A20-1344

FILED
September 9, 2021
OFFICE OF APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

Energy Policy Advocates,

Respondent,

vs.

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

Appellants.

PRINCIPAL BRIEF AND ADDENDUM OF APPELLANTS KEITH ELLISON AND OFFICE OF THE ATTORNEY GENERAL

KEITH ELLISON
Attorney General
State of Minnesota

Liz Kramer (#0325089)
Solicitor General

Oliver Larson (#0392946)
Adam Welle (#0389951)
Jennifer Kitchak (#0317056)

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1412

Attorneys for Petitioners Keith Ellison in his official capacity and Office of the Attorney General

UPPER MIDWEST LAW CENTER

DOUGLAS P. SEATON
Attorney Reg. No. 127759

JAMES V.F. DICKEY
Attorney Reg. No. 393613

8421 Wayzata Blvd., Suite 105
Golden Valley, Minnesota 55426
(612) 428-7000

Attorneys for Respondent Energy Policy Advocates

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HARDIN LAW OFFICE

MATTHEW D. HARDIN
Attorney Reg. No. 0397178
1725 I Street NW, Suite 300
Washington, DC 20006
(202) 802-1948

Attorney for Appellee Energy Policy Advocates

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INTRODUCTION

The Attorney General is the State's chief legal officer. In this capacity, he directly enforces State law in many areas, including consumer protection, antitrust law, and charities oversight—among others. The Office of the Attorney General ("OAG") also represents more than one hundred state agencies, boards, and commissions in the prosecution and defense of various legal matters. Before this Court are important questions concerning the ability of the OAG to preserve the confidentiality of information critical to the OAG's functions. The OAG's ability to maintain client privileges, coordinate with other law enforcement entities and other state attorneys general, and review matters of public interest brought to the Office by concerned parties, is dependent upon a measure of confidentiality that the Data Practices Act and common law privileges afford.

In particular, Section 13.65 of the Data Practices Act includes a provision specific to the OAG, making certain types of data on administrative matters, policy matters, and inactive civil investigations not accessible to anyone *except* an individual who is the subject of the data. Another provision of the Data Practices Act with general application, Section 13.393, gives broad protections to attorney-client and work-product privileged materials. These provisions are critical to the OAG's effective legal representation. Like many attorneys, the OAG also coordinates with attorneys representing other parties with a common interest—most notably other state attorneys general who coordinate in common investigations and legal actions.

With its opinion in this matter (the "Decision"), the court of appeals narrowed the protections of Section 13.65. The Decision also held that Minnesota does not recognize

the common-interest doctrine to maintain the attorney-client and work-product privileges over communications shared with others who have a common interest in the subject matter of the representation. If the Decision stands, Minnesota would be unique. No other jurisdiction has reviewed and rejected the common-interest doctrine. Minnesota case law also fully supports the principles underlying the common-interest doctrine. With this holding, the Decision also impacts not just the work of the OAG, but the work of attorneys throughout Minnesota. This Court should reverse.

STATEMENT OF THE CASE

Respondent is an advocacy organization based in the state of Washington. (Add. 2.) It made two data requests on the OAG that are the subject of this appeal. (Add. 31.) In general, the requests sought communications to or from the OAG that contained certain keywords designed to capture communications between the OAG and other attorneys general on environmental issues. (Dkt. 2 ¶¶ 6, 9.) The OAG identified and preserved the documents triggered by the word searches, reviewed them for privilege and classification under the Data Practices Act, and determined that there were no responsive, non-privileged, public data to produce. (Add. 31.)

Respondent sued in district court under Section 13.08, subdivision 4 of the Data Practices Act, alleging that the OAG had misclassified the data as nonpublic and seeking an order for its production. (Add. 31.) By agreement between the parties, and as contemplated by the Data Practices Act, the matter was submitted to the district court by way of briefing. (*Id.*) The OAG also tendered copies of the non-privileged documents to the district court for in camera inspection. (*Id.* 31-37.)

