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State of Minnesota
10/26/2021 2:37 PM

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

Stinson LLP,

Plaintiff

vs.

University of Minnesota,

Defendant.

Case Type: Civil – Other

Court File No. 27-CV-21-6320
Judge Patrick D. Robben

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Stinson LLP respectfully submits this memorandum in support of its Motion for Summary Judgment.

INTRODUCTION

Minnesota has long recognized the public's right "to know what the government is doing." *Montgomery Ward & Co. v. Hennepin Cnty.*, 450 N.W.2d 299, 307 (Minn. 1990). The legislature codified this right in the Minnesota Government Data Practices Act ("DPA"), Minn. Stat. ch. 13, and established clear guidelines that protect the public's right to access government data. First, the legislature established a presumption that "government data are public and are accessible by the public." Minn. Stat. § 13.01, subd. 3. Second, the DPA requires each agency to designate a "responsible authority" to handle "collection, use and dissemination of" public data. *Id.* subd. 1; *id.* §§ 13.02, subd. 16(a), (b). Third, each agency's responsible authority must establish procedures to "insure that requests for government data are received and complied with in an appropriate and

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

prompt manner." *Id.* § 13.03, subd. 2(a). And fourth, the DPA prohibits a state agency from inquiring into the requester's purpose. *Id.* § 13.05, subd. 12.

This case involves a fundamental breach of the DPA's mandates, in both letter and spirit. Plaintiff submitted two DPA requests to the University of Minnesota in August 2020. Those requests sought government data on topics of great public interest—namely, the environmental impact of fossil fuel consumption, and the University's involvement in promoting climate-related litigation. Plaintiff received no response to those requests for eight weeks and no responsive data for nineteen weeks. The University refused to preserve responsive data for months; repeatedly ignored Plaintiff's communications; refused to discuss a production schedule; and rejected a search term proposal designed to help the University respond more efficiently. The University has explicitly questioned Plaintiff's motives (despite their statutory irrelevance). And now, more than a year in, the University is not even close to finishing its production of responsive data.

Plaintiff brought this lawsuit when it became clear that, absent court intervention, the University would continue to shirk its DPA obligations. Summary judgment is appropriate. The material facts are undisputed, and they establish a clear violation of the DPA. In particular, it is undisputed that: (i) the University has failed to produce responsive data within a year of receiving the requests, even though Plaintiff has prioritized its requests into narrow topics covering a handful of custodians for limited periods of time; and (ii) the University has refused to commit to a production schedule or even predict when it will likely finish. Accordingly, the University has failed to produce responsive, public data in an "appropriate and prompt manner," Minn. Stat. § 13.03, subd. 2(a), or a "reasonable time," Minn. R. 1205.0300, subp. 3.

The Court should grant Plaintiff's motion for summary judgment. Moreover, because further delay would exacerbate Plaintiff's harm from the University's violation, the Court should

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

order the University to (i) complete its productions of the priority topics within two months of the date of its order, and (ii) promptly produce the remaining materials on a reasonable schedule, to be negotiated by the parties and approved by the Court.

ISSUES PRESENTED FOR SUMMARY JUDGMENT

1. Whether the University violated the Minnesota Government Data Practices Act, Minn. Stat. § 13.03, subd. 2(a), by failing to produce responsive, public data in a timely manner. *See* Minn. Stat. § 13.03, subd. 2(a) ("The responsible authority in every government entity shall establish procedures, consistent with this chapter, to insure that requests for government data are received and complied with in an appropriate and prompt manner."); Minn. R. 1205.0300, subp. 3 ("[T]he responsible authority shall provide for a response to a request for access within a reasonable time.").

STATEMENT OF DOCUMENTS IN SUPPORT OF MOTION

Plaintiff relies on its Motion for Summary Judgment, this Memorandum, the Declaration of Peter J. Schwingler and accompanying exhibits ("Schwingler Decl."), and the Declaration of Claire M. Williams and accompanying exhibits ("Williams Decl.").

STATEMENT OF UNDISPUTED FACTS

I. Drawing on memoranda supplied by University faculty, Attorney General Ellison files a lawsuit targeting the petroleum industry.

In June 2020, Minnesota Attorney General Keith Ellison filed a complaint in the District Court of Ramsey County against the American Petroleum Institute and several oil and gas companies (the "API Action"). *See* Schwingler Decl. Ex. A. Echoing allegations made by attorneys general in other jurisdictions, General Ellison alleges, among other things, that the oil industry by engaging in the ongoing policy debate on alleged climate change ("climate change"), misled Minnesotans about the environmental effects of carbon emissions. *Id.* ¶¶ 3, 6, 122, 180.

