Minnesota Sees Mixed Results on Access and First Amendment Issues Related to Law Enforcement, Government Information, and Protests

In the final months of 2022, Minnesota courts reached different results in cases with notable implications for press freedom and access to government information. In September, the Minnesota Supreme Court expanded the scope of privilege for government legal documents in a move that may make it more difficult to access this information. In October, Robbinsdale reached a settlement with a woman who brought a federal civil rights lawsuit after she alleged that Robbinsdale police officers violated her First Amendment rights by issuing criminal charges after she filmed a police interaction. In November, the City of Minneapolis reached a settlement with protestors injured in 2020 during demonstrations following the murder of George Floyd.

MN Supreme Court Expands Privileges for Government Legal Documents

On Sept. 28, 2022, the Minnesota Supreme Court issued its decision in *Energy Policy Advocates v. Keith Ellison*. No. A20-1344, 2022 WL 4488489 (Minn. 2022). In the opinion, the Court held that the state of Minnesota recognizes the common-interest doctrine, that the attorney client-privilege can apply to internal communications among attorneys in public law agencies, and that, "as classified by the Legislature, 'data created, collected and maintained by the Office of the Attorney General' under Minnesota Statutes section 13.65, subdivision 1 (2020), 'are private data on individuals,' even if the data do not pertain to natural persons." Advocates of government transparency have raised concerns that the decision could make it more difficult to access government records.

According to the Supreme Court opinion, the case arose after Energy Policy Advocates (EPA), an environmental nonprofit organization, submitted requests for documents to the Minnesota Office of the Attorney General. Specifically, it sought information about the Attorney General's involvement in multistate climate change litigation, including potential communications with the Democratic Attorneys General Association and other state attorneys general. When the Attorney General's office responded that the request "yielded no responsive, nonprivileged public data," the group "brought a civil action against

Keith Ellison in his official capacity as Attorney General" and the Office of the Attorney General, collectively seeking the documents under the Minnesota Government Data Practices Act (DPA). The district court denied EPA's motion to compel and dismissed the complaint in October 2020. *Energy Policy Advocates v. Ellison*, No. 62-CV-19-5899 (Ramsey Cnty. Ct., Oct. 1, 2020). On June 1, 2021, the Minnesota Court of Appeals affirmed in part, reversed in part, and remanded the case. *Energy Policy Advocates v. Ellison*, A20-1344 (Minn. Ct. App. June 1, 2021).

Minnesota Court of Appeals Judge Matthew Johnson delivered the June 1, 2021 opinion. According to Johnson, in December 2018, EPA requested all correspondence during a six-month period to or from a specific person within the Office of the Attorney General that contained any of eleven search terms relevant to the multistate climate change litigation. In January 2019, an assistant attorney general sent a letter to EPA claiming that the Office of the Attorney General had no responsive documents that were classified as public and therefore the Office would provide no information in response to the request. The Attorney General asserted attorney-client privilege for documents "internal to the Office." The Office of the Attorney General also argued that the documents were protected as "private data on individuals" under the Minnesota Data Practices Act. The statute provides in relevant part:

"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." Minn. Stat. §13.65, subd. 1 (b) (2022).

EPA argued that this exception was only relevant when the data at issue was actually "data on individuals," but the Attorney General argued that Minn. Stat. §13.65, subd. 1(b) applied to "communications and noninvestigative files" regardless of whether the data was on individuals. The Court of Appeals agreed with EPA on this interpretation, holding that there was "no reasonable interpretation of the phrase 'private data on individuals' that could broaden the phrase 'data on individuals' so that it encompasses data in which no individual is the subject of the data."

At the Court of Appeals, EPA and the Attorney General also disagreed on the applicability of the attorney-client privilege and the common-interest doctrine. EPA argued that internal documents created by and shared between attorneys in the Office of the Attorney General did not qualify for protection under the attorney-client privilege because they were not shared with a client.

The Court of Appeals found that the Attorney General did not provide sufficient justification that the documents at issue were protected by this doctrine.

