A20-1344

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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.

REPLY BRIEF OF APPELLANTS KEITH ELLISON AND OFFICE OF THE ATTORNEY GENERAL

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INTRODUCTION

In reviewing a straightforward case about the sufficiency of the Attorney General's response to a data request, the Court of Appeals misinterpreted the plain language of the Data Practices Act, unnecessarily restricted the attorney-client privilege for public attorneys, and refused to recognize the common-interest doctrine relied upon by Minnesota attorneys and their clients, both private and public. This Court should reverse.

RESPONSIVE STATEMENT OF FACTS

Respondent devotes substantial space in its brief to various arguments concerning the power of the Office of the Minnesota Attorney General ("OAG") to appoint fellows affiliated with New York University ("NYU") as special assistant attorneys general, as well as various theories on allegedly clandestine coordination among state attorneys general on climate-related litigation. (Resp. Br. at 3-7, 10, 12-13.) Respondent implies that the OAG is withholding vast troves of documents concerning issues such as the appointment of the NYU fellows in question. (*Id.*) None of this is relevant to the present appeal in *this* Court, which concerns pure issues of law. But the record also shows Respondent's theories are misplaced, and that there was little or no data of the sort the Respondent seeks at the time of the requests at issue in this case. In later requests, Respondent received all requested documentation regarding the NYU fellows.

The timing of Respondent's request explains why there is little material responsive to its data requests, and virtually no material of any relevance to the issues that animated the requests. For example, Respondent sought information about the OAG's appointment of two fellows affiliated with NYU as special assistant attorney generals. (Resp. Br. at 3-

4.) As Respondent concedes, however, the OAG did not apply to NYU for funding to appoint these special assistant attorneys general until March 15, 2019. (Resp. Br. 5.)[1] Respondent's data requests predate this application by months –Respondent made its first request on December 20, 2018 and the second on December 26, 2018. (Dkt. 23 ¶¶ 3-4). It is therefore unsurprising that these requests did not result in the production of data concerning the appointment of special assistant attorneys – because the appointments were months away – and instead produced by-catch data on items like the OAG's representation of the State in antitrust flat-screen TV litigation. (Dkt. 23 ¶ 16.)

The record also establishes that there were no responsive communications – produced or withheld – between the Deputy Attorney General named in Respondent's request (Karen Olson) and the private law firm of SherEdling, or DAGA, or @democraticags.org, or alama@naag.org (the primary targets of the Respondent's December 20 request). (Dkt. 23 ¶ 3.) Similarly, there were also no communications between Ms. Olson and anyone using any of the file sharing services of interest to Respondent (the target of Respondent's December 26 request). (*Id.* ¶ 4.)

The only documents the OAG located in response to the requests concerning climate change issues were e-mails from a Massachusetts assistant attorney general on policy matters and federal appointments. (Dkt. 23 ¶¶ 3, 15.) Moreover, all but one of the documents identified in response to the December 26 request are irrelevant to the

[1] The fellows in question eventually joined the OAG in July and September of 2019. Respondent later made data requests for information concerning the appointments. The OAG produced the appointments for the fellows, and the agreements between the OAG and NYU. Had these documents existed at the time of the data requests at issue here, they would have been produced.

Respondent's professed interest in NYU and climate litigation. Outside of a single e-mail on energy independence, the identified documents have nothing to do with climate change issues, or Michael Bloomberg, or NYU fellows, and instead involve the AGO's defense of non-climate litigation on subjects like mental health treatment requirements and Medicare fraud. (Dkt. 23 ¶¶ 15-16.) These documents were identified in response to Respondent's data request largely because they discuss discovery efforts made on data sharing services used by the targets of the OAG's investigations. (*Id.*) The one document the OAG identified in response to Respondent's December 26 request that does touch upon a climate issue was tendered to the district court for in camera inspection. (Dkt. 23 ¶ 14.)

In sum, Respondent's recitation of its various conspiracy theories is not supported by the documents, and is irrelevant to the issues before this Court, other than to illustrate the complete disconnect between those legal issues presented and the Respondent's initial rationale for its DPA request.