The district court entered judgment in favor of the OAG, finding that the OAG had properly classified the documents in question as private on the bases that they were either privileged or work-product protected, or nonpublic civil investigative data, or nonpublic data on administrative or policy matters that did not evidence a final decision and were not about Respondent. (Add. 54.) Respondent appealed, challenging various legal holdings of the district court, and arguing that the OAG's submissions to the district court were insufficient to support its classifications. (Add. 3-4, 21.) The Decision affirmed in part and reversed in part, making the following holdings:

1. That the work product doctrine continues to protect privileged communications, even after the litigation ends—affirming the district court and rejecting Respondent's argument. (Add. 22.)
2. That the Data Practices Act's protections for active civil investigative data continue to protect covered data through the end of any related litigation—affirming the district court and rejecting Respondent's argument. (Add. 18.)
3. That Minnesota courts have not yet recognized the common interest doctrine, and the court of appeals lacked authority to do so, and as a result, the OAG could not rely on the common interest doctrine to maintain attorney-client privilege or work-product protection over documents shared with other Attorneys General—overruling the district court and accepting Respondent's argument. (Add. 24-26.)
4. That communications purely internal to the OAG could not be attorney-client privileged because there was no client for the communication—accepting Respondent's argument (the district court made no holding on this issue). (Add. 23-24.)
5. That Section 13.65 of the Data Practices Act, providing protection to data on administrative and policy matters and inactive civil investigative data, applied only if the data was about an individual—overruling the district court and accepting Respondent's argument. (Add. 10-13.)

The court of appeals remanded the matter to district court for further proceedings in light of the Decision, including for the creation of a privilege log and an in-camera inspection

of various documents. (Add. 28-29.) The OAG petitioned for review of issues 3-5 above, with substantial amicus support, and this Court granted review.

STATEMENT OF FACTS

In December 2018, Respondent served two data requests on the OAG which are the subject of the present suit. (Add. 31.) Respondent sought data to substantiate claims the OAG was coordinating with other Attorneys General on environmental matters and was using offline storage systems to facilitate these communications. (Dkt. 2 at 1.)

The first request, dated December 20, sought communications to or from Deputy Attorney General Karen Olson that contained any of the following terms: SherEdling, Sher Edling, DAGA, @democraticags.org, alama@naag.org, or Mike.Firestone@state.ms.us. (Dkt. 23 ¶ 2.) The purpose was to capture communications among state attorneys general and others concerning climate-related litigation.[1] (Dkt. 2 at 1-2.) The OAG conducted a review of its e-mail and document management systems in response to this request using word searches and identified and preserved 145 documents. (Dkt. 23 ¶ 3.) All of the identified responsive documents were either e-mails or attachments to e-mails that were sent or received by Massachusetts Assistant Attorney General Mike Firestone. (*Id.*) There were no communications to or from Sher Edling, DAGA, @democraticags.org, or alama@naag.org. (*Id.*) The OAG determined that none of the 145 documents was both responsive and classified as public data under the Data Practices Act. (*Id.*)

[1] Sher Edling LLP is a private law firm that litigates environmental damage claims, DAGA is the Democratic Attorneys General Association, and NAAG is the National Association of Attorneys General.

The second request, dated December 26, sought communications to or from Karen Olson that contained any of the following terms: @googlegroups.com, Google doc, ucsusa.org, dropbox, box.com, or Sharepoint. (Dkt. 23 ¶ 4.) The purpose of the request was to identify communications among attorneys general using off-line methods. (Dkt. 2 at pp. 1-2 and ¶ 9.) The OAG conducted a review of its e-mail and document management systems in response to this request using word searches and identified and preserved 154 documents. (Dkt. 23 ¶ 4.) None of the documents concerned communications with other state attorneys general using any of the identified file sharing services. (*Id.*) The OAG determined that none of the documents were both responsive and classified as public data under the Data Practices Act and communicated those determinations to Respondent. (*Id.*; Dkt. 2 at Exs. C, D.) Respondent sued to challenge those determinations. (Dkt. 2.)

To assist the trial court in its review of disparate sets of documents, the OAG classified the documents preserved into eighteen categories. (Add. 5-8.) The categories variously contained data classified by the OAG as privileged, as civil investigative data, and as data on policy matters on which the office took no action. (*Id.*) The OAG therefore classified the data as not available to the Respondent under Sections 13.39, 13.393, and 13.65 of the Data Practices Act. (*Id.*)

ARGUMENT

The Data Practices Act strikes a sensitive balance between public access to data held by government and the OAG's ability to provide quality legal representation to the State of Minnesota. The Decision jeopardizes that balance by eliminating protections afforded to the OAG by statute. The Decision further upends the widely held understanding that

attorneys, both public and private, could maintain attorney-client and work product privileges when communicating with others whose clients have a common interest at stake. The Court should correct these errors and clarify the protections and privileges at issue in this case.