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

This, he alleges, caused the federal government (and governments throughout the world) to impose less stringent regulations on fossil fuels, leading to greater fossil fuel consumption and emissions of greenhouse gases like carbon dioxide. *Id.* ¶¶ 54, 123, 173, 180, 182. General Ellison alleges that this consumption of fossil fuels and the related emissions throughout the world led to increased temperatures, which allegedly caused a variety of injuries to Minnesota and its citizens. *Id.* ¶¶ 139–71.

Based on information from the Attorney General's Office, Plaintiff learned that University faculty played a central role in compiling (largely from third-party sources), and to a lesser extent developing, the legal theories underlying the complaint in the API Action. Political advocacy groups, funded and directed by out-of-state interests, first approached the University to help persuade the Attorney General to commence climate change litigation in late 2018. Schwingler Decl. Exs. B and C. These activist groups, including Fresh Energy and the Rockefeller Family Foundation, asked the University to research potential Minnesota-law claims against petroleum companies. Schwingler Decl. Ex. C. Communications between University faculty and these advocacy groups reveal several interesting facts: first, that faculty closely assisted in analyzing both liability and damages theories against the defendants in the API action; second, that faculty solicited funding from at least one outside group in connection with this work; third, that the advocacy groups presented the Attorney General with legal memoranda, on University letterhead, describing potential liability and damages theories; and fourth, that many of these theories found their way into the Attorney General's complaint in the API Action.[1]

[1] Compl. Ex. C. (University faculty and students presenting the Attorney General legal theories for liability); Schwingler Decl. Ex. D (University professor soliciting colleagues' input regarding damages to Minnesota); *Id.* Ex. C (University faculty seeking funding from Fresh Energy in connection with climate change litigation research); *Id.* Ex. E (Fresh Energy informing University

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

II. In August 2020, Plaintiff submits two DPA requests to the University seeking information related to climate change and climate litigation.

On August 26, 2020, Plaintiff submitted two separate DPA requests: one to the Twin Cities campus and one to the Duluth campus. Compl. Exs. A and B; Answer ¶ 25. Both requests were aimed at learning more about two related topics: (i) the University's contributions to the public debate over climate change, and (ii) its involvement in developing General Ellison's legal theories in the *API* litigation.

Although the University describes these requests as "breathtakingly broad," Univ. Mem. in Supp. of Mot. to Transfer Venue at 1, they were actually quite specific and targeted to particular inquiries of interest to Plaintiff (and to the public). The request to the Twin Cities campus, for example, contained seventeen discrete topics. Six topics sought data related to specific events, articles, or websites. *See* Compl. Ex. B at 2–3 (bullets 10, 12, 14, 15, 16, 17). Five others sought communications about climate change or climate litigation by a handful of named faculty members. *See id.* (bullets 1, 7, 8, 9, 11). And the remaining topics concerned issues directly addressed by the University's memoranda to General Ellison—including the University's research into climate change and the University's own substantial consumption of fossil fuel. *See id.* (bullets 2, 3, 4, 5, 6, 13). The request to the Duluth campus was even more focused: that request contained only six discrete topics, five of which named specific faculty members. *See* Compl. Ex. A.

faculty that legal memoranda, on University letterhead, describing potential liability and damages theories, is "all final and in front of [Attorney General] Keith [Ellison]"); *Id.* Ex. A (applying most of the legal theories that the University presented to the Attorney General in Compl. Ex. C).

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

III. The University slow-rolls its response to Plaintiff's requests.

The University responded to Plaintiff's requests with silence and delay. First, the University simply ignored the requests. On October 20, after nearly two months without a response, Plaintiff requested that the University grant prompt access to responsive data or provide written objections to the requests. *Id.* ¶¶ 5, 27, 61; Schwingler Decl. Ex. F; Answer ¶ 26. Plaintiff also reminded the University of its statutory obligation to respond in an "appropriate and prompt manner." Schwingler Decl. Ex. F.

The University delayed another week before responding. Compl. ¶ 28; Answer ¶ 27. On October 27, the University emailed Plaintiff—not with written objections or a substantive response, but with a request that Plaintiff identify specific employees as document custodians. Compl. ¶ 28; Schwingler Decl. Ex. G; Answer ¶ 27. The University also asked Plaintiff to prioritize the data and limit the search via date ranges. Compl. ¶ 28; Schwingler Decl. Ex. G; Answer ¶ 27.