ARGUMENT

This Court is confronted with three issues fundamental to the ability of the OAG to effectively represent the State and its agencies in litigation. The Court of Appeals decision ("the Decision") will also have broad implications for the practice of law throughout Minnesota in all settings unless reversed – as evidenced by the constellation of *amici* advocating for this Court's reversal of the Decision on the common interest issue. In many ways the Respondent now retreats, offering *no* argument, for example, that this Court should not adopt the common interest document. Respondent instead invites the Court to

duck issues, or formulate special rules giving the OAG spectral versions of the privileges afforded to all other clients and attorneys.

Simply put, there is no ducking the issues presented by this appeal. The Decision is now the only precedential opinion on Section 13.65 of the Data Practices Act. The Decision is also a *precedential opinion* holding that *no* attorney and *no* client in the State can rely on the common-interest doctrine – and not because the Court of Appeals concluded the doctrine shouldn't be recognized, but rather because it concluded it lacked the authority to do so. If this Court does not reverse, the common-interest doctrine will not exist in Minnesota, contrary to the expectations of every sector of the Minnesota bar and every district court that has ever confronted the issue. This Court should reverse the Decision on the three issues raised by the OAG and remand the matter to the district court. The district court will then be well-positioned to consider whether the protections afforded by Section 13.65 and the attorney-client and work-product privileges apply based on the specific facts of this case.[2]

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

For the reasons set forth in the OAG's opening brief, the Decision misinterprets Section 13.65 and inserts a requirement, found nowhere in the section's language, that data be about an individual to be classified as private data on individuals. In Section A below,

[2] The Decision remanded to the district court to consider a privilege log and review the data *in camera*. The OAG has not appealed those aspects of the Decision. Thus, Respondent's focus on the previous privilege designations or lack of *in camera* review is misplaced. (Resp.'s Br. 1, 15, 19.)

the OAG addresses Respondent's arguments (or lack thereof) concerning the plain language of Section 13.65. In Section B, the OAG addresses the Respondent's arguments concerning how Section 13.65 must be read in conjunction with other sections of the Data Practices Act. In Section C, the OAG addresses Respondent's arguments that the purposes of the Data Practices Act would be thwarted if the Decision is reversed.

A. The Plain Language of Section 13.65 Provides That All Data in Certain Categories are Private Data on Individuals.

As set forth in the OAG's opening brief, the Decision ignores the plain language of Section 13.65, incorrectly inserting a requirement into the text of that section that data be *about* an individual to be classified as "private data on individuals." (App. Br. at 8-10.) Respondent follows suit, but fails to offer any argument that its interpretation flows from the plain language of Section 13.65. Like the Decision, Respondent instead skips ahead to an argument that Section 13.65 must be read together with other sections of the Data Practices Act, and that when read together with other provisions of the Act, a requirement that data be *about* an individual emerges.

This Court does not need to venture beyond the plain and unambiguous language of Section 13.65. Nothing in Section 13.65 requires data be determined to be about an individual to be classified as "private data on individuals." The legislature could have easily imposed such a requirement in Section 13.65 using any number of formulations. For example, it could have included the words "on individuals" when describing the data subject to Section 13.65's classification:

Actual Language Not Requiring Data be About an Individual	**Alternative Language Requiring Data be About an Individual**
SUBDIVISION 1. **Private data**. The following data created, collected and maintained by the Office of the Attorney General are private data on individuals:	SUBDIVISION 1. **Private data**. The following data <u>on individuals</u> created, collected and maintained by the Office of the Attorney General are private data on individuals: *or alternatively:* SUBDIVISION 1. **Private data**. The following data <u>on individuals</u> created, collected and maintained by the Office of the Attorney General are private ~~data on individuals~~:

This Court can and should infer from the statute's plain text that the legislature made an intentional decision to categorize all the information carefully described in (a)-(e) as private data on individuals, without any further limitation. Neither the Decision nor the Respondent offers any explanation for why the plain language of Section 13.65 is not, in and of itself, dispositive of this case. The arguments are instead that the OAG has a "myopic" focus on the language of Section 13.65, but there is nothing myopic about focusing on the plain language of the statutory section in question. Indeed, statutory interpretation must begin and end with the plain and unambiguous text of the statute. *State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020). But as set forth the OAG's opening brief (App. Br. at 10-14) and below, reading the Data Practices Act as a whole changes nothing. A holistic review instead reinforces the conclusion that data does not need to be about an individual to receive classification under Section 13.65 as private data on individuals.