I. THE PROTECTIONS AFFORDED TO OAG DATA BY SECTION 13.65 APPLY IRRESPECTIVE OF WHETHER THE DATA IS ABOUT AN INDIVIDUAL.

Section 13.65 of the Data Practices Act creates special protections for certain types of data in the hands of the OAG that are not afforded to other State government entities. Relevant here, Section 13.65 classifies the following types of data (among others) as "private data on individuals": (1) all communications on matters of policy or administrative issues that do not evidence a final public action; and (2) inactive civil investigative data. The significance of these classifications is that the data is not publicly available to anyone, unless it concerns an individual, in which case that individual (and only that individual) can access the data. Here, some of the data requested by the Respondent concerned administrative or policy matters or potentially inactive civil investigations. The OAG properly classified it as private data on individuals, and because the Respondent was not an individual who was a subject of the data, did not produce the data to the Respondent.

The district court agreed with the OAG, but the Decision reversed, erring in three ways. First, the Decision failed to apply the plain language of Section 13.65, inserting words into the section and the related definition of "private data of individuals" to harmonize Section 13.65 with what the court believed the legislature was attempting to accomplish. This is not permissible. *State v. Noggle*, 881 N.W.2d 545, 550 (Minn. 2016)

(holding that courts will not insert words into a statute based on the court's view that the statute's language does not accomplish what the legislature intended). Second, the Decision ignores contrasting language in other provisions of the Data Practices Act that show the structure and language of Section 13.65 was no accident. Third, the Decision ignores that there are important policy reasons for Section 13.65 to read as it does.

A. The Decision Ignores the Plain Language of Section 13.65, Inserting Words that are not Present.

The Decision held that "private data on individuals" must first be *about* an individual, and remanded for determinations on this issue. While superficially appealing, the holding ignores the plain language of the Data Practices Act, inserts language that is not there, and ignores the mechanics of the Data Practices Act.

The language of Section 13.65 provides no such limitation on what types of data can be classified as private data under the statute. It simply states that all data on certain subject matters are "private data on individuals". Those identified subject matters—policy matters without final public action, and inactive investigative data—are not inherently about individuals:

> Subdivision 1. Private data. The following data created, collected and maintained by the Office of the Attorney General are private data on individuals:
>
> ***
>
> (b) communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions;
>
> ***
>
> (d) investigative data, obtained in anticipation of, or in connection with litigation or an administrative proceeding where the investigation is not currently active . . .

The plain language of Section 13.65 therefore imposes no requirement that data be about an individual to be classified as private data on individuals. *Noggle*, 881 N.W.2d at 550.

Similarly, nothing in the Data Practices Act's definition of "private data on individuals" requires the data to be about individuals. The full text of the relevant definition is:

> Subd. 12. **Private data on individuals.** "Private data on individuals" are data made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data.

The use of the word "data" in this definition—with no modifier—when describing what data can be classified as "private data on individuals" means that *any* data of *any* nature can be classified as "private data on individuals." Section 13.65 classifies *any* data of *any* nature on administrative and policy matters, and inactive civil investigative data, as "private data on individuals."

A court "may not add words to a statute that the legislature has not supplied." *Johnson v. Cook Cty.*, 786 N.W.2d 291, 295 (Minn. 2010). The Decision nonetheless held that "private data on individuals" must be *about* individuals, without explaining how the text of Sections 13.65 or 13.02 compelled that result. In so holding, the Decision inserts language into the definition of "private data on individuals" that is not there, rewriting the definition as follows:

> Subd. 12. **Private data on individuals.** "Private data on individuals" are data <u>on individuals</u> made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data.

As set forth below, the legislature did not omit the words "on individuals" after the word "data" in the definition of "private data on individuals" to avoid potential redundancy. To

the contrary, the legislature's omission of the words "on individuals" gives the legislature an expedient way to classify data to produce a specific result—data so classified is not available to the public except in the limited circumstance in which the data is about an individual, in which case the individual and no one else can obtain the data.

B. The Decision Ignores Other Provisions of the Data Practices Act that Show the Structure of Section 13.65 is Intentional.

The Decision referenced another section of the Data Practices Act in support of its conclusion that data must be about individuals to be classified as private data on individuals—but did so while ignoring examples that cut against its conclusion. In sherry picking one section of the Data Practices Act, while ignoring others, the Decision impermissibly does not read the statue as a whole. *See Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 177 (Minn. 2020) (noting that it is appropriate to consider an entire act in construing one of its provisions).

In particular, the Decision contrasted the language of Section 13.65 with the language of Section 13.39, subd. 2(a), which provides that data on active civil investigations:

> 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.

From this, the Decision concluded that if the Legislature wanted to provide protection to "data not on individuals" in Section 13.65 it would have used a similar structure calling out both data types. The Decision, however, assumed too much and ignored other sections

of the Data Practices Act that do not follow the pattern of Section 13.39. *See Save Lake Calhoun*, 943 N.W.2d at 177.