Plaintiff promptly complied with the University's requests. Compl. ¶ 29. First, in a November 11 letter, Plaintiff provided a list of the professors whom Plaintiff identified in its initial request. Schwingler Decl. Ex. H; Answer ¶ 28. Plaintiff also requested that the University "expressly communicate [the DPA's] preservation obligation" to the identified individuals as soon as possible and that the University confirm such communication "no later than November 13." Schwingler Decl. Ex. H (citing Minn. Stat. § 13.03, subd. 1 (stating that government entities are required to keep records of data "to make them easily accessible for convenient use")); Answer ¶ 28.

Second, on November 13, Plaintiff prioritized its requests to focus on data related to climate change research and litigation. Answer ¶ 28; Schwingler Decl. Ex. I. Specifically,

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

Plaintiff prioritized bullets 1 and 7-12 of the Twin Cities request and bullets 1-6 of the Duluth request. Schwingler Decl. Ex. I. Plaintiff re-identified the following University employees associated with those specific topics—Alexandra Klass, Stephen Polasky, Gabe Chan, John Goodge, Richard Axler, Byron Steinman, and John Green—and named five additional document custodians. *Id.* Based on such clarifications, Plaintiff asked the University to produce responsive data as soon as possible, and no later than November 24. *Id.* Yet for the rest of November, Plaintiff heard nothing from the University.

On December 9, after another month of waiting, Plaintiff spoke with the University by phone. Compl. ¶¶ 30–32; *see also* Schwingler Decl. Ex. J; Answer ¶ 29. During that call, the University claimed that it might need *over a year* to provide a complete response. Schwingler Decl. Ex. J; Compl. ¶¶ 31–32. This was so, the University suggested, because the University prioritizes shorter DPA requests over longer and more complex DPA requests. Schwingler Decl. Ex. J; Compl. ¶¶ 31–32. As an example, the University noted that it had one request, seeking data from the emails of two professors over a nine-month period, that had been pending for over a year and that no data responsive to that request had been produced. Schwingler Decl. Ex. J; Compl. ¶ 32.

Shortly after the December 9 call, Plaintiff informed the University that a delay of a year or more would violate the DPA's requirement that the University respond in an "appropriate and prompt manner." Minn. Stat. section 13.03, subd. 2(a); Schwingler Decl. Ex. J; Answer ¶ 32. Therefore, Plaintiff asked the University to complete its responses to the DPA requests, as prioritized in Plaintiff's November 13 letter, no later than six months after the date they were served. Schwingler Decl. Ex. J. Plaintiff's letter, sent on December 18, also asked the University

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

to provide available times to speak before the holidays. *Id.* The University never responded. Compl. ¶ 34.

IV. Meanwhile, the University drags its feet in preserving responsive data.

The University also delayed in preserving responsive materials. In its December 18 letter, Plaintiff reminded the University of its obligation to preserve data, both under the DPA itself and Minnesota Statutes section 15.17. Schwingler Decl. Ex. J; Answer ¶ 32. As noted above, the University never responded. Instead, on January 5, 2021, the University produced about thirty documents—its first release of data since the August 26 requests. Answer ¶ 33. The University also sent Plaintiff a letter stating that the University "will provide responsive data as soon as feasible." Compl. Ex. D; *see also* Answer ¶ 33. The January 5 letter did not acknowledge, much less address, Plaintiff's concerns about preservation. Compl. Ex. D.

Over the next five weeks, Plaintiff repeatedly asked the University to preserve responsive data. Compl. ¶¶ 36, 39; Schwingler Decl. Ex. K (citing *Halva v. Minn. State Colleges & Univs.*, Slip. Op at 19, A19-0481 (Minn. Jan. 20, 2021)); Answer ¶¶ 32, 36. Instead, the University continued its pattern of delay. Not only did the University ignore several communications from Plaintiff, but the University initially refused to send preservation notices to the named document custodians. Schwingler Decl. Ex. J. It was not until February 4—over five months after the DPA requests were issued, and nearly seven weeks after Plaintiff's December 18 letter—that the University confirmed in writing that (i) Google Vault holds had been implemented on all custodians' Google accounts and (ii) certain current University employees had received preservation instructions. Compl. ¶ 36; Schwingler Decl. Ex. L. Yet even then, the University

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

refused to send preservation notices to former employees likely to have materials generated during their time as University employees that are responsive to Plaintiff's requests. Compl. ¶ 37.[2]

V. Plaintiff's efforts to prioritize and streamline are met with delay and a lack of transparency.

Plaintiff remained in prompt contact with the University throughout the winter and spring of 2021. On multiple occasions, Plaintiff accommodated the University's requests to further narrow the priority topics. Plaintiff also proposed search terms designed to reduce the University's search burdens. The University, however, refused to test those search terms or commit to a production schedule for the narrowed priority requests.