B. Read as a Whole, the Data Practices Act Requires that Section 13.65 be Interpreted to Categorize *All* Data in Certain Categories as Private Data on Individuals Unless there is Specific Language to the Contrary.

As set forth in the OAG's opening brief, the appearance of limiting language in other sections of the Data Practices Act expressly restricting the data being classified as private data on individuals to "data on individuals" strongly suggests that in Section 13.65, where that restrictive language is missing, the omission is intentional and conveys that the private data does *not* need to be "data on individuals." (OAG Br. at 10-14.) Respondent argues to the contrary, citing other provisions of the Data Practices Act to argue that the classification for private data on individuals is only used where the data is inherently about individuals. (Resp. Br. 21-22.) But the very sections Respondent cites undermine its argument.

For example, Respondent focuses on two Data Practices Act sections dealing with health and genetic data, Sections 13.3805 and 13.386, respectively. But these sections show the same pattern the OAG highlighted with respect to welfare data (Section 13.46) – an express limitation of these sections to data on individuals that is absent from section 13.65. Health data is defined as "*data on individuals* created, collected, received" by the Department of Health. Minn. Stat. § 13.3805, subd. 1(a)(2) (emphasis added). Genetic data is defined as "information about an *identifiable individual*" derived from their genetic code. Minn. Stat. § 13.386, subd. 1(a) (emphasis added).

If Respondent were correct, and nothing can be "private data on individuals" unless it is determined to be about individuals, the express definitions in these sections of the Data Practices Act limiting their application to data on individuals would have been completely

unnecessary. The legislature could have simply relied on its use of the term "private data on individuals" and dispensed with the rest. Far from refuting the OAG's arguments on reading the Data Practices Act as a whole, these sections bolster the OAG's argument that the absence of similar language in Section 13.65 is intentional and significant. Respondent offers no argument for why this Court should adopt an interpretation of the Data Practices Act that renders all of these express limitations redundant and unnecessary. *See 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.").

Respondent also argues that in constructing Section 13.65 the legislature could have used an alternative formulation that expressly called out data on individuals and data not on individuals, classifying the former as "private data on individuals" and data on the latter as "nonpublic data." (Resp.'s Br. 19-20.) From this, Respondent argues that its interpretation of Section 13.65 should be adopted to avoid the alleged redundancy of the legislature having two ways to accomplish the same goal. (*Id*.) The problem with this argument is that the same result would *not* be achieved.

In particular, classifying data not on individuals as "nonpublic" data would require a result different than what Section 13.65 actually provides. "Nonpublic" data is available to the subject entity. By classifying all data, whether about an individual or not an individual, as "private data on individuals, a different result is achieved. The data on individuals is available to the individual, but data not on individuals is not. (*See also* OAG Br. at 13.) Put another way – through the structure in Section 13.65, the legislature required

disclosure of the covered data only if the data is about individuals, and only to individuals who are the subject of the data.

