. We will consider each argument in turn. We do not consider the nature of appellant's interest in

the requested data; the sole inquiry is whether there is a statutory basis for a classification that negates the presumption that government data are generally accessible to the public at large. See Minn. Stat. §§ 13.01, subd. 3, .03, subd. 1.

I. Attorney General Communications Data

Appellant first argues that the district court erred by concluding that the documents in categories 1, 2, 3, 4, 5, 7, 8, and 15 need not be disclosed on the ground that they contain data that are classified as “private data on individuals” pursuant to section 13.65, subdivision 1(b).

A. Interpretation of Statute

Appellant first contends that the district court erred by misinterpreting the statute on which respondents based their withholding of the identified categories of documents. The statute provides:

The following data created, collected and maintained by the Office of the Attorney General are private data on individuals:

(a) the record, including but not limited to, the transcript and exhibits of all disciplinary proceedings held by a state agency, board or commission, except in those instances where there is a public hearing;

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

(c) consumer complaint data, other than those data classified as confidential, including consumers’ complaints against businesses and follow-up investigative materials;

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

(e) data collected by the Consumer Division of the Attorney General's Office in its administration of the home protection hot line

Minn. Stat. § 13.65, subd. 1 (2020) (emphasis added).

Respondents did not provide access to the documents in the identified categories on the ground that they are “communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions.” *See* Minn. Stat. § 13.65, subd. 1(b). Appellant argued to the district court that the documents could not be classified as “private data on individuals” if the data are not “data on individuals.” Respondents argued to the district court that section 13.65, subdivision 1(b), applies both to data on individuals and data not on individuals. The district court agreed with respondents’ interpretation of the statute. Accordingly, the district court ruled that all data in the identified categories are not accessible to appellant. In the alternative, the district court ruled that the data in categories 1, 2, and 5 relate to specific individuals and, thus, are inaccessible to appellant even under appellant’s interpretation of the statute.

On appeal, appellant contends that the district court erred because, as a matter of law, data cannot be “private data on individuals” unless the data are “data on individuals.” Appellant’s contention requires us to interpret section 13.65. “The first step in statutory interpretation is to determine whether the statute’s language, on its face, is ambiguous.” *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). “‘A statute is ambiguous only if it is subject to more than one reasonable interpretation.’” *Id.* (quoting *500, LLC v. City*

of Minneapolis, 837 N.W.2d 287, 290 (Minn. 2013)). If a statute is unambiguous, “then we must apply the statute’s plain meaning.” *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014) (quotation omitted). But if a statute is ambiguous, “then we may apply the canons of construction to resolve the ambiguity.” *Thonesavanh*, 904 N.W.2d at 435. This court applies a *de novo* standard of review to a district court’s interpretation of the MGDPA. *Harlow v. State Dept. of Human Servs.*, 883 N.W.2d 561, 566 (Minn. 2016).

Appellant’s interpretation of section 13.65, subdivision 1, is consistent with the plain language of the statute, which is unambiguous in its meaning for purposes of this appeal. The MGDPA defines the term “data on individuals” to mean

all government data *in which any individual is or can be identified as the subject of that data*, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual.

Minn. Stat. § 13.02, subd. 5 (2020) (emphasis added). The addition of the word “private” before the phrase “data on individuals” narrows the scope of the phrase to a subset of data on individuals. There is no reasonable interpretation of the phrase “private data on individuals” that could broaden the phrase “data on individuals” so that it encompasses data in which no individual is the subject of the data. If the legislature had intended for section 13.65 to apply to both data on individuals and data not on individuals, it could have used language to clearly indicate a broader scope, such as language stating that data “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.” See Minn. Stat. § 13.39, subd. 2(a) (2020).

In addition, appellant's interpretation of the phrase "private data on individuals" is confirmed by the structure of section 13.65. That statute consists of three subdivisions, which are captioned "private data," "confidential data," and "public data." See Minn. Stat. § 13.65. Those three captions correspond to the three possible classifications of data on individuals. See Minn. Stat. § 13.02, subds. 3, 12, 15; see also *KSTP-TV v. Ramsey County*, 806 N.W.2d at 789. Data not on individuals are classified using different terms: protected nonpublic, nonpublic, and public. See Minn. Stat. § 13.02, subds. 9, 13, 14; see also *KSTP-TV v. Ramsey County*, 806 N.W.2d at 789. Thus, the structure of section 13.65 makes clear that it is concerned with data on individuals, not with data not on individuals. See *State v. S.A.M.*, 891 N.W.2d 602, 604-08 (Minn. 2017) (interpreting statute based on its structure); *State v. Wenthe*, 865 N.W.2d 293, 303 (Minn. 2015) (same).¹