Plaintiff twice narrowed its priority requests in February. On a February 17 call, Plaintiff offered to limit the priority requests to a handful of topics related to climate change and a handful of custodians. Compl. ¶ 41; Answer ¶ 38. In response, the University asked Plaintiff to consider narrowing the topic to "climate change litigation" instead of climate change in general. Compl. ¶ 41.

The next day, Plaintiff wrote the University and agreed to that additional limitation, in a goodwill attempt to expedite the University's compliance with its statutory obligations. Compl. ¶ 42; Schwingler Decl. Ex. M; Answer ¶ 39. Plaintiff's February 18 email listed the following revised priority items (in descending order of importance):

- Twin Cities Bullets 1 and 7-12: Klass, Polasky, and Chan for 2016 through the date of the DPA request; narrowed to replace "climate change" with "climate change litigation";
- Twin Cities Bullets 1 and 7-12: Knuth, Hellmann, Frelich, Gutkneeth, Reich, Surapaneni, and Twine for 2016 through the date of the DPA request; narrowed to replace "climate change" with "climate change litigation";

[2] To the extent Plaintiff later learns that data subject to production was lost or destroyed as a result of the University's inaction, Plaintiff reserves the right to seek appropriate relief.

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

- UMD Bullets 1-6: Anderson, Goodge, Axler, Steinman, Green for 2016 through the date of the DPA request; narrowed to replace "climate change" with "climate change litigation";

- Twin Cities Bullets 1 and 7-12 and UMD Bullets 1-6 for all custodians pre-2016; narrowed to replace "climate change" with "climate change litigation";

- Colgan, Thakrar, Domingo, and Tilman for responsive data related to "Global Food system emissions could preclude achieving 1.5 and 2 C climate change targets";

- All remaining responsive data, regardless of custodian or request.

Schwingler Decl. Ex. M.

Plaintiff also proposed a list of search terms[3] to aid the University in reviewing the emails and documents of the three top-priority custodians. *Id.*; Compl. ¶ 42; Answer ¶ 39. Plaintiff explained that it "would be happy to work with [the University] to refine the terms as necessary." Schwingler Decl. Ex. M; *see also* Compl. ¶ 42. Moreover, Plaintiff identified search methods that would mitigate the University's compliance obligations. *See, e.g.*, Schwingler Decl. Ex. M (explaining that, for searches over Google Drive, "it is possible to search a specific custodian's files" by using "quot;owner:usernamequot; as the syntax"). Plaintiff asked the University to test the terms by running a hit report on the three custodians' electronic files for the relevant period. Schwingler Decl. Ex. M; *see also* Compl. ¶ 42; Answer ¶ 39. The purpose of this request was

[3] Plaintiff's suggested search terms were as follows: "Fresh Energy"; "Hamilton" OR "Drake"; "Walburn"; "Noble"; "Sher" OR "Edling"; Bloomberg; "New York University" OR "NYU"; "Center for Environmental Advocacy"; MCEA; "Minnesota Attorney General's Office" OR "attorney general" OR "OAG" OR "AGO"; SAAG; Ellison; Currie; Surdo; Hayes; Honolulu; "The Legal and Scientific Case for Recovering Climate Change Damages"; Exxon; Koch; "American Petroleum Institute"; API; "Flint Hills" OR "FHR"; "Pine Bend"; "climate change" AROUND 10 lawsuit; "climate change" AROUND 10 litigation; "climate change" AROUND 10 claims; "climate change" AROUND 10 case; potential AND (lawsuit OR litigation OR claims OR case) AND (petroleum OR oil OR "fossil fuel"); "market share liability"; "Baltimore"; "San Mateo"; "Oakland"; "Marathon"; "Union of Concerned Scientists"; "Center for Climate Integrity." *See* Schwingler Decl. Ex. M.

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

simple: to determine whether the proposed search terms would help narrow the University's review burden. Schwingler Decl. Ex. M; *see also* Compl. ¶ 42.

After receiving no reply to its February 18 email, Plaintiff followed up with emails to the University on February 23 and 26. Compl. ¶ 43; Answer ¶ 40. In the February 23 email, Plaintiff asked the University to check its availability to discuss the search terms. Schwingler Decl. Ex. N; Compl. ¶ 43; Answer ¶ 40. Having received no response, on February 26, Plaintiff asked the University for an update on when Plaintiff could expect another production and proposed a call for the following Monday. Schwingler Decl. Ex. O. The University agreed to the call, but offered no update on production, preservation, or Plaintiff's suggested search terms. Schwingler Decl. Ex. P; Compl. ¶ 44.