Respondent also relies on *KSTP-TV v. Ramsey County* to argue that all data must be about individuals to be classified as private data on individuals. (Resp. Br. at 15.) Respondent reads too much into *KSTP*. There, the Court noted that the structure of the Data Practices Act generally divides data depending upon whether it concerns individuals or doesn't concern individuals. 806 N.W.2d 785, 789 (Minn. 2011). The observation, however, was ultimately not relevant to the Court's decision for at least two reasons. First, the Data Practices Act section in question (concerning protection for ballot data) specifically called out for separate treatment for data on individuals and data not on individuals. *Id.* at 788 *citing* Minn. Stat. § 13.37, subd. 2. The Court was not confronted with the issue of whether the Data Practices Act would have required this distinction in the absence of the language in the specific section at issue. Second, because both types of data at issue in *KSTP* received identical protections (accessible to the subject person or entity but no one else), the distinction was irrelevant to the case. *Id.* at 790. Simply put, the *KSTP* Court was not confronted with the issue here – a Data Practices Act provision that on its face classifies all data as private data on individuals with no limitations. *Id.* For this reason, *KSTP* is not controlling here. Nothing in the Data Practices Act requires that all inquiries under the act start with a determination of whether the data is about individuals or not about individuals and *KSTP* should not be read to graft that requirement onto the statute.

Section 13.65's classification of all data as private data on individuals is therefore not only consistent with the Data Practices Act as a whole, but required to harmonize provisions of the Data Practices Act.

C. Section 13.65's Structure Reflects Sound Reasoning.

As set forth in the OAG's opening brief, there are sound reasons for the legislature's construction of Section 13.65. (OAG Br. at 14-15.) The legislature struck a balance between giving individuals access to data about them, while preserving the ability of the OAG to handle certain non-public administrative, policy, and investigative matters in confidence. Respondent offers three arguments in response (Resp. Br. 23-24), none of which are persuasive.

First, Respondent contends that the OAG's interpretation of Section 13.65 would allow natural persons to obtain data about themselves, but not entities like the Respondent. This is correct, and a complete non sequitur. The Data Practices Act's very purpose is to make distinctions in who can access what data, and it frequently gives differing access to different classes of requestors. Simply put, there is nothing unusual or suspicious about the legislature giving natural persons greater access to data about themselves than is afforded to non-natural entities.

Second, Respondent offers the straw-man argument that the OAG's position would leave it the sole arbiter of whether the data in question is available to a requestor. That ignores Section 13.08 of the Data Practices Act – the very provision under which Respondent brought this suit – which allows a party to challenge the OAG's determinations on data classifications.

Third, Respondent argues that burdensomeness is not a reason to interpret Section 13.65 in a particular manner. Again, this is correct, but a non sequitur. The OAG does not argue that this Court should relieve it from the burdens of Section 13.65 that would result if its interpretation is not accepted. What the OAG has argued is that the legislature's construction of Section 13.65 is logical because it affords an expedient way to determine whether action is necessary on a data request where any existing data would not be available to the requestor in question. If the request is coming from an entity, not an individual, or if the individual is not the subject of the data, no further inquiry is required.

II. RESPONDENT OFFERS NO RATIONALE TO DISCARD THE COMMON-INTEREST DOCTRINE OR EXCLUDE ITS APPLICATION FOR GOVERNMENT ATTORNEYS.

Rather than opposing the merits of the common-interest doctrine, Respondent argued that lower courts lacked authority to consider it. Now that the question over the doctrine's existence in Minnesota is before this Court (which unquestionably has the power to recognize it), Respondent offers no argument to reject it. Also, Respondent's attempt to apply a less protective version of attorney-client privilege and work-product protection for public attorneys is defied by Section 13.393 and this Court's precedent. The Court should reverse the Decision and allow the district court to consider the common-interest doctrine when it reviews the subject documents on remand.

A. Respondent Has Not and Does Not Contest the Universally Accepted Law Supporting the Common-Interest Doctrine.

The OAG's opening brief and several *amici* have now fully articulated the legal and policy imperatives supporting the doctrine, including:

- the need for commonly aligned parties to plan and coordinate to receive better representation, improve compliance, and avoid legal disputes;

- efficiency in ongoing and anticipated multi-party litigation;
- candor between parties facing common adversaries or legal threats;
- consistency and comity among jurisdictions in which Minnesota litigants operate; and
- the prevention of forum shopping.

In response, Respondent does not contest that the doctrine has been universally accepted by American jurisdictions that have considered it. In fact, Respondent concedes that this Court held in *Schmitt v. Emery* that parties may "combine[] their efforts" in "preparing" for litigation[3] and describes a "survey of case law" applying the doctrine as formulated in the *Restatement (Third) of the Law Governing Lawyers*. (Resp.'s Br. 27-29.)