The Attorney General argued that sharing internal documents with the attorneys general of other states did not defeat attorney-client privilege because "the extension of privilege to communication between attorneys general who are sharing litigation work-product in matters where their state clients share a common interest makes sense." EPA contended that Minnesota did not recognize the common-interest doctrine and that by sharing documents with third parties, the Attorney General had waived its right to claim attorney-client privilege.

The Court of Appeals refused to "recognize the common-interest doctrine for the first time." Even if Minnesota did recognize the common-interest doctrine, Johnson wrote that the doctrine "excuses the disclosure of an otherwise privileged communication between an attorney and a client" which requires the existence of an attorney-client relationship. Because the internal documents were not shared with a client, the Court of Appeals held that they would not be subject to attorney-client privilege and therefore the common-interest doctrine would be inapplicable even if it was recognized in Minnesota.

On June 23, 2021, Ellison petitioned the Minnesota Supreme Court for further review of the case.

In an opinion authored by Minnesota Supreme Court Associate Justice Margaret Chutich, the Court reversed the rulings of the Court of Appeals. First, the Supreme Court expressly held that Minnesota recognizes the common-interest doctrine, which "prevents privilege waiver in certain situations." Typically, parties "waive the protection of the attorney-client privilege and the work-product doctrine when they disclose protected information to third parties," but the common-interest doctrine "permits parties with the same legal interests to share documents without losing the protection of the attorney-client privilege or work-product doctrine."

The Court elaborated further: "[I]n Minnesota, the common-interest doctrine applies when (1) two or more parties (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy." In "formally" acknowledging the common-interest doctrine, the Court noted that "numerous other states" and "nearly every federal circuit court of appeals" recognized the doctrine.

Next, the Court analyzed the applicability of the attorney-client privilege to public law offices. The privilege "indisputably extends to public law offices" and that the "Data Practices Act does not erode the protection of the attorney-client privilege as applied to government law offices." Though attorney-client privilege is generally limited to "communications between an attorney and an identifiable client," the Court rejected "the categorical rule that the attorney-client privilege may *never* apply to internal communications" in the Office of the Attorney General when there is no identifiable client. Practically, the "duties of the office mean that the Attorney General often conducts litigation in which no discrete 'client' is readily ascertainable," Chutich wrote. The Court declined to "delineate the precise circumstances" in which the attorney-client privilege apply to "inter-attorney communications lacking a client," and explained that applying the attorney-client privilege is a "fact-intensive inquiry."

Finally, the Court adopted an interpretation of Minnesota Statutes §13.65 subd. 1 (b) that aligned with the arguments made by the Attorney General. The Data Practices Act "defines '[p]rivate data on individuals' as 'data made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data." By "applying the plain language of the statute" that court "concluded that the Attorney General data are not public, and the district court correctly ruled that Energy Policy is not entitled to access the data under section 13.65, subdivision 1." The Legislature's inclusion of "categories of data that clearly do not have to be about individuals, such as 'administrative or policy matters' or 'investigative data,'' refutes EPA's argument that the exception for "private data on individuals" applies "*only* if the data actually are on individuals." According to the opinion, the Legislature did not explicitly state that private data on individuals only included data actually about individuals, and the Court "may 'not add words to a statute that the Legislature has not supplied."

In dissenting, Justice Paul C. Thissen disagreed with this characterization of the statute. "Put quite simply: I find it hard to understand how data can be 'private data on individuals' when it is not data on individuals. Why would the Legislature have used the word 'individuals' if it meant for section 13.65 to cover data that was not on individuals? Only a lawyer could take delight in pondering that question and reaching the result the court reaches today; other Minnesotans will be scratching their heads."

The opinion is available at: https://z.umn.edu/EnergyPolicyAdvocates.

The case will "prove to be highly problematic for transparency at all levels of government in Minnesota," the Minnesota Coalition on Government

Information (MNCOGI) said in a statement released Oct. 14, 2022. According to the statement, the Supreme Court "has struck at the very fundamental way that our Data Practices Act (DPA) is supposed to function." The "practical result" of the decision will mean that government officials and public attorneys will have "additional tools to deny access to data that should be public." Following the decision, "the Minnesota Coalition on Government Information will push to correct what the Supreme Court has done, and to educate lawmakers from both parties about the problems that the Attorney General's position will cause for government transparency in this state."