This pattern repeated throughout March. Compl. ¶¶ 44–49. After a March 1 call, where Plaintiff renewed the possibility of using search terms, the University did not respond to Plaintiff for another two and a half weeks, despite committing to respond on several issues by March 8. Compl. ¶ 44; *see also* Schwingler Decl. Ex. P (noting discussion of preservation for new custodians, missing email attachments, timing of next production, and search terms for "first priority items"); Answer ¶ 41–42.

Having heard nothing, Plaintiff emailed the University on March 8, asking to speak. Compl. ¶ 45; Schwingler Decl. Ex. P; Answer ¶ 42. Plaintiff emailed the University again on March 10, repeating the request and proposing times later in the week. Compl. ¶ 45; Schwingler Decl. Ex. Q; Answer ¶ 42. After two more days of silence, Plaintiff emailed the University, asking for "the courtesy of a response yet today." Schwingler Decl. Ex. R; Compl. ¶ 45; Answer ¶ 42. The University finally responded, agreeing to a call the next week. Compl. ¶ 45; Schwingler Decl. Ex. S; *see also* Answer ¶ 42.

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

The parties' March 17 and 23 calls were more of the same. Compl. ¶¶ 46–48; *see also* Answer ¶ 43. Despite Plaintiff's efforts to cooperate, the University still would not commit to a timeline for future productions and still had not tested Plaintiff's proposed search terms. Compl. ¶ 46; Answer ¶¶ 43, 45. The University claimed that some terms are vague and would capture the names of other employees and students. *See* Answer ¶¶ 39, 43. The University also claimed the Plaintiff's new date range of 2016 to August 2020 was still too broad. *See* Answer ¶ 43. Accordingly, the University asked Plaintiff to narrow the date range even further for a few of its top-priority topics. Compl. ¶ 46; *see* Answer ¶ 43.

In response, Plaintiff (yet again) agreed to further prioritize its requests. Compl. ¶ 48; Answer ¶ 45. On a March 23 call, Plaintiff informed the University that it could apply the narrowed date range of 2018 to August 2020 to the top-priority requests. Compl. ¶ 48; Answer ¶ 45. The University seemingly accepted this limitation and promised Plaintiff an update by the end of March 24. Compl. ¶ 48. But the University once again failed to deliver. *Id.* ¶ 49. Despite Plaintiff's multiple attempts to address the University's stated concerns around the breadth of the requests or the workload associated with gathering the requested information, the University continued to stonewall with respect to its obligations.

Plaintiff wrote the University on March 25, reminding it of its promise and asking again for an update on the search term process, but the University responded only that it was busy. *Id.* ¶¶ 48–49; Schwingler Decl. Ex. T; Answer ¶¶ 45–46; Schwingler Decl. Ex. U. Plaintiff followed up yet again on March 29, but the University claimed it "won't have time to meet this week on this topic" and "will send an email when [it has] an update." Schwingler Decl. Ex. V; Schwingler Decl. Ex. W.

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

Having received no further communication since March 29, Plaintiff tried once more, on April 27, to discuss using search terms to aid the University's efforts to respond to Plaintiff's request and sending preservation notices to certain custodians. Compl. ¶ 52; Schwingler Decl. Ex. X; Answer ¶ 49. The University never responded. Compl. ¶ 52. Left with no other choice, Plaintiff filed this lawsuit on May 7, 2021. *Id.*

VI. Over a year after the DPA requests, the University is nowhere close to completing its responses.

As of the date of this motion, the University has made sixteen separate productions of responsive data.[4] The number of distinct productions, however, is a red herring. These productions contain very few unique (*i.e.*, non-duplicative) documents responsive to the highest priority requests. But more importantly, the University has refused to commit to a production schedule or offer any insight into when it expects to finish.

The University's first production (January 5) did not occur until over four months after the initial requests. Answer ¶ 33. The first batch consisted largely of a book chapter and the publicly available curriculum vitae of two professors. Williams Decl. ¶ 2. The second batch (February 8) contained emails related to the climate change litigation and the University's role in developing the theories of liability but was missing all the attachments to those emails containing the substance of the University's work. Answer ¶ 37; Williams Decl. ¶ 3. The third batch (March 18) was mostly documents unrelated to climate change litigation. Williams Decl. ¶ 4; *see* Answer ¶ 44. Instead, the batch contained emails about solar energy and its integration into Minnesota's utility system. Williams Decl. ¶ 4. The fourth batch (April 8) had documents—reflecting collaborations between the University and political advocacy groups—relevant to climate change litigation and

[4] Plaintiff is currently reviewing the University's most recent production, which was produced on October 25.

related damages to Minnesota. *Id.* ¶ 5 (containing an email requesting input from University professors on a document created by Fresh Energy listing the expected damages to Minnesota and emails and drafts circulated by those professors on the same subject); *see* Answer ¶ 47. The fifth production (April 20) also contained documents related to climate change litigation and the University's participation with political advocacy groups in developing theories of damages. Williams Decl. ¶ 6; *see* Answer ¶ 48. Many of the pages in both the fourth and fifth production were duplicates.