Respondent's suggestion that the doctrine is unconstrained and unformulated is wrong. In fact, federal caselaw and authorities like the *Restatement* have developed a body of law that provides persuasive authority for answering future questions that may arise under the doctrine. For example, most federal courts hold that the doctrine is not limited to parties facing actual or imminent litigation, and Minnesota should follow this majority approach. *See, e.g.*, *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 n. 6 (7th Cir. 2007) (gathering cases). Most courts also confine the doctrine for attorney-client privilege

[3] Respondent's attempt to downplay *Schmitt* by asserting that it is about the "joint defense privilege" is ineffective. While courts have used varying terminology for waiver exceptions based on coordinated legal strategy, the "joint defense" or "joint client" doctrine is often invoked when one attorney represents multiple parties. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000). The parties in *Schmitt*, on the other hand, were represented by and exchanged information between different counsel. 2 N.W.2d 413, 417 (Minn. 1942). In any event, the doctrines are concomitant: the common-interest doctrine avoids punishing parties for choosing (or needing) to retain their own counsel by allowing coordination among different attorneys with clients facing common interests. *See* RESTATEMENT, *supra* § 76 cmt. b.

to parties sharing a "legal" interest. *Id*. But the *Restatement* instructs that such interests need not be "entirely congruent." RESTATEMENT, *supra*, § 76 cmt. e; *see also, e.g.*, *O'Boyle v. Borough of Longport*, 94 A.3d 299, 315 (N.J. 2014) (rejecting requirement that interests be "completely congruent or identical"). Work product, meanwhile, can be exchanged with those sharing broader interests, so long as the information is not likely disclosed to an adversary. RESTATEMENT, *supra*, § 91(4). Other basic elements developed by American courts for applying the common-interest doctrine are set forth in sections 76 (as to attorney-client privilege) and 91 (as to work product) of the *Restatement*.

B. Section 13.393 Provides that Public Attorneys Have the Same Privilege and Work-Product Protection for Legal Documents as Other Attorneys.

Respondent asks for a novel exception to the common-interest doctrine for public lawyers. (Resp.'s Br. 37-43.) The Court should follow its precedent and the Data Practices Act's plain text in rejecting this argument.

1. Respondent's Request for a Double Standard for Private and Public Attorneys Directly Contradicts Section 13.393.

There is no statutory support for the proposition that privileged and work-product data of public attorneys exchanged under the common-interest doctrine are not entitled to the same protection as that exchanged by private attorneys. Quite the opposite, Section 13.393 states that "the use, collection, storage, and dissemination of data" by attorneys "acting in a professional capacity for a government entity" are protected under the

"statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility."[4]

As the Court of Appeals stated in *Kobluk v. University of Minnesota*, Section 13.393 "incorporates existing law" for judicial privileges and protections and "does not expand or narrow" such protections as applied to the Data Practices Act. 556 N.W.2d 573, 576 (Minn. Ct. App. 1996).[5] This Court too confirmed in that case that privileges afforded under court-developed standards applied to a public lawyer's claim of privilege under the Data Practices Act. 574 N.W.2d 436, 440-41 (Minn. 1998) (reversing to the extent the lower court rejected privilege claims). Since then, courts and Department of Administration opinions have many times applied this section, and Respondent does not cite to any case applying a different or more exacting standard to a public lawyer's claim of attorney-client privilege or work-product protection. Because Respondent's argument defies the Data Practices Act's plain language and decades of precedent, this Court should reject it.

The novel argument asserted by *amicus* in support of Respondent that the common-interest doctrine is not available for government attorneys because it is not explicitly named in statutes or rules misunderstands the doctrine, which is itself an application of privilege and work-protection protection (and associated waiver principles) that are clearly reflected in Minnesota statutes and rules. The doctrine is not "a separate privilege" that would be

[4] The federal Freedom of Information Act contains an analogous exemption (Exemption 5) that "incorporates the privileges available to Government Agencies in civil litigation [such as] attorney-client privilege, and attorney work-product doctrine." *U.S. Fish & Wildlife Serv. v. Sierra Club*, 141 S. Ct. 777, 785 (2021); *see* 5 U.S.C. §552(b)(5).