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

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

Minn. Stat. § 13.46, subd. 2 (emphasis added). In contrast, Section 13.65 contains no similar specific limitation to "data on individuals." This is significant for at least two reasons.

First, if the Decision is correct that data must be *about* an individual in order to be classified as "private data on individuals," there would have been no need for the legislature to have specified that only welfare "data on individuals" was protected as "private data on individuals" in Section 13.46—because the legislature's mere use of the term "private data on individuals" would have sufficed. Section 13.46 shows that the legislature did not believe that data must be about an individual to be classified as private data on individuals. Moreover, the Decision's interpretation of the term "private data on individuals" would render language in Section 13.46 redundant. This Court should not apply an interpretation of "private data on individuals" that would make other language in the act redundant. *Swanson v. Brewster*, 784 N.W.2d 264, 277 (Minn. 2010) (interpreting statute to avoid redundancy); *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) ("a statute is to be

construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant").

Second, the only way to harmonize Section 13.65 with other provisions of the data practices act is to recognize that it has a particular purpose—to generally protect certain classes of data at the OAG from public disclosure by making them available only to an individual who is the subject of the data and no one else. Taking Section 13.65 together with three other Sections (13.37 – Trade Secret Data, 13.39 – Civil Investigative Data, and 13.46 – Welfare Data) illustrates this point. Each section has a unique approach to how it classifies data, and shows that the legislature is familiar with the Data Practices Act's various definitions and uses them to accomplish particular results.

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The Data Practices Act's contrasting approaches can be summarized as follows:

Example	Language	Result
Section 13.37 – Trade Secret Data	Classifies all data on the subject matter as: • "private data on individuals" if it is "data on individuals" • "nonpublic data" if it is "data not on individuals"	The data *is not* generally available: • but is accessible by the individual or entity that is the subject matter of the data
Section 13.46 - Welfare Data	Classifies data on the subject matter as: • "private data on individuals" *but only* if it is "data on individuals"	The data *is* generally available: • unless it is about an individual, in which case it is available (only) to the individual
Section 13.65 - OAG Data	Classifies all data on the subject matter as: • "private data on individuals"	The data *is not* generally available: • unless it is about an individual, in which case it is available (only) to the individual
Section 13.39 - Active Civil Investigative Data	Classifies all data on the subject matter as: • "confidential data on individuals" if it is "data on individuals" • "protected nonpublic" if it is "data not on individuals"	The data is not available to anyone

Simply put, if in drafting Section 13.65 the legislature wanted only data on individuals to be covered, it would have said so explicitly as it did with Welfare Data. If the legislature also wanted data on entities to be confidential, but available to the subject of the data, it would have said so explicitly as it did with Trade Secret Data. It did neither of these things. What the legislature wanted to accomplish in Section 13.65 was something else—to make OAG data not publicly available, unless it was about an individual, in which

case the individual (and on one else) was given access. That is the impact of classifying all data as private data on individuals, and it is an impact this Court should recognize.

C. The Decision Ignores Sound Reasons for the Legislature to Classify Broad Categories of Data as Private Data on Individuals in Section 13.65

The Decision also erred in failing to recognize that there are valid reasons for the structure of Section 13.65 and its classification of broad classes of data, without limitation, as private data on individuals. Section 13.65's structure makes sense, for at least two reasons.

First, it will not always be immediately apparent upon the collection of data whether it is data on individuals, or if so, who those individuals are. *See Burks v. Metropolitan Council*, 884 N.W.2d 338 (Minn. 2016). In *Burks*, for example, the question (involving a different section of the Data Practices Act) turned on who was in frame at various points in a video. *Id.* Second, there can also be disputes about who is the subject of the data, and some data sets must be parsed on this basis. For example, when an individual makes a complaint about an employer, there is a question about whether the employee or the employer is the subject of the data. *See In re Kokesch*, 411 N.W.2d 559, 562 (Minn. Ct. App. 1987).

By categorizing all data covered by Section 13.65 as private data on individuals, the OAG's review of data when it receives a request is greatly simplified because the initial inquiry is: Is there any responsive data specific to the individual requesting the data? If not, the inquiry does not need to go any further. For example, if an individual asked for inactive civil investigation about a matter involving another individual and a related entity,

and the file contained data that might be variously classified as data on individuals or data not on individuals, the OAG can start the inquiry by asking at the outset whether the requestor is the subject of any of the data. If not, the data is classified in a way that the unrelated individual has no access, and the inquiry ends.