The University's practice of producing duplicative or irrelevant materials continued after Plaintiff filed this lawsuit. The sixth production (May 19) had many pages of newsletters from other organizations and invitations for professors to speak on panels. Williams Decl. ¶ 7. But there were very few pages about climate change litigation, which Plaintiff had identified, at the University's request, as its top priority. *Id.*; *see* Schwingler Decl. Ex. M; Compl. ¶ 42. The seventh and eighth productions (June 15 and 18) again had many pages of newsletters from other organizations and invitations to speak on panels. Williams Decl. ¶¶ 8–12. Very few pages related to climate change litigation. *Id.* ¶¶ 8–12. The documents in the ninth production (June 25) were all duplicates of emails that the University produced in April. *Id.* ¶ 13. Similarly, the tenth production (July 16) consisted mostly of duplicates from earlier productions. *Id.* ¶¶ 14–17. Finally, the eleventh batch (July 28) was only seventy-three pages consisting mostly of newsletters, and the twelfth production (August 12) contained no documents related to climate change litigation. *Id.* ¶¶ 18–19. The thirteenth batch (September 7) was mostly emails between academic colleagues about papers and presentations with a handful of emails related to climate change litigation. *Id.* ¶ 20. Even further afield from the priority topics, the fourteenth and fifteenth batches (September 24 and October 8) consisted mainly of online discussions largely between members of

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

the American Association for the Advancement of Science who are unaffiliated with the University. *Id.* ¶ 21–22.

All in, the University has produced remarkably few unique, responsive documents. And due to the University's total lack of transparency, Plaintiff is left to wonder when, if ever, the University intends to complete its production of responsive data.

ARGUMENT

I. The University violated the DPA by failing to produce public data in an appropriate and prompt manner.

The DPA requires government agencies to grant access to public data in an "appropriate and prompt manner." Minn. Stat. § 13.03, subd. 2(a); *see also* Minn. R. 1205.0300, subp. 3 ("[T]he responsible authority shall provide for a response to a request for access within a reasonable time."). Accordingly, the University must establish procedures that, "when followed, should result in appropriate and prompt responses *in all cases*." *Webster v. Hennepin Cnty.*, 910 N.W.2d 420, 431 (Minn. 2018) (emphasis added). What constitutes a reasonable time turns on the complexity of the request and amount of data requested. *See* Adv. Ops. 98-040, 02-020, and 14-003.

The requirement of a prompt response applies to both (i) an agency's initial response and (ii) its ultimate production of responsive data. As to the former, several Advisory Opinions by the Commissioner of Administration make clear that a delay of six weeks or more is not prompt. Advisory Op. 02-026 (concluding that a government entity "did not respond in an appropriate and timely manner" where it "did not respond at all for six weeks"); Adv. Op. 96-003 ("[A] response to a request for data, delivered six weeks later, cannot be considered prompt."). As to the latter, Minnesota authorities uniformly recognize that productions occurring six months (or more) after the initial request are untimely. In *Webster v. Hennepin County*, for example, the defendant agency conceded that a six-month delay from mid-August to mid-January was not prompt. 910 N.W.2d

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

at 431. And at least two Advisory Opinions confirm that a delay of eight months between request and receiving the data is not timely or prompt, as required by statute. *See* Adv. Ops. 19-010 & 06-029. Courts applying FOIA or similar state laws have reached similar conclusions. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (clarifying that, depending on the circumstances, "promptly available" typically means "within days or a few weeks of a determination, not months or years." (quotation omitted)); *Sierra Club v. EPA*, No. 18-CV-03472-EDL, 2018 WL 10419238, at *5 (N.D. Cal. Dec. 26, 2018) (holding that four years for production was not prompt, but that ten months could be because of the request's breadth); *Domestic Violence Servs. of Greater New Haven, Inc. v. Freedom of Info. Comm'n*, 688 A.2d 314, 318 (Conn. 1997) (finding violation where agency "failed to promptly provide the complainant with a copy of the [requested] records" until almost three months after her initial request).

The University's responses to Plaintiff's two DPA requests fall short in every respect. First, apart from an auto-generated email acknowledging receipt, the University did not respond to either request for nearly two months. Schwingler Decl. Ex. G; Answer ¶ 27. This alone violates the DPA. Adv. Op. 02-026 (six weeks too long); Adv. Op. 96-003 (same).