[5] *Kobluk* discusses Minn. Stat. § 13.30 (1994), which was later recodified as Section 13.393.

independently codified. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). Disregarding judicial "standards" developed under recognized privileges would also contradict section 13.393's text and lead to absurd results—for example, the Data Practices Act would only incorporate Section 595.02, subdivision 1(b), and none of the documents sought from the OAG could be withheld on privilege grounds because they are documents, not testimony on "examination." This would be an absurd outcome at odds with this Court's analysis of the Data Practices Act in *Kobluk*. 574 N.W.2d at 440 (applying privilege as applied under common law, which is broader than under section 595.02).

2. Section 13.393 Reflects the Need for Effective Legal Representation for Public Entities Balanced Among Other Policies.

Lacking statutory or case support, Respondent advocates an absolutist desire for open records as a basis to prevent public attorneys from exchanging legal information under the common-interest doctrine. (Resp.'s Br. 37-43.) But the Data Practices Act is not absolute. Instead, it reflects a balancing of goals between public access to government records and an "equally important public policy" of confidentiality in "certain situations" limited and defined by the statute itself. *Annandale Advoc. v. City of Annandale*, 435 N.W.2d 24, 32 (Minn. 1989). Such interests include the need to "protect personal information" and preserve "effective government operation." *KSTP-TV v. Ramsey Cty.*, 806 N.W.2d 785, 788–89 (Minn. 2011) (quotation omitted).

Section 13.393 serves the policies underlying the judicial privileges and protections that it incorporates, including allowing public clients "to confide openly and fully in [their] attorney without fear that the communications will be divulged" and enabling public lawyers "to act more effectively on behalf of [their] client[s]." *Kobluk*, 574 N.W.2d at 440;

see also Missouri Coal. for Env't Found. v. Army Corps of Engineers, 542 F.3d 1204, 1208–09 (8th Cir. 2008) ("The goal of [Exemption 5] is clear and straightforward: to allow full and frank discussion while preserving the goal of an open government."). Section 13.393 ensures that attorneys and their public clients receive the benefit of those protections and can act on "a level playing field" with private lawyers. *See Hunton & Williams v. U.S. DOJ*, 590 F.3d 272, 277 (4th Cir. 2010) (stating that Exemption 5 ensures that FOIA is not used to "impair an agency's ability to prepare effectively for litigation [] and thereby thwart its ability to discharge its functions in the public interest").

Section 13.393, by its language deferring to judicial standards, also preserves comity among branches of state government and avoids creating conflict between the Data Practices Act and courts in their "regulat[ion]" of proceedings, judicial privileges, and the conduct of legal practitioners. *See In re Zbiegien*, 433 N.W.2d 871, 874 (Minn. 1988) (describing powers of judicial branch). Respondent's argument to disregard judicially recognized privileges and protections for government attorneys thus directly contradicts legislative prerogatives under the DPA.

3. Disregarding the Common-Interest Doctrine Under the DPA Will Prevent Coordination Rather than Increase Disclosure.

Respondent is also wrong in predicting that recognizing the common-interest doctrine will prevent future access to government communications. The doctrine only applies to content subject to underlying privilege or work-product protections—doctrines that exist to allow communications that "might not have been made absent the privilege." *City Pages v. State*, 655 N.W.2d 839, 844 (Minn. Ct. App. 2003). Likewise, if the common-

interest doctrine is rejected in Minnesota, public lawyers will be unable to share legal materials lest they reveal sensitive strategies or client confidences to adversaries.