The MNCOGI statement is available at: https://mncogi.org/wp-content/uploads/2022/10/MNCOGI-statement-on-EPA-v-Ellison-data-case.pdf.

Robbinsdale Settles Federal Civil Rights Lawsuit for $70,000 After Alleged First Amendment Violations

On Oct. 4, 2022, the Minneapolis *Star Tribune* reported that the city of Robbinsdale paid $70,000 and agreed to implement policy reforms to settle a federal civil rights lawsuit brought by a woman charged with a misdemeanor for recording Robbinsdale police in 2018.

In August 2018, Amy Koopman was charged with obstructing the legal process after she recorded livestreamed video of Robbinsdale police pulling over two Black men, the *Star Tribune* reported. The police officers had their guns drawn, and Koopman filmed the interaction from nearly 40 yards away, according to the Minnesota ACLU. Koopman, who witnessed the scene while driving past, recorded the interaction "to ensure that the two Black motorists remained safe and that the police would be held accountable," the *Star Tribune* reported.

In June 2019, Hennepin County District Judge Susan Robiner ruled that Koopman should not be prosecuted for the misdemeanor, the *Star Tribune* reported on June 22, 2019. "This Court finds that it is not fair and reasonable to require [Koopman] to stand trial because she did not physically obstruct, resist, or interfere with a peace officer engaged in the performance of official duties," Robiner held.

In a written statement, ACLU-MN legal director Teresa Nelson celebrated the decision to drop the charges. "Charging Amy Koopman with a misdemeanor was an attempt to chill the First Amendment right to monitor, record and even verbally challenge policing in public spaces," Nelson said. "We hope officers

across the state will take heed of this ruling and respect people's right to observe and record police activity."

On Aug. 17, 2021, Koopman and ACLU-MN filed a federal civil rights lawsuit in the U.S. District Court for the District of Minnesota against the City of Robbinsdale and the three officers involved in the stop. "Video recording police officers in the course of their official duties is a protected activity under the First Amendment to the United States Constitution. Engaging with, and even criticizing, police officers in the court of their official duties is a protected activity under the First Amendment to the United States Constitution," the complaint read. When Koopman recorded the police interaction, she "was engaging in constitutionally-protected activities." Charging her with a misdemeanor for exercising that right "is enough to chill a person of ordinary firmness from engaging in a constitutionally-protected activity." The complaint argued that this charge was "prompted by retaliatory animus" and provided that "the right to be free from retaliation for speech-related activity protected by the First Amendment is clearly established under the Constitution." The complaint is available at: https://ecf.mnd.uscourts.gov/doc1/10118949704.

As part of the settlement, the Robbinsdale Police Department must "adopt policies that codify bystanders' rights to record police conduct while barring officers from taking adverse actions against bystanders who do so or who verbally object to that conduct," the *Star Tribune* reported Oct. 4, 2022. The settlement also mandates the department to "have a policy subjecting officers to discipline, including firing, if they violate the law or fail to follow department policies" and officers "must also attend training on the First and Fourth Amendments and state law on obstruction," according to the *Star Tribune*.

"In an era marked by the police killings of George Floyd, Daunte Wright and so many others, the ability to hold police accountable, record their interactions, and stand witness is more crucial than ever," ALCU-MN staff attorney David McKinney said in a statement.

"I hope police get the message that they cannot punish people for exercising their First Amendment rights," Koopman said in a statement released by the ACLU-MN.

Robbinsdale city manager Tim Sandvik told WCCO on Oct. 4, 2022 that the settlement ended "the possibility of additional, prolonged litigation and was reached in the best interest of the parties involved." He added that the Robbinsdale Police Department's policy manual was being revised, and that training was scheduled for all officers.

City of Minneapolis, Protestors Reach $600,000 Settlement

On Nov. 30, 2022, the ACLU-MN announced a settlement in a lawsuit brought by twelve protestors injured during demonstrations following the murder of George Floyd. The settlement involves a $600,000 payout to the protestors and several reforms.