Second, over a *year* has passed since the requests, and the University is not even close to the finish line. Plaintiff has repeatedly narrowed its priority topics: first, by focusing on materials from a handful of document custodians related to climate change or climate change litigation; then, by limiting the date range; then, by eliminating climate change as a priority topic; and finally, by limiting the date range even further. Plaintiff has also proposed a method (search terms) commonly used to cull non-responsive materials from large document sets. If implemented, this method would *reduce* the volume of documents to be reviewed for responsiveness. Yet the University

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

seems committed to delay. Rather than complete its production of data responsive to Plaintiff's top priority topics, the University complains about the breadth of Plaintiff's *other* topics. *See* Univ. Mem. in Supp. of Mot. to Transfer Venue at 1, 7. Likewise, rather than test Plaintiff's search term proposal by running an ordinary hit report—a process the University initially agreed to conduct—the University quibbles about hypothetical problems that may or may not exist, and that cannot be confirmed without running a hit report in the first place. *Id.* at 9–10.

The University failed to respond to Plaintiff's requests for nearly two months, has not completed its document productions within a year, and has no apparent plan to finish anytime soon. By any measure, the University has failed to respond and produce responsive data in an "appropriate and prompt manner."

II. The Court should order the University to comply with a reasonable production schedule.

Given the University's self-evident disregard for its statutory obligations, intervention by this Court is necessary to ensure that Plaintiff receives the access guaranteed by the DPA.

The DPA authorizes injunctive relief to stop ongoing violations. Section 13.08, subdivision 2, provides that a "government entity which violates or proposes to violate this chapter may be enjoined by the district court." Minn. Stat. § 13.08. subdiv. 2. Moreover, the Court "may make any order or judgment as may be necessary to prevent the use or employment by any person of any practices which violate this chapter." *Id.*

Here, the University has failed to respond to Plaintiff's DPA requests in an appropriate and prompt matter. This violation is ongoing, as the University has provided no plan to come into compliance. An injunction requiring the University to produce responsive materials on a reasonable schedule is therefore authorized by the first sentence of Section 13.08, subdivision 2, because the University both "violates" and "proposes to violate" the DPA. An injunction is also

Filed in District Court
State of Minnesota
10/26/2021 2:37 PM

authorized under the second sentence of subdivision 2 to "prevent the use or employment" of practices which violate the DPA—specifically, delay tactics that make a mockery of a statute designed to ensure timely access to government data.

Given the delay that has already occurred, any injunction should require the University to comply with a sense of urgency. Plaintiff's requests have been pending for over a year. By the time this motion is decided, they will have been pending even longer. Accordingly, Plaintiff respectfully asks the Court to order the University to complete, within two months of the order, its productions of all data responsive to Plaintiff's most recent (and narrowest) priority topics. Those topics are set forth in the first three bullets of counsel's February 18, 2021 email, as modified to reflect the shorter date range Plaintiff agreed to in March:

- Twin Cities Bullets 1 and 7-12: Klass, Polasky, and Chan for 201[8] through the date of the DPA request; narrowed to replace "climate change" with "climate change litigation";

- Twin Cities Bullets 1 and 7-12: Knuth, Hellmann, Frelich, Gutkneeth, Reich, Surapaneni, and Twine for 201[8] through the date of the DPA request; narrowed to replace "climate change" with "climate change litigation"; [and]

- UMD Bullets 1-6: Anderson, Goodge, Axler, Steinman, Green for 201[8] through the date of the DPA request; narrowed to replace "climate change" with "climate change litigation[.]"

Schwingler Decl. Ex. M; Schwingler Decl. Ex. Y. Appendix A lists Plaintiff's modified requests, incorporating Plaintiff's narrowing and prioritization by correspondence between the parties. The Court should also order the University to meet and confer with Plaintiff about a reasonable schedule for producing data responsive to the remaining topics, set a deadline by which this must occur, and schedule a conference thereafter to resolve any disputes that remain.

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CONCLUSION

The University has violated the DPA in both letter and spirit. Plaintiff respectfully asks the Court to grant summary judgment in its favor and, through an appropriately tailored injunction, require the University to produce responsive data without further delay.