Thus, the district court erred by ruling that the data in categories 1, 2, 3, 4, 5, 7, 8, and 15 may be classified as "private data on individuals" pursuant to section 13.65,

¹If the statute were ambiguous, we would reach the same result by considering the interpretation of the Minnesota Department of Administration, which issues advisory opinions concerning the MGDPA. See *Minnesota Joint Underwriting Ass'n v. Star Tribune Media Co., LLC*, 862 N.W.2d 62, 67 (Minn. 2015); *Schwanke v. Minnesota Dep't of Admin.*, 851 N.W.2d 591, 594 n.1 (Minn. 2014); *Benda v. Girard*, 592 N.W.2d 452, 457 (Minn. 1999); *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988); cf. Minn. Stat. § 13.072, subd. 2 (2020). In Advisory Opinion No. 94-047, the commissioner of administration rejected the attorney general's position that certain data was "private data on individuals" pursuant to section 13.65, subdivision 1(b), even though the data did not relate to any individual. Op. Minn. Dep't of Admin., No. 94-047 (Oct. 29, 1994). The commissioner reasoned, "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.*

subdivision 1(b), without regard for whether the data are data on individuals. The documents in the identified categories may be withheld from appellant pursuant to section 13.65, subdivision 1(b), only to the extent that they contain data on individuals.

B. Application of Statute

Appellant contends further that, based on its interpretation of section 13.65, subdivision 1(b), and respondents' general descriptions, the documents in categories 1, 2, 3, 4, 7, 8, and 15 do not relate to individuals and, thus, do not contain "data on individuals." As stated above, the term "data on individuals" is defined by the MGDPA to mean "data in which any individual is or can be identified as the subject . . . , unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data." Minn. Stat. § 13.02, subd. 5.

Of the categories challenged by appellant, the district court conducted an *in camera* review of the documents in only two categories: 1 and 2. Respondents' descriptions of those two categories state that the documents relate to requests "the Office received from another attorney general's office to join a comment letter opposing" two appointments to positions in the federal government. The district court determined that each category consists entirely of documents containing data on individuals. Appellant contends that the documents relate to "OAG's opposition to" the nominees rather than the nominees themselves. We disagree. Respondents' descriptions refer directly to two individuals who were nominated to two federal offices. Furthermore, we have reviewed the documents and have confirmed that the nominees "can be identified as the subject of that data." See Minn.

Stat. § 13.02, subd. 5. Thus, the documents in categories 1 and 2 consist of “data on individuals.”

With respect to categories 3, 4, 7, 8, and 15, the district court did not make a determination as to whether the documents contain data on individuals, presumably because it had interpreted the statute to not require such a determination. Appellant contends that the “plain language” of the category descriptions “indicates that they are not ‘data on individuals’ at all as they do not identify any person as being the ‘subject’ of that data.” Appellant further contends, “if OAG cannot even state that the data relates to an individual, then it cannot fall under the protections of Section 13.65.”

Appellant’s contention implicates the exception to the definition of “data on individuals,” which applies if “the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual.” Minn. Stat. § 13.02, subd. 5. The fact that respondents described the documents without reference to any individual indicates that the data “are not accessed by the name or other identifying data of any individual.” *See id.* Furthermore, respondents’ descriptions indicate that it collected and maintained the data according to the subject of the public policy issues mentioned, not according to the particular person or persons mentioned in the documents, which tends to indicate that the data are not data on an individual. *See Edina Educ. Ass’n v. Board of Educ. of Indep. Sch. Dist. No. 273*, 562 N.W.2d 306, 311-12 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). Nonetheless, it is necessary to first determine whether “any individual is or can be identified as the subject of that data” and, if so, to consider the exception, including whether

“the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data.” *See* Minn. Stat. § 13.02, subd. 5. It is appropriate for the district court to make those determinations in the first instance and to determine whether the documents contain data on one or more individuals. *See KSTP-TV v. Metropolitan Council*, 884 N.W.2d 342, 350 (Minn. 2016) (reversing and remanding to ALJ for determination of purpose for which data was maintained).