The State would be ill-served by such a result. For example, *amicus* state attorneys general have made clear that other states and regulators will freeze out Minnesota from multistate matters if the doctrine is rejected.[6] *Amicus* agencies similarly explain how Minnesotans will no longer have the benefit of coordinated responses to legal wrongdoing and public emergencies (such as youth smoking, the COVID-19 pandemic, environmental harms, and the opioids epidemic).[7] This will create real and serious gaps and inefficiencies that will inhibit the OAG's mission to enforce laws and legally advocate for the State, and may result in harm to other agencies or private parties where legal practitioners in Minnesota can no longer collaborate in anticipation of joint legal challenges.

4. There is No Precedent or Logic for Grafting Standards for Closing Public Meetings onto Section 13.393.

The Court should reject Respondent's suggestion to apply standards from the Open Meeting Law to Data Practices Act requests. (Resp.'s Br. 38-40.) The Open Meeting Law is a separate statutory scheme that serves a unique purpose (among others) to encourage public participation in the governing process. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). While the Open Meeting Law originally did not allow bodies to close sessions for attorney consultation, this Court recognized an exception that balanced "the purposes served by the attorney-client privilege against those served by the Open Meeting

[6] Brief of Amici District of Columbia & 38 States, A20-1344, at 12-17 (filed Sep. 15, 2021).

[7] Brief of Amici Gov. Tim Walz & 23 Cabinet Agencies, A20-1344, at 5-12 (filed Sep. 16, 2021).

Law dictates the need for absolute confidentiality." *Id*. at 737. The privilege exception was eventually codified and courts continue to apply the balancing test to review the need for closed sessions. *Id.* at 736-38; *see* Minn. Stat. § 13D.05, subd. 3(b).

This test used for assessing the need for closed meetings under the Open Meetings Law has never been applied to data requests or challenges under section 13.393. Again, when this Court in *Kobluk* analyzed a privilege claim under what is now section 13.393, it did not impose a different test for government lawyers or in any way reference or allude to standards under the Open Meeting Law. 574 N.W.2d at 440. Nor is there any need to do so given section 13.393's incorporation of judicial standards that already limit the scope of attorney-client privilege and work-product protection. That section applies only to data used and maintained by attorneys in their "professional capacity for a government entity." An attorney's data that is not entitled to privilege or work-product protection (or is subject to waiver) would not be protected under this section.

The Data Practices Act also already provides a procedural vehicle to challenge privilege claims made by the government, including Section 13.072 petitions before the Department of Administration and Section 13.08 proceedings before district courts. Cases like *Kobluk*, *City Pages*, and numerous public administrative opinions demonstrate the avenues available to challenge privilege claims and ensure that Section 13.393 is not abused. Indeed, in this very case, the district court will on remand have a full opportunity to review the OAG's claims to privilege and work product and conduct an *in camera* review. In sum, Respondent offers no statutory or legal basis, need, or workable model

supporting a second-tier standard for privilege or work-product claims for data used or maintained by public lawyers.

5. Respondent Does Not Contest the Common-Interest Doctrine's Applicability to Work Product Under Caselaw and Section 91 of the *Restatement*.

Respondent's brief incorrectly states that "work product protections . . . are not even mentioned in the *Restatement*'s formulation of the common-interest doctrine." (Resp.'s Br. 27-28.) In fact, while section 76 provides an analysis of waiver and common-interest doctrine as to attorney-client privilege, section 91 separately addresses the doctrine as to work product:

> Work-product protection is waived by disclosure to third parties if it occurs in circumstances in which there is a significant likelihood that an adversary in litigation will obtain the materials. . . . However, the privacy requirement for work-product material is in some situations less exacting than the corresponding requirement for the attorney-client privilege. **Effective trial preparation often entails disclosing work product to coparties and nonparties. Work product, including opinion work product, may generally be disclosed . . . persons similarly aligned on a matter of common interest (compare § 76).**

RESTATEMENT, *supra*, § 91, cmt. b (emphasis added). Respondent does not contest that section 91 should apply to the OAG's claims of work-product protection, nor does it otherwise counter that information protected as work product can be exchanged when other elements of the common-interest doctrine are met. (Resp.'s Br. 26-27.)