This is particularly relevant to OAG data. Civil investigative material and the communications the OAG has on policy or administrative matters sometimes concern an individual or a narrow group of people, and sometimes concern the public at large. The purpose of Section 13.65 is to classify such communications as not publicly available—except to an individual who is the subject of the communications or inactive investigation. This presumably reflects a policy decision that the special interest an individual (as opposed to an entity) might have in the materials merits disclosure irrespective of the burdens of parsing the data.

In sum, this Court should reverse the Decision's interpretation of Section 13.65, and hold that data does not need to be about an individual to be classified as private data on individuals through Section 13.65.

II. THE COMMON-INTEREST DOCTRINE IS A WIDELY RECOGNIZED AND BENEFICIAL EXCEPTION TO PRIVILEGE WAIVER THAT SHOULD BE APPLIED BY MINNESOTA COURTS.

Among the items identified in response to Respondent's data request were confidential communications between the OAG and other state attorneys general that the district court held were protected under the "common interest" doctrine. In reversing that holding, the Decision made two holdings as to the status of the common-interest doctrine that are relevant here:

- First, the court acknowledged that Minn. Stat. § 13.393 incorporated court-based discovery standards into the Data Practices Act but held that "the common interest doctrine is not recognized in Minnesota." (Add. 1-2.) This determination was based on reasoning that the doctrine would "extend[] existing law" and could only be recognized by "the supreme court or the legislature." (Add. 26.)

- Second, having rejected application of the common-interest doctrine, the court stated in dicta that even if the common-interest standard outlined in section 76 of the *Restatement (Third) of the Law Governing Lawyers* applied, it would only protect disclosure of attorney-client-privileged communications and not work-product protection. (Add. 27.)

Now that the issue is squarely before this Court, the OAG respectfully requests that this Court formally recognize the doctrine and provide clear instruction for the district court to apply standards that are well-established in American legal practice.[2]

[2] Because the Court of Appeals, in a published decision, held that the common-interest doctrine does not exist in Minnesota and can only be recognized by this Court, this Court can and should reach this issue irrespective of its resolution of the Section 13.65 issue. *In re Guardianship of Tschumy*, 853 N.W.2d 728, 736 (Minn. 2014) (recognizing the Court can and should reach issues of statewide significance even if moot). To do otherwise would result in this Court deciding the issue through inaction, at least for a significant period of time until another case makes its way back to this Court. The constellation of amicus participants on this issue amply demonstrates the statewide importance of the common-interest issue. In addition, if this Court affirms the Decision giving a narrow construction to Section 13.65, it must then reach the common-interest issue.

A. The Common-Interest Doctrine is Consistent with Precedent and American Jurisprudential Norms.

Federal and state courts across the United States have recognized that there is no waiver of attorney-client privilege when communications are exchanged between parties represented by different counsel who share a "common interest" in a matter.[3] No jurisdiction that has considered the common-interest doctrine has rejected it: "every court that has addressed it has recognized [the doctrine] in some form." *Selby*, 90 N.E.3d at 1154. This includes federal courts in Minnesota. *E.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); *John Morrell & Co. v. Local Union 304A of Un. Food & Com. Workers*, 913 F.2d 544, 555-56 (8th Cir. 1990); *Shukh v. Seagate Tech., LLC*, 872 F. Supp.2d 851, 855 (D. Minn. 2012).

[3] *E.g.*, *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007); *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 363-64 (3d Cir. 2007); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249-50 (4th Cir. 1990); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989); *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526, 531 (S.C. 2010); *Am. Zurich Ins. v. Mont. Thirteenth Jud. Dist. Ct.*, 280 P.3d 240, 246 (Mont. 2012); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 37 (N.Y. 2016); *Selby v. O'Dea*, 90 N.E.3d 1144, 1150 (Ill. Ct. App. 2017); *OXY Res. Cal. LLC v. Superior Ct.*, 9 Cal. Rptr. 3d 621, 636 (Cal. App. 4th Dist. 2004); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 51 (Tex. 2012); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 214 (Tenn. Ct. App. 2002); *Visual Scene, Inc. v. Pilkington Bros.*, 508 So.2d 437, 443 (Fla. Ct. App. 1987); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Serv, Inc.*, 870 N.E.2d 1105, 1111–12 (Mass. 2007).

The modern doctrine has also been codified in the *Restatement (Third) of the Law Governing Lawyers*:

> (1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68- 72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000).