Therefore, the district court did not err by ruling that the data in categories 1 and 2 are properly classified as “private data on individuals.” But the district court erred by ruling that the data in categories 3, 4, 7, 8, and 15 are classified as private data on individuals without conducting an *in camera* review and without making a determination as to whether the documents in those categories contain data on an individual. We note that appellant has not challenged the classification of the documents in category 5.

II. Investigative Data

Appellant next argues that the district court erred by concluding that the documents in categories 6, 10, 11, 12, 13, 14, 16, and 17 need not be produced to appellant on the grounds that they contain data classified as “private data on individuals” pursuant to section 13.65, subdivision 1(d), or “protected nonpublic data not on individuals” or “confidential data on individuals” pursuant to section 13.39, subdivision 2(a).

Respondents did not submit the identified documents to the district court for *in camera* review. The district court made its ruling based on respondents’ descriptions of the documents in each category. The district court ruled that the documents in each of the

categories contain data about an investigation and that the documents are protected by either section 13.65, subdivision 1(d), or section 13.39, subdivision 2(a).

A. Attorney General Inactive Investigative Data

The first statute concerning investigative data on which respondents rely classifies the following data as private data on individuals: “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(d).

To the extent that the district court granted respondents’ motion based on section 13.65, subdivision 1(d), appellant reiterates its argument that data cannot be classified as private data on individuals unless the data are data on one or more individuals. We have so held, as explained above. *See supra* part I. Respondents’ descriptions of the documents in categories 6, 10, 11, 12, 13, 14, 16, and 17 do not expressly state that the documents contain data on any individual. The district court did not determine whether the documents in the identified categories contain data on any individual, presumably because it had concluded that such a determination is unnecessary and because respondents did not submit the documents for *in camera* review. Given respondents’ general descriptions, which do not identify or refer to any individual, and in the absence of an *in camera* review, the district court had no basis for a determination as to whether the documents in the identified categories contain data on one or more individuals. *See* Minn. Stat. § 13.02, subd. 5.

Thus, to the extent that the district court ruled that the documents in categories 6, 10, 11, 12, 13, 14, 16, and 17 are classified “private data on individuals” pursuant to section 13.65, subdivision 1(d), the district court erred by making such a ruling without conducting

an *in camera* review and without making a determination as to whether those documents contain data on one or more individuals.

B. Active Civil Investigative Data

The second statute concerning investigate data on which respondents rely provides:

[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. 2(a). “Whether a civil legal action is pending shall be determined by the chief attorney acting for the government entity.” *Id.*, subd. 1. While a civil legal action is pending,

any person may bring an action in the district court in the county where the data are maintained to obtain disclosure of data classified as confidential or protected nonpublic under subdivision 2. The court may order that all or part of the data be released to the public or to the person bringing the action. In making the determination whether data shall be disclosed, the court shall consider whether the benefit to the person bringing the action or to the public outweighs any harm to the public, the government entity, or any person identified in the data. The data in dispute shall be examined by the court *in camera*.

Id., subd. 2a. An investigation becomes “inactive” if the government entity elects not to pursue a civil action, the time in which to commence a civil action has expired, or the right to appeal has expired. *Id.*, subd. 3(1)-(3). After an investigation becomes inactive, data arising from the investigation “are public, unless the release of the data would jeopardize

another pending civil legal action” or unless the data are classified as not public for other reasons. *Id.*, subd. 3.

Appellant’s primary contention concerning section 13.39, subdivision 2(a), is that the district court erred by construing the term “pending civil legal action” too broadly. Appellant cites *Star Tribune v. Minnesota Twins Partnership*, 659 N.W.2d 287 (Minn. App. 2003), in support of the proposition that the term “pending civil legal action” does not include an action that has already been commenced. In *Star Tribune*, this court concluded that certain data possessed by a government entity were not civil investigative data because the government entity obtained the data from an opposing party in the discovery phase of litigation, not in the course of its own investigation. *Id.* at 298-99. Our decision was based on the purpose of the government entity’s collection of the data, not the timing of the collection. *See id.* If a government entity obtains data from an opposing party in the course of discovery, section 13.39 does not apply. *See* Minn. Stat. § 13.39, subd. 2(a). But section 13.39 applies if a government entity obtains data “as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action” or “in anticipation of a pending civil legal action.” *See id.*