The case was filed in August 2020 in the U.S. District Court for the District of Minnesota and later consolidated with another case brought by protestors against the City of Minneapolis and Minneapolis police. *Samaha v. City of Minneapolis*, No. 20-cv-01715-KMM-DTS. According to the amended complaint, the lawsuit aimed to "declare as unlawful, and put an end to, the systematic use of excessive force by the Minneapolis Police Department ("MPD") against peaceful protestors and against the citizens of Minneapolis" and to "compensate Plaintiffs for the unreasonable violation of their constitutional rights." According to the complaint, the First Amendment rights of the plaintiffs to free speech and peaceful assembly were "chilled" by Minneapolis police officers' use of "crowd-control devices" including pepper spray, mace, tear gas, and rubber bullets. The complaint is available at: https://ecf.mnd.uscourts.gov/doc1/10119373807.

(For more information on First Amendment issues related to demonstrations following the death of George Floyd, see "Court Order, Settlement Prohibit Minnesota State Patrol from Arresting and Attacking Journalists, Require Improved Training, Technology" in the Spring 2022 issue of the Silha *Bulletin*, "Members of the Press Detained and Targeted with Use of Force by Police, Despite Court Order" in the Winter/Spring 2021 issue, *Federal Court Grants Preliminary Injunction in Case Stemming from Police Targeting Members of the Press; Minnesota State Patrol Purges Texts/Emails After Summer 2020 Protests* in "Lawsuits, Court Rulings, and Other Developments in Minnesota Raise Important Media Law Questions and Problems" in the Fall 2021 issue, "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue, and "Ongoing Protests and Confrontations Between the Press and Policy Prompt Legal Action, Ethical Debates, and Media Advocacy" in the Fall 2020 issue.)

Under the terms of the settlement, the City of Minneapolis is prohibited from arresting, threatening to arrest, or using physical force (including devices like chemical agents and foam-tipped bullets) against "persons engaging in lawful protests, lawful public assemblies, or lawful demonstrations who are not

posing an immediate threat to the safety of others, officers, or the public safety." The settlement also bars officers from using chemical agents to disperse a protest, assembly, or demonstration when there is no threat to the public safety unless the demonstration is unlawful and the officer first gives a verbal dispersal order. All officers deployed to protests must also have their body worn cameras recording. The district court "shall oversee compliance" with the settlement and "take appropriate action in the event it is violated." The stipulation for injunction is available at: https://www.aclu-mn.org/sites/default/files/field_documents/2022_11_09_dkt_138_sealed_stip_for_injunction_0.pdf.

According to the *Star Tribune*, the Minneapolis City Council approved the settlement on Oct. 20, 2022 and Minneapolis Mayor Jacob Frey approved it six days later. The settlement was not final until it was approved by a federal judge on Nov. 30, 2022.

Gustafson Gluek partner Josh Rissman, whose firm contributed legal services to the case, said in a statement posted on Fish & Richardson's website on Nov. 30, 2022 that the settlement provided "historic relief." "The City of Minneapolis has agreed to an injunction enforceable in federal court," Rissman said. "Anytime the Minneapolis Police Department unlawfully uses rubber bullets, mace, or tear gas against peaceful protestors, we can immediately seek to enforce the injunction. In the past, any misconduct required years of litigation to reach a resolution. While we appreciate there is desire to reform the Minneapolis Police Department, this settlement provides a crucial accountability mechanism with respect to peaceful protests."

ALCU-MN legal director Teresa Nelson emphasized the constitutional significance of the case. "People who are demonstrating peacefully should never be met with police violence as they were in Minneapolis during protests over MPD's murder of George Floyd," Nelson said in a statement posted to the ACLU-MN website on Nov. 30, 2022. "Tear gas, foam bullets and pepper spray became weapons for intimidating and hurting protestors, making it dangerous for people to exercise their First Amendment rights. We hope this settlement sends a message to law enforcement across Minnesota that this violation of our constitutional rights will not be tolerated."

— Claire Colby
Silha *Bulletin* Editor