STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0736

Tony Webster,
Respondent,

vs.

Hennepin County, et al.,
Relators.

Filed April 10, 2017
Affirmed in part and reversed in part
Larkin, Judge

Office of Administrative Hearings
File No. OAH 5-0305-33135

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Teresa Nelson, American Civil Liberties Union of Minnesota, St. Paul, Minnesota; and

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Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Relators Hennepin County and the Hennepin County Sheriff's Office (sheriff's office) challenge an administrative-law judge's (ALJ) determination that relators violated the Minnesota Government Data Practices Act (MGDPA) by failing to (1) establish procedures to ensure appropriate and prompt compliance with data requests, (2) keep records containing government data in an arrangement to make them easily accessible for convenient use, and (3) provide access to requested public government data. We reverse the ALJ's rulings that relators' procedures and records arrangement violate the MGDPA, but affirm the ALJ's ruling that relators violated the MGDPA by failing to provide access to requested public government data.

FACTS

Respondent Tony Webster identifies himself as an investigative journalist who is researching how law-enforcement agencies use and deploy mobile biometric technologies, such as fingerprint scanners. On August 12, 2015, respondent made an extensive letter request to relators under the MGDPA for public data and information regarding biometric

data and mobile biometric technology. Although it is not clear that all 14 "requests" listed in respondent's letter were proper requests for data, the parties agree that relators nevertheless satisfied Requests 1-13 in November 2015. The focus of this appeal is Request 14, which originally sought:

> 14. Any and all data since January 1, 2013, including emails, which reference biometric data or mobile biometric technology. This includes, but is not necessarily limited to emails containing the following keywords, which I request the County conduct both manual individual searches and IT file and email store searches for:
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> a. biometric OR biometrics
> b. Rapid DNA
> c. facial recognition OR face recognition OR face scan OR face scanner
> d. iris scan OR iris scanner OR eye scan OR eye scanner
> e. tattoo recognition OR tattoo scan OR tattoo scanner
> f. DataWorks
> g. Morphotrust
> h. L1ID or L-1 Identity
> i. Cognitec
> j. FaceFirst

Relators objected to Request 14 as "unreasonable and too burdensome with which to comply," noting that Hennepin County has approximately 8,000 employees and a search of every mailbox would tie up Hennepin County's servers 24 hours per day for more than 15 months. On December 4, 2015, respondent wrote to relators, noting that he had retained counsel and asserting that "[a]n organization-wide email search is a routine task," but nevertheless narrowing the scope of Request 14. As restated, Request 14 seeks all e-mails (instead of all data) of all employees and contractors of the sheriff's office, crime lab, jail,

security department, as well as any other county employees providing services to those departments (instead of all employees) that contain the identified keywords.

Relators responded that, as restated, Request 14 was still unduly burdensome and fell outside the scope of a proper data-practices request, as it required a search for 20 words in approximately 1,000 employees' e-mail accounts for a two-and-one-half-year period. Relators noted that they were still analyzing the burden imposed by the request, but asked respondent to consider further narrowing his request. The same day, respondent filed an expedited data-practices complaint with the Minnesota Office of Administrative Hearings (OAH).

After a one-day hearing, an ALJ made detailed findings of fact, which are not challenged on appeal. In these findings of fact, the ALJ summarized relators' procedures for handling data requests and the steps relators took to respond to requests. As to respondent's request, the ALJ found that, "It is estimated that it will take approximately 18 hours to complete the search for responsive data," and ordered relators to provide respondent "with the opportunity to inspect the data he requested." The ALJ also ordered relators to overhaul their procedures and their records arrangement to comply with the MGDPA, but did not identify specific ways in which the current systems fail to meet statutory requirements.

In May 2016, relators filed this certiorari appeal and began making data responsive to Request 14 available on a rolling basis, producing 3,700 e-mails and their attachments.