Dated this 26th day of October, 2021

STINSON LLP

/s/Peter Schwingler

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ATTORNEYS FOR PLAINTIFF

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Appendix A.1

Priority Topics 1 and 2: Bullets 1 and 7-12 to the University of Minnesota, Twin Cities, as modified by correspondence between the parties

Priority 1 Custodians: Alexandra Klass, Stephen Polasky, and Gabe Chan

Priority 2 Custodians: Kate Knuth, Jessica Hellmann, Lee Frelich, Jessica Gutkneeth, Peter Reich, Vishnu Laalitha Surapaneni, and Tracy Twine

Date Range: January 1, 2018, through August 26, 2020

Modified bullets:

1. All data relating to the participation, coordination, research, promotion, or other activity by the University or its faculty related to any litigation or putative litigation related to or involving climate change, including (without limitation) by the University of Minnesota Law School, the Humphrey School of Public Affairs, Professor Alexandra Klass, Dr. Stephen Polasky, Dr. Gabe Chan, or J. Drake Hamilton. The data requested includes, but is not limited to, all communications (whether in electronic form, hard copy, or otherwise) to or from the individuals named above that refer or relate in any way to litigation or putative litigation related or involving climate change.

7. All data relating to internal communications, including e-mail communication, by or between Professor Alexandra Klass, Dr. Stephen Polasky, and/or Dr. Gabe Chan, regarding ~~climate change or~~ actual or putative climate change litigation.

8. All data relating to communications, including e-mail communication, by or between Professor Alexandra Klass, Dr. Stephen Polasky, Dr. Gabe Chan, and/or any non-governmental organizations or representatives, including Fresh Energy, J. Drake Hamilton, Vik Sher, Roberta Walburn, Sher Edling LLP, and the Minnesota Center for Environmental Advocacy, regarding ~~climate change or~~ climate change litigation.

9. All data relating to communications, including e-mail communication, by or between Professor Alexandra Klass, Dr. Stephen Polasky, Dr. Gabe Chan, and the Minnesota Attorney General's Office, regarding ~~climate change or~~ climate change litigation.

10. All data relating to communications, including e-mail communication, by or between Professor Alexandra Klass, Dr. Stephen Polasky, Dr. Gabe Chan, Vik Sher, Sher Edling LLP, Roberta Walburn, and the Minnesota Attorney General's Office, regarding a Seminar entitled "The Legal and Scientific Case for Recovering Climate Change Damages in Minnesota from Fossil Fuel Companies," which took place at the University of Minnesota Law School on October 15, 2019.

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10/26/2021 2:37 PM

11. All data relating to communications, including e-mail communication, by or between Professor Alexandra Klass, Dr. Stephen Polasky, Dr. Gabe Chan, and/or any other local, state, federal, or other governmental agency, regarding ~~climate change or~~ climate change litigation.
12. All data, including e-mail communications, relating to the opinion piece published by Prof. Alexandra Klass in MinnPost dated July 13, 2020 and entitled, "Ellison extends a proud history: Holding ExxonMobil and Koch accountable."

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Appendix A.2.

Priority Topic 3: Bullets 1-6 to the University of Minnesota, Duluth campus, as modified by correspondence between the parties

Priority 3 custodians: John Green, John Goodge, Richard Axler, Ellen Anderson, and Byron Steinman

The University's third priority shall be producing all responsive data, including, for each modified request to the University of Minnesota – Duluth below, data contained in written documents, letters, e-mails, text messages, notes, reports, meeting minutes, internal memoranda, and the like from 2018 through August 26, 2020.

1. All data relating to the participation, coordination, research, promotion, or other activity by the University or its faculty related to any climate change litigation or putative climate change litigation, including by Professors John Green (emeritus), John Goodge, Richard Axler, or Byron Steinman.

2. All data relating to internal communications, including e-mail communication, by or between Professors John Green (emeritus), John Goodge, Richard Axler, and/or Byron Steinman regarding ~~climate change or~~ climate change litigation.

3. All data relating to internal communications, including e-mail communication, by or between Professors John Green (emeritus), John Goodge, Richard Axler, and/or Byron Steinman regarding their letter to the editor of the Duluth News Tribune dated August 11, 2020, see *https://www.duluthnewstribune.com/opinion/letters/6606299-Readers-View-Beware-biased-sources-of-climate-deniers*.

4. All data relating to communications, including e-mail communication, by or between Professors John Green (emeritus), John Goodge, Richard Axler, Byron Steinman, and/or the Minnesota Attorney General's Office, regarding ~~climate change or~~ climate change litigation.

5. All data relating to communications, including e-mail communication, by or between Professors John Green (emeritus), John Goodge, Richard Axler, Byron Steinman, and/or any other local, state, federal, or other governmental agency, regarding ~~climate change or~~ climate change litigation.

6. All data relating to communications, including e-mail communication, by or between Professors John Green (emeritus), John Goodge, Richard Axler, Byron Steinman, and/or any nongovernmental organization including the Minnesota Center for Environmental Advocacy, regarding ~~climate change or~~ climate change litigation.