While this Court has not had the chance to specifically adopt the modern formulation of the doctrine set forth in the *Restatement*, it has applied the doctrine's principles and rejected waiver when parties represented by different counsel exchanged information while pursuing a common interest. In the 1942 case of *Schmitt v. Emery*, the Court held that a tort defendant's counsel could share privilege-protected information with another party's counsel when the attorneys had "combined their efforts in [a] common cause" during the litigation. 2 N.W.2d 413, 317 (Minn. 1942).[4] Four years later, the Court in *Knox v. Knox* endorsed the related "joint defense" or "joint representation" doctrine, which allows parties represented by the same counsel to exchange privileged information

[4] In 1981, the Court overruled *Schmitt* concerning a separate issue—i.e., whether the underlying communication itself (between an employee and the employer's claims agent) was privileged. *Leer v. Chi., Milwaukee, St. Paul. & P. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981).

without waiver when pursuing "a common interest" (but does not shield communications in litigation between those parties). 25 N.W.2d 225, 230 n.4 (Minn. 1946).[5]

Consistent with *Schmitt* and *Knox*, the Court should recognize the modern common-interest doctrine, which "serves to protect the confidentiality of communications passing from one party to the attorney for another party" that shares a common interest. *Schwimmer*, 892 F.2d at 243. The doctrine improves the quality of legal advice and advocacy. *See* RESTATEMENT, *supra*, § 76, cmt. b; *In re Grand Jury Subpoenas*, 902 F.2d at 250 (stating that doctrine allows parties to "more effectively prosecute or defend their claims"); *Ambac*, 57 N.E.3d at 38 (noting that without common-interest doctrine, parties that "share a common legal interest" will be subject to "the threat of mandatory disclosure [that] may chill the parties' exchange of privileged information and [] thwart any desire to coordinate legal strategy"). It also creates efficiency, allowing cooperation in litigation that can expedite proceedings where multiple parties face a common adversary. *Selby*, 90 N.E.3d at 1156 (explaining how litigation process is "better served when parties are allowed to pool resources").

[5] Note 4 in *Knox* directed readers to section 2312 of Wigmore's *Evidence*, which provided that when "the same attorney acts for two parties having a common interest[] and each party communicates with him," the "communications are clearly privileged from disclosure at the instance of a third person." John Henry Wigmore, 8 EVIDENCE § 2312 (3d ed. 1940) (Add. 55-57.) Modern treatises (including *The New Wigmore*) document the more recent developments of the common-interest and joint-representation doctrines. *See, e.g.*, Edward J. Imwinkelried, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.8.1; Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE & WORK-PRODUCT DOCTRINE 346-97 (6th ed.).

B. The Common-Interest Doctrine Allows Agencies to Coordinate Law-Enforcement Efforts and Otherwise Allows the Attorney General to Provide Legal Representation to the State as Sovereign.

The interests undergirding the common-interest doctrine are especially heightened in this case because it concerns the OAG's need to communicate with other state attorneys general concerning areas of shared enforcement concern. Indeed, criminal and civil authorities—whether at the federal, state, tribal, or local level—often face overlapping jurisdiction or parallel investigatory authority over the same or similar conduct. It is thus essential that agencies be able to communicate effectively and confidentially. If law enforcement cannot communicate candidly, violators will more easily evade prosecution and play agencies off against one another. *See Tobaccoville,* 692 S.E.2d at 531 (recognizing need for common-interest doctrine to protect communications among state attorneys general to "coordinat[e] regulation and enforcement"); *Kittitas Cty. v. Allphin*, 381 P.3d 1202, 1210 (Wash. Ct. App. 2016) (protecting communication under the common-interest doctrine because disclosure "would force government attorneys to forego communicating with other law enforcement professionals" concerning matters of shared jurisdiction), *aff'd* 416 P.3d 1232 (Wash. 2018).

The communications at stake in this case also involve the OAG's interactions with Minnesota agencies, which may occur outside of a strict attorney-client relationship but nevertheless concern important common interests in matters litigated by the OAG.[6] For example, the Attorney General has sole authority to commence civil actions to enforce

[6] OAG categories 6 and 10. (Add. 6-7.)

statutes prohibiting unlawful business practices and brings such actions without an agency client named as party to the litigation. *See* Minn. Stat. §§ 8.31, 8.32; *State ex rel. Peterson v. City of Fraser*, 254 N.W. 776, 778 (Minn. 1934) (stating that AG's "discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state"). But when the OAG investigates or brings such litigation, agencies with interests in or shared jurisdiction over the subject matter may be confidentially consulted—and the State and its residents are better served when such coordination occurs. The common-interest doctrine is precisely designed to allow enhanced and efficient legal representation in these and other circumstances where the OAG represents the State in the Attorney General's sole capacity and where agencies are situated as third parties.