On May 18, 2016, relators obtained a partial stay pending appeal, which this court affirmed over respondent's challenge.[1]

D E C I S I O N

A party aggrieved by a final decision on an MGDPA complaint filed in the OAH is entitled to judicial review as provided in Minn. Stat. §§ 14.63-.69 (2016). Minn. Stat. § 13.085, subd. 5(d) (2016). This court may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the administrative findings, inferences, conclusion, or decision are, in relevant part, affected by error of law or unsupported by substantial evidence. Minn. Stat. § 14.69. Interpretation of the MGDPA presents a question of law subject to de novo review. *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 345 (Minn. 2016).

I. The ALJ erred in determining that relators' procedures fail to comply with the MGDPA.

"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. Stat. § 13.03, subd. 2(a) (2016). Relators contend that the volume of data-practices requests received by Hennepin County easily exceeds 500 per month and complain that the ALJ's conclusion was premised entirely on relators' failure to provide requested public data promptly *in this case*.

[1] Respondent petitioned for further review of this court's decision regarding the stay, and the Minnesota Supreme Court granted review. The supreme court affirmed this court's decision on March 15, 2017. *Webster v. Hennepin Cty.*, ___ N.W.2d ___ (Minn. Mar. 15, 2017).

Relators do not dispute that their response in this case was untimely. But they argue that any violation in this case does not support a conclusion that their procedures for handling data-practice requests fail to comply with the MGDPA. Respondent counters that relators' failure in this case shows that relators' procedures are deficient.

As to the establishment of procedures, the ALJ found that relators had each appointed a responsible authority who has processes in place for coordinating responses to data-practices requests. Hennepin County's responsible authority has four direct reports, one of whom she meets with weekly to review the status of pending requests, and 29 data-practices contacts in different county departments. Most requests are handled directly by the departments. The ALJ did not identify any deficiencies with these procedures, and the record does not reveal obvious faults in relators' internal procedures for handling data-practices requests.

The ALJ's conclusion that relators' procedures fail to comply with Minn. Stat. § 13.03, subd. 2(a), is not supported by his findings or substantial evidence in the record. Although deficient procedures could cause a failure in a particular case, poor execution of a proper procedure is an equally plausible explanation for failure. The ALJ therefore erred in determining that relators have failed to establish procedures to insure that data requests are received and complied with in an appropriate and prompt manner as required by Minn. Stat. § 13.03, subd. 2(a).

II. The ALJ erred in determining that relators' records arrangement fails to comply with the MGDPA.

"The responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use." Minn. Stat. § 13.03, subd. 1 (2016). With respect to the arrangement of relators' records, specifically e-mail, the ALJ found:

> 23. Hennepin County has 13,163 e-mail accounts, of which approximately 8,000 are employee e-mail accounts. There are 208,936,308 e-mails, representing 23.56 terabytes of data in these accounts. Typically, the County receives approximately 6 million e-mails per month, 70 percent of which are spam. The County uses Microsoft Outlook 2010. The County's e-mail is on 19 state-of-the-art servers. The County's e-mail system was set up on the standard format and is indexed by sender, receiver, subject, date, and attachment by name. Microsoft Outlook 2010 does not index e-mails by words used in the body of the e-mail, unless specific words are specifically added as index terms. The County does not index e-mails by words within the body of e-mails, and does not know of other counties that do. The County does not maintain e-mail messages based on the classification of the correspondence and attachments as public or not public data.
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> 24. The County's e-mail files are maintained as PST files.
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> . . . .
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> 33. The County does have the ability to perform multi-mailbox searches. It is estimated that it will take approximately 18 hours to complete the search for responsive data.

The ALJ made additional findings about the way partial searches were performed in this case, explaining that relators began with a traditional forensic process and then transitioned to searches performed directly on the server.

The ALJ concluded that the MGDPA does not require relators to index or organize e-mails in any particular way. The ALJ then concluded that "[r]ecords in the County's possession, particularly e-mail correspondence and attachments containing government data are not kept in an arrangement and condition to make them easily accessible for convenient use." As with relators' procedures, the ALJ did not identify any specific ways in which the arrangement of relators' records fails to comply with statutory requirements.