6. Respondent's Remaining Factual Arguments about Underlying Privilege and Work Product Questions Will be Addressed on Remand.

Respondent's detailed discussion of the underlying elements for work-product doctrine (as well as attorney-client privilege) on pages 30-31 of its brief is unnecessary:

the Court of Appeals has already remanded to the district court for additional review including production of a privilege log, *in camera* inspection, and determinations of privilege or work-product protections. Other than the question of whether the district court can consider the common-interest doctrine in evaluating an alleged waiver, there are no concrete disputes for this Court to resolve related to the scope of attorney-client privilege or work-product doctrine.[8] Respondent's factual arguments about work-product elements and third parties not subject to a common interest (however divorced from the reality of the actual communications at issue) can be raised to the district court on remand.

III. THE ATTORNEY-CLIENT PRIVILEGE SHOULD PROTECT COMMUNICATIONS WITHIN A PUBLIC LAW OFFICE IF MADE FOR THE PURPOSE OF SEEKING AND RECEIVING LEGAL ADVICE.

Notwithstanding the fact that the district court did not decide whether the attorney-client privilege attaches to internal communications between attorneys in a public law agency, the Decision announced a requirement that a communication must include an outside client for the privilege to attach. (Add. 023-024.) This holding is a needlessly mechanical application that incorrectly restricts the privilege. In its responsive brief, Respondent does not point to any contradictory authority to the cases applying the attorney-

[8] Respondent's discussion of work-product elements, while unneeded, is mostly uncontroversial. (Resp.'s Br. 30-31.) Respondent, however, wrongly suggests that work-product protection is always a "conditional" protection that can be overcome by a showing of substantial need. In fact, so-called "opinion" work product (i.e., "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation") is never discoverable. Minn. R. Civ. P. 26.02(d); *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947) (distinguishing ordinary from opinion work product); RESTATEMENT, *supra*, §§ 87-89 (same). Respondent also suggests an overly restrictive definition that only applies to materials created for actual litigation. In fact, materials are protected when they "can fairly be said to have been prepared or obtained because of the prospect of litigation." *City Pages*, 655 N.W.2d 846.

client privilege to internal public law office communications seeking and giving legal advice. (*See* App. Brief 25.) Instead, it misrepresents and exaggerates the OAG's position as broadly seeking to shield *all* internal OAG communications from disclosure. (Resp. Br. 48.) That is not what the OAG asks this Court to do.

The OAG asks this Court to clarify, for purposes of remand, that the attorney-client privilege *may* attach to shield internal communications between attorneys within a public law office, if those communications embody the seeking and giving of legal advice. This clarification does not extend the attorney-privilege beyond the protections afforded to private attorneys. Such guidance is wholly consistent with this Court's statement that courts should consider "the nature and form of the document and the circumstances of the exchange" to determine whether a "contested document embodies a communication in which legal advice is sought or rendered." *Kobluk.*, 574 N.W.2d at 444. If, for example, an Assistant Attorney General is asked to provide legal advice to the Minnesota Attorney General, the Attorney General is the client. *See RFF Fam. P'ship, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 708 (2018) (similar to when a corporation employs an attorney to serve as its in-house counsel, when a governmental entity employs an attorney to serve as its in-house legal counsel, the entity is the client). In this context, a document embodying the seeking and giving of such advice to the Minnesota Attorney General should be afforded the same protection that attaches to a document reflecting advice sought and given by a private attorney to their client. This evenhanded application of the privilege will ensure that a public law agency client may engage in full and frank communication when seeking and receiving legal advice, consistent with the policy underlying the privilege.

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. The Court should also hold that the plain language of Section 13.65 does not reflect Legislative intent that the protections for Attorney General Data apply exclusively to data that pertains to individuals.

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 132.01

The undersigned certifies that the above reply brief contains 6,124 words (exclusive of the caption, tables, signature block, addendum and certificate) and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This brief was prepared using a proportional spaced font size of 13 point. The word count is stated in reliance on Microsoft Word for 365, the word processing system used to prepare this brief.

/s/ Liz Kramer
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