Appellant also contends that respondents’ descriptions are insufficient to allow a determination that respondents’ investigations remain active. “Civil investigative data become inactive, and thus presumably public, upon the occurrence of” any of three specified events. *Id.*, subd. 3(1)-(3). Respondents’ descriptions of categories 6, 10, 11, 12, 13, 14, 16, and 17 do not expressly state whether the investigations at issue presently are active or inactive. The district court noted the lack of information about the status of some

investigations. The district court made inferences that the investigations described in categories 11 and 12 are active and that the investigations described in categories 10, 13, and 14 are inactive, but the district court refrained from making any determination about the status of the investigations described in categories 6, 16, and 17. Given respondents' general descriptions, which do not provide sufficient information about the status of the investigations, and in the absence of an *in camera* review, the district court had an inadequate basis for a determination as to whether the documents in the identified categories relate to investigations that are active or inactive. Furthermore, an *in camera* review is mandated by the statute, which provides, "The data in dispute shall be examined by the court *in camera*." *Id.*, subd. 2a.

Thus, to the extent that the district court ruled that the documents in categories 6, 10, 11, 12, 13, 14, 16, and 17 are classified as "protected nonpublic data not on individuals" or "private data on individuals" pursuant to section 13.39, subdivision 2(a), the district court erred by making such a ruling without conducting an *in camera* review to determine whether the documents contain data collected in an active investigation (in which event the data would be protected by subdivision 2(a)) or data collected in an inactive investigation (in which event the data would be presumed public pursuant to subdivision 3).

III. Data of Attorneys

Appellant last argues that the district court erred by concluding that the documents in categories 5, 6, 10, 11, 12, 13, 14, 16, and 17 need not be provided to appellant on the grounds that they are protected by the work-product doctrine, the attorney-client privilege, or the common-interest doctrine.

This issue is governed by the following statute:

Notwithstanding the provisions of this chapter . . . , the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility; provided that this section shall not be construed to affect the applicability of any statute, other than this chapter . . . 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

Minn. Stat. § 13.393 (2020). The effect of section 13.393 is to make the MGDPA inapplicable to any data that are protected by the work-product doctrine or the attorney-client privilege. *See City Pages v. State*, 655 N.W.2d 839, 843 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003).

A. Work-Product Doctrine

The work-product doctrine protects “an attorney’s mental impressions, trial strategy, and legal theories in preparing a case for trial” or “in anticipation of litigation.” *City Pages*, 655 N.W.2d at 846 (quoting *Dennie v. Metropolitan Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986)).

Whether documents were prepared in anticipation of litigation is a factual determination. The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

Id. (quotation omitted). Attorney work product need not be disclosed in discovery. Minn. R. Civ. P. 26.02(d).

Respondents did not submit the documents in the identified categories to the district court for *in camera* review and did not prepare and submit a privilege log, even though they agreed to do so. The district court analyzed respondents' assertions of work product based solely on respondents' general descriptions of categories of documents. The district court determined that respondents' descriptions are sufficient to establish that the documents concern "matters in anticipation of litigation or giving legal advice, or concerning pending litigation matters" and are "inherently the work-product of attorneys."

Appellant contends that respondents' descriptions are insufficient to allow a determination that the documents are protected by the work-product doctrine. Appellant's argument has merit. For example, the description of category 6 refers to "communications . . . concerning existing or proposed multi-state litigation" but does not state that the communications contain opinions, conclusions, legal theories, or mental impressions and, furthermore, does not provide a basis from which opinions, conclusions, legal theories, or mental impressions may be inferred. Similarly, the description of category 10 refers to communications concerning a request to join an *amicus* brief, which respondents ultimately did not join, but says nothing about opinions, conclusions, legal theories, or mental impressions. The same is true for categories 11, 12, 13, 14, 16, and 17. Thus, the district court erred by concluding, based solely on respondents' general descriptions, that the documents in categories 5, 6, 10, 11, 12, 13, 14, 16, and 17 are protected by the work-product doctrine.

Appellant also contends that the district court erred by applying the work-product doctrine to documents relating to litigation that has concluded. Appellant asserts that “the work-product doctrine does not apply to OAG materials unless the protection is sought in an ongoing case in which OAG is involved as a litigant.” In support of this proposition, appellant relies heavily on one case from a foreign jurisdiction: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962). But in *City Pages*, this court applied the work-product doctrine to documents relating to a civil action that had been resolved five years earlier. *City Pages*, 655 N.W.2d at 842-846. Furthermore, a Supreme Court opinion interpreting a provision in the federal Freedom of Information Act that is similar to section 13.393 states that “attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared.” *Federal Trade Comm’n v. Grolier Inc.*, 462 U.S. 19, 28, 103 S. Ct. 2209, 2215 (1983). Minnesota law concerning the work-product doctrine generally conforms to federal law. See Minn. R. Civ. P. 26, 1975 advisory comm. cmt., para. 5. Thus, the work-product doctrine may apply to documents or data relating to legal matters that no longer are active or pending.