The ALJ's determination that relators failed to comply with Minn. Stat. § 13.03, subd. 1, is not supported by his factual findings or substantial evidence in the record. The ALJ therefore erred in determining that relators failed to keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use, as required by Minn. Stat. § 13.03, subd. 1.

III. The ALJ properly determined that relators violated the MGDPA by failing to make requested public government data available for inspection.

"Upon request to a responsible authority or designee, a person shall be permitted to inspect and copy public government data at reasonable times and places." Minn. Stat. § 13.03, subd. 3(a) (2016). Relators argue that the ALJ erred in finding that they violated Minn. Stat. § 13.03, subd. 3(a), by refusing to perform respondent's specified keyword searches, because the request was improper. They also ask this court to read an "overly burdensome" exception into the MGDPA.

A. The MGDPA does not obligate government entities to perform specific searches.

Relators contend that a request for a search is not a proper request under the MGDPA. Respondent asserts that the ALJ did not order relators to perform any search, and that respondent never sought particular keyword searches as part of his requests.

Although it appears that this litigation was driven at least in part by respondent's insistence on particular keyword searches of all or many mailboxes, we agree with respondent that the ALJ did not order relators to perform any particular search. The distinction between requesting a particular search and requesting e-mails regarding certain topics or containing certain keywords is a fine one, but not insignificant. The MGDPA contemplates requests for "public government data." Minn. Stat. § 13.03, subd. 3(a). "Government data' means all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7 (2016). The MGDPA does not contemplate requests for particular searches or enable a requestor to dictate how a government entity gathers requested data.

Relators assert that it is a distinction without a difference to conclude that requests for particular searches are improper, yet to require relators to produce e-mails containing keywords. Relators contend that a data request for all e-mails containing the word "Mississippi," without any context, is the functional equivalent of a request for a search. They also express concern that Request 14 requires a search for irrelevant e-mails,

including for example, messages regarding biometric screening of personnel for health-insurance purposes.

Although we appreciate relators' concerns, they are beyond the scope of this appeal. Respondent's data request articulated his interest in "how law enforcement agencies use and deploy mobile biometric technologies," and asked for e-mails containing certain keywords related to the use of that technology. Reading respondent's request as a whole, e-mails about biometric screening for health-insurance purposes are beyond its scope, as they have no bearing on how law enforcement uses or deploys mobile biometric technology. Thus, relators are not required to craft a search that returns those e-mails.

Compliance with any data request requires a search. But under the MGDPA, the government entity, and not the requestor, determines how and where to search for the requested data. Here, the ALJ's order does not require relators to perform a computer-aided search of the mailboxes of every employee if they can locate requested data bearing on relators' use of mobile biometric technology without doing so.

B. Respondent did not request data in a different format.

Relators also argue that respondent's request is improper because it effectively requires relators to produce data in a format that it does not have—a limited database of e-mails containing the keywords listed. A government entity need not "provide the data in an electronic format or program that is different from the format or program in which the data are maintained by the government entity." Minn. Stat. § 13.03, subd. 3(e) (2016). But culling data from larger stores does not change the format of the data, it merely segregates

it for public access. The ALJ therefore correctly rejected relators' "different format" argument.

Relators also argue that technological developments since the adoption of the MGDPA allow the conclusion that a request for a substantial collection of electronically stored data is not a proper "request." But relators cite no authority in support of their argument that the meaning of "request" has changed as the nature of government data has evolved and expanded. That e-mail was not in widespread use 30 years ago does not mean that asking for e-mails is not a "request."

C. Minnesota Statutes section 13.03, subdivision 2(a), does not provide a basis for restricting access to public data.

Relators and amici League of Minnesota Cities and Association of Minnesota Counties ask this court to conclude that, because of the breadth of respondent's request, relators satisfied their responsive obligations under the MGDPA by requesting additional limitations. Relators and amici argue that rejecting an overly broad request is an "appropriate" response under Minn. Stat. § 13.03, subd. 2(a).