Full recognition of the doctrine would also provide consistency and predictability. Because the doctrine is recognized by Minnesota federal courts, would-be litigants will face needless and distressing uncertainty as to whether their communications will be protected based on whether their dispute ends up in state or federal court. Such doubt should be avoided: "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

Respondent has not, for its part, opposed the common-interest doctrine on its merits and has instead focused on this Court's lack of direct precedent. The Decision accepted this argument; however, the district court in this case and Minnesota courts in other contexts have been able to assume or predict the doctrine's recognition by this Court. (*See*

Add. 52-53 (quoting section 76 of the *Restatement* and holding that Respondent "has not advanced a convincing argument to counter the application of the common interest privilege to the data at issue"); *Walmart Inc. v. Anoka Cty*., No. A19-1926, 2020 WL 5507884, *2-3 (Minn. Ct. App. Sept. 14, 2020) (noting ALJ's acknowledgement of common-interest protection but reversing based on application of the doctrine); *State by Swanson v. CashCall, Inc*., No. 27-CV-13-12740, 2016 WL 11737539, *7 n.3 (Minn. 4th Dist. July 29, 2016) (quoting the *Restatement* and stating that "the Court believes that the Minnesota appellate courts would find the common interest doctrine applicable under these circumstances").) Regardless of whether the court of appeals correctly analyzed its jurisdictional role, the issue is now squarely before this Court and there is no substantive basis for the doctrine to not be recognized. The Court should adopt the doctrine and bring Minnesota in line with common and well-practiced legal standards.

C. The Court Should Also Confirm that Work Product Shared with Parties with Common Interests is Not Waived Unless Disclosed to an Adversary.

Common standards also establish that parties who "anticipate litigation against a common adversary on the same or similar issues" can share work product and preserve the protection, so long as they do so in a way "not at all likely to disclose the work product material to the adversary." *United States v. Am. Tel. & Tel. Co*., 642 F.2d 1285, 1299 (D.C. Cir. 1980); *see also* Alexa Ashworth et. al, *No Waiver by Disclosure of Work Product to Persons with Common Interests*, 10 FED. PROC., L. ED § 26:221 (2021). This, again, is the standard applied in Minnesota federal courts. *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997) ("[D]isclosure to an adversary waives work product protection as to items

actually disclosed."). The standard is also codified in the *Restatement*: "Work product . . . may generally be disclosed to . . . persons similarly aligned on a matter of common interest." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 91, cmt. b (2000).

The Court should recognize this standard.[7] Rule 26.02 of the Rules of Civil Procedure codifies the protection of work product, preventing discovery of "documents . . . prepared in anticipation of litigation or for trial" and "an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial." *City Pages v. State*, 655 N.W.2d 839, 846 (Minn. 2003) (quoting *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986)). The above-defined waiver standard is consistent with the purpose of work-product protection to "promote the operation of the adversary system by ensuring that a party cannot obtain materials that his opponent has prepared in anticipation of litigation." *Pittman*, 129 F.3d at 988. "[W]ith common interests on a particular issue against a common adversary, the transferee [of information] is not at all likely to disclose the work product material to the adversary." *Am. Tel. & Tel. Co.*, 642 F.2d at 1299-1300. And again, the interests at stake in this case—including the need for the OAG to confidentially share

[7] The impact of the Decision as to questions over waiver of work-product is not completely clear. Having held that the common-interest doctrine could not be recognized under Minnesota law, the court of appeals additionally stated in dicta that even if the doctrine could be recognized, it would apply "only to [attorney-client communications] and not [attorney work product.]" (Add. 27.) Yet the court favorably cited section 91 of the *Restatement* as supplying a separate standard for waiver of work-product protection. (*Id.*) And, as stated above, that section instructs that work product may be exchanged without waiver so long as there is no "significant likelihood that an adversary or potential adversary in anticipated litigation would obtain it." Regardless of any disputes over interpreting the Decision in this regard, the issue is before this Court. The standard under section 91, including the protection for communications confidentially shared among parties with common interests, should be recognized by this Court as applicable under Minnesota law.

thoughts and impressions with other state attorneys general over common enforcement issues—are of utmost importance.

So to the extent the documents at issue concern information that the State asserts is protected by the work-product protection (in addition or alternative to the attorney-client privilege), the Court should recognize the ability to confidentially share work product without risk of waiver and consistent with standards set forth under section 91 of the *Restatement*. This standard is consistent with the "'common interest' test utilized by [federal] courts" and allows sharing of work-product when not likely to be shared with the common adversary. RESTATEMENT, *supra*, § 91, reporter's note cmt. b.

III. THE DECISION IMPROPERLY CONSTRICTS THE ATTORNEY-CLIENT PRIVILEGE FOR PUBLIC AGENCIES.

The Decision incorrectly rejected the OAG's claims that the attorney-client privilege shields certain documents from public disclosure pursuant to Section 13.393, reasoning that internal OAG communications did not reflect a "communication with a client" so were not privileged. (Add. 23-24.) By imposing a strict requirement that the privilege cannot apply unless there is a communication with an outside client, the Decision improperly restricts the attorney-client privilege for public agencies.

Public agencies, here the OAG, stand in a unique position of often being both the client and attorney when representing the public. Indeed, the Attorney General is "the chief law officer of the state" and has authority to "institute, conduct, and maintain such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights." *Slezak v. Ousdigian*, 110 N.W.2d

1, 5 (Minn. 1961). So, for example, when the OAG litigates an action to remediate consumer fraud, abate a public nuisance, or prevent abuse by a registered, the Attorney General must consult and obtain legal counsel from his deputies, assistants, and other legal staff. Those officials in turn must also frequently make lower-level decisions on behalf of the State in which they must consult attorneys within the Office. In these situations, both the client and its legal counsel are attorneys in the same office. *See* Minn. R. Prof. Resp. 1.2 (outlining duty of client to make ultimate decisions and duty of lawyer to consult with client).

Such internal communications serve the same purpose as any other attorney-client communications, so should be recognized as privileged. While Minnesota courts have not had occasion to address this issue, federal courts have found the attorney-client privilege protects communications within the office of the Attorney General. *See, e.g.*, *ACLU v. NSA*, 925 F.3d 576, 585, 589 (2d Cir. 2019) (attorney-client privilege protected from disclosure a memorandum prepared by an Assistant Attorney General for the Attorney General that reviewed and analyzed the legality of an electronic surveillance program); *New York Times Co. v. U.S. Dep't of Justice*, 282 F.Supp.3d 234, 236-38 (D.D.C. 2017) (attorney-client privilege protected from disclosure a memorandum to the Attorney General from a then-Assistant Attorney General discussing legal issue). *See* also *U.S. v. ChevronTexaco Corp.*, 241 F. Supp.2d 1065, 1977 (N.D. Cal. 2002) (finding it is consistent with the fundamental policies that drive attorney-client privilege to treat an in-house lawyer communicating with another in-house lawyer both as lawyer and as client for purposes of applying the privilege).

The Decision's holding—that there can be no attorney-client privilege for such communications—failed to examine the legal or policy implications of constricting the attorney-client privilege for public agencies. This Court has warned against such needlessly mechanical applications of attorney-client privilege. *Kobluk v. Univ. of Minn.*, 574 N.W.2d 346, 444 (Minn. 1998). Instead, courts must examine whether "the contested document embodies a communication in which legal advice is sought or rendered." *Id*. This basic inquiry involves reviewing "the nature and form of the document and the circumstances of the exchange." *Id*. The Decision's rigid search for an *external* client disregards this principle. *See* 1 Rice, Attorney-Client Privilege in the United States, at 53, § 3:14 ("The confidential communications between in-house counsel and th[e] client are privileged to the same extent as communications between outside retained counsel and the clients who have consulted him for legal advice or assistance.") The Court should take this opportunity to clarify that internal communications at the OAG which "embody a communication in which legal advice is sought or rendered" may be protected by the attorney-client privilege without the presence of or communication with an "external" client.

CONCLUSION

This Court is confronted with an important decision on three issues that will have substantial impacts on the ability of the OAG, and private attorneys, to communicate effectively with one another and represent their clients. The Court should reverse the Decision, acknowledge the common-interest doctrine, acknowledge that public entities can house both the client and attorney for purposes of the attorney-client privilege, and hold that Section 13.65 applies to all data, not just data about individuals.

Dated: September 9, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ **Liz Kramer**
LIZ KRAMER
Solicitor General
Atty. Reg. No. 0325089

OLIVER LARSON
Assistant Attorney General
Atty. Reg. No. 0392946

ADAM WELLE
Assistant Attorney General
Atty. Reg. No. 0389951

JENNIFER KITCHAK
Assistant Attorney General
Atty. Reg. No. 0317056

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1010 (Voice)
(651) 282-5832 (Fax)
liz.kramer@ag.state.mn.us
oliver.larson@ag.state.mn.us
adam.welle@ag.state.mn.us
jennifer.kitchak@ag.state.mn.us

ATTORNEYS FOR PETITIONERS KEITH ELLISON IN HIS OFFICIAL CAPACITY AND THE OFFICE OF THE ATTORNEY GENERAL

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