B. Attorney-Client Privilege

“An attorney cannot, without the consent of the attorney’s client, be examined as to any communication made by the client to the attorney or the attorney’s advice given thereon in the course of professional duty” Minn. Stat. § 595.02, subd. 1(b) (2020). The attorney-client privilege applies if the following requirements are satisfied: “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as

such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” *Kobluk v. University of Minnesota*, 574 N.W.2d 436, 440 (Minn. 1998) (quotation omitted). To be protected by the attorney-client privilege, a document must be a confidential communication relating to the seeking or giving of legal advice. *Id.* at 440-41. The party resisting disclosure under the attorney-client privilege “bears the burden of presenting facts to establish the privilege’s existence.” *Id.* at 440. Attorney-client-privileged information need not be disclosed in discovery. Minn. R. Civ. P. 26.02(d). Data that is protected by the attorney-client privilege need not be disclosed in response to a data-practices request. *Kobluk*, 574 N.W.2d at 440.

The district court did not expressly consider whether the identified categories of documents are protected by the attorney-client privilege, presumably because it had determined that all such documents were protected by the work-product doctrine. Appellant contends that the district court erred by approving respondents’ assertions of attorney-client privilege without analyzing whether the requirements described above are satisfied and, furthermore, that respondents’ general descriptions are insufficient to allow a determination that the requirements are satisfied. Again, appellant’s argument has merit. Each of respondents’ category descriptions is devoid of specific information about a communication with a client. Respondents’ descriptions for categories 12, 13, and 14 expressly refer to “internal communications.” A communication between or among two or more attorneys in a law office, by itself, cannot satisfy the requirements stated above in the absence of a communication between one of the attorneys and a client. *See id.*

Respondents cite *Kobluk* for the proposition that the attorney-client privilege applies to its internal communications even if “they were not sent to a client.” But the communications in *Kobluk* were not internal communications between or among associated attorneys; the communications consisted of “preliminary drafts of a document, exchanged between a client and a lawyer.” 574 N.W.2d at 438. The district court “characterized these exchanges as ‘a conversation between’” the client and the attorney, and the supreme court agreed. *Id.* at 442.

The descriptions for categories 16 and 17, state simply that the documents contain “attorney client and work product privileged communications,” without providing any justification for that conclusion. Respondents’ general descriptions are insufficient to allow either appellant or the district court to “assess the applicability of the privilege” with respect to particular documents. *See* Minn. R. Civ. P. 26.02(f)(1). Thus, to the extent that the district court determined that the documents in categories 5, 6, 10, 11, 12, 13, 14, 16, and 17 are protected by the attorney-client privilege based solely on respondents’ general descriptions of categories of documents, the district court erred.

C. Common-Interest Doctrine

The common-interest doctrine has been described as “an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party, and it applies if the privilege-holder discloses privileged documents to a third party with which it shared a common interest.” *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (quotations and citations omitted). If it applies, “[t]he doctrine permits disclosure without waiver as long as the party claiming the exception demonstrates

that the parties communicating: (1) have a common legal, rather than commercial, interest; and (2) the disclosures are made in the course of formulating a common legal strategy.” *Id.* (quotation omitted); *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); Restatement (Third) of the Law Governing Lawyers § 76 (2000).

In this case, respondents asserted the common-interest doctrine as one of its justifications for not disclosing the documents in categories 6, 10, 13, and 14. The district court adopted respondents’ position, reasoning that “[t]he extension of privilege to communication between attorneys general who are sharing litigation work-product in matters where their state clients share a common interest makes sense” and that appellant “has not advanced a convincing argument to counter the application of the common interest privilege to the data at issue.”

Appellant contends that the district court erred in several respects by applying the common-interest doctrine to preclude a finding that the attorney-client privilege has been waived. Appellant contends that the doctrine is not recognized in Minnesota, that the doctrine should not be adopted in conjunction with the MGDPA, that the doctrine should not apply to the extent that an attorney within the OAG communicated with an attorney outside the OAG about a matter involving a client of the other attorney but not a client of the OAG, and that respondents have not established that it has a formal agreement with attorneys outside the OAG that applies to a particular subject matter and ensures mutual cooperation in maintaining the confidentiality of attorney-client-privileged information.

Respondents may rely on the common-interest doctrine in response to a data-practices request only to the extent that the application of the doctrine is authorized by

section 13.393. That statute provides, in relevant part, that the data of “an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility.” Minn. Stat. § 13.393. The attorney-client privilege is codified in a statute and is protected by a rule of court. *See* Minn. Stat. § 595.02, subd. 1(b); Minn. R. Civ. P. 26.02(d). But the common-interest doctrine is not embodied in a statute or a rule. The common-interest doctrine might be considered a “professional standard” if it were recognized by law, but—as respondents concede—it has not been recognized in Minnesota. The rules of professional conduct provide that “a lawyer shall not knowingly reveal information relating to the representation of a client,” Minn. R. Prof. Conduct 1.6(a), except in eleven enumerated circumstances, but none of the enumerated exceptions incorporates the common-interest doctrine, *see* Minn. R. Prof. Conduct 1.6(b).

Respondents urge this court to recognize the common-interest doctrine for the first time, but we decline the invitation to do so. As we have stated many times, “the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.” *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Because the common-interest doctrine is not recognized in Minnesota, its application is not authorized by section 13.393. Accordingly, the common-interest doctrine is not an exception to the disclosure requirements of the MGDPA. Thus, the district court erred by applying the common-interest doctrine.

Even if the common-interest doctrine were recognized in Minnesota, appellant's alternative arguments concerning the scope of its application in this case would have some merit. The common-interest doctrine excuses the disclosure of an otherwise privileged communication between an attorney and a client. *Shukh*, 872 F. Supp. 2d at 855. Accordingly, a pre-existing attorney-client communication is a prerequisite of the application of the common-interest doctrine. *See id.* Furthermore, communication between a client's attorney and another attorney is brought within the protection of the attorney-client privilege only if the communication between or among attorneys reveals the prior attorney-client communication. *See id.* In this case, it is impossible to determine whether the documents in categories 6, 10, 13, and 14 satisfy these requirements because the descriptions of those documents are very general and because the documents have not been submitted for *in camera* review.

Nonetheless, it is clear that the district court applied the common-interest doctrine too broadly by applying it not only to preclude the waiver of the attorney-client privilege but also to preclude the waiver of the work-product doctrine. To the extent that the common-interest doctrine is recognized, it applies only to the former but not to the latter. *See* Restatement (Third) of the Law Governing Lawyers § 76 cmt. d; *cf. id.* § 91 cmt. b. But appellant's final alternative argument concerning the absence of a formal agreement appears to be inconsistent with the law in the jurisdictions in which the common-interest doctrine is recognized. The Restatement provides, "Exchanging communications may be predicated on an express agreement, but formality is not required." Restatement (Third) of the Law Governing Lawyers § 76 cmt. c.

Thus, the district court erred by applying the common-interest doctrine with respect to the documents in categories 6, 10, 13, and 14.

DECISION

For the reasons stated in part I, the district court did not err by concluding that respondents need not provide the documents in categories 1, 2, and 5 to Energy Policy Advocates. But the district court shall conduct an *in camera* review of the documents in categories 3, 4, 7, 8, and 15 and determine whether any of the documents contain data on one or more individuals.

For the reasons stated in part II, the district court shall conduct an *in camera* review of the documents in categories 6, 10, 11, 12, 13, 14, 16, and 17. With respect to the categories of documents for which respondents have withheld documents based on section 13.65, subdivision 1(d), the district court shall determine whether any of the documents contain data on one or more individuals. With respect to the categories of documents for which respondents have withheld documents based on section 13.39, subdivision 2(a), the district court shall determine whether any of the documents contain data on an active investigation.

For the reasons stated in part III, the district court shall conduct an *in camera* review of the documents in categories 5, 6, 10, 11, 12, 13, 14, 16, and 17. In addition, the district court shall require respondents to submit a privilege log itemizing each document and stating the legal basis or bases on which the document was not provided to appellant. The district court shall review the documents *in camera* and determine whether any of the

documents contain data that are protected by the work-product doctrine or the attorney-client privilege.

Affirmed in part, reversed in part, and remanded.

A handwritten signature in black ink, reading "Matthew Johnson". The signature is written in a cursive style with a large, stylized "M" and a long, sweeping underline.