The plain language of section 13.03 does not support this argument. It provides, ["t]he responsible authority . . . 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." *Id.*, subd. 2(a). To the extent that subdivision 2(a) (addressing procedural requirements) informs the analysis of subdivision 3(a) (requiring provision of requested public government data), the former expressly holds that the procedures established must be "consistent with this chapter." *Id.* This language indicates that the

purpose of subdivision 2(a) is to effectuate the requirements of subdivision 3(a), not to limit its reach.

Courts must read and construe a statute as a whole and interpret each section in light of the surrounding sections to avoid conflicting interpretations. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Interpreted in light of subdivision 3(a), subdivision 2(a) requires the establishment of procedures to allow appropriate and prompt inspection and copying of public government data. The MGDPA does not prevent a government entity from working with a requestor to better understand or narrow the scope of a request. Narrowing or clarifying a request benefits a requestor by shortening the time reasonably required for the government entity to locate and review the data. But if the requestor ultimately refuses to narrow his search, as respondent did here, subdivision 2(a) does not provide a basis for a government entity to refuse access to public government data.

D. Creating an exception for burdensome requests is a policy decision.

Relators and their amici urge this court to read an "unduly burdensome" exception into the MGDPA. It is undisputed that the MGDPA does not contain an express exception for broad, complex, or otherwise burdensome requests.

"The purpose of the MGDPA is to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The Act also attempts to balance these competing rights within a context of effective government operation." *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011) (quotation omitted). Relators assert that complying with

overly burdensome requests is not required because compliance would impair effective government operation, but point to no statutory language in support of this argument.

Compliance with the MGDPA unquestionably takes time and resources, in part because, after data is located, review is required to ensure that only public data are provided to the requestor. *See* Minn. Stat. § 13.08 (2016) (providing for civil damages, costs, and attorney fees for violations of MGDPA and waiver of immunity by government entity); *see also Westrom v. Minn. Dep't of Labor*, 686 N.W.2d 27 (Minn. 2004) (affirming this court's reversal of summary judgment to department in action for civil damages under MGDPA based on release to news media of confidential or protected nonpublic civil investigative data); *Navarre v. S. Washington Cty. Sch.*, 652 N.W.2d 9, 30 (Minn. 2002) (recognizing that an entity that violates the MGDPA by disseminating private personnel data is liable for any damages, including emotional harm).

Relators emphasize federal caselaw, which has long read an "unreasonable burden" limitation into the Freedom of Information Act (FOIA). Although the purposes of FOIA and the MGDPA are similar, Minnesota courts have not relied on federal courts' interpretation of FOIA as an aid to interpreting the MGDPA. *See Ramsey County*, 806 N.W.2d at 789 n.1 ("The MGDPA is fundamentally different from other state statutes and the [FOIA].)" (quotation omitted)). We discern no principled basis to proceed otherwise in this case.

Relators also point to Minn. Stat. § 645.17, which provides that the legislature does not intend a result that is "absurd, impossible of execution, or unreasonable," as a statutory basis for excusing compliance with respondent's request. Given that the MGDPA contains

a statutory "presumption that government data are public and are accessible by the public for both inspection and copying," *Metro. Council*, 884 N.W.2d at 345 (citing Minn. Stat. § 13.01, subd. 3), we cannot conclude that requiring relators to provide access to public government data produces an absurd result.

Respondent and amici American Civil Liberties Union and Electronic Frontier Foundation argue that civil litigation e-discovery best practices should set the standard for responding to requests under the MGDPA and would lessen the burden of responding to requests. Although this argument has some appeal, we note that civil litigation discovery is subject to proportionality requirements and reciprocal obligations, and that the risks of inadvertent disclosure can be tempered through party agreements. *See, e.g.*, Minn. R. Civ. P. 26.02, subd. 2 (imposing proportionality requirement on discovery). None of these limitations or protections apply to data-practices requests.

We are cognizant that the nature of government data has evolved and expanded in recent decades. It may be that the time is right for a reassessment of competing rights to data within the context of effective government operation. *See Ramsey County*, 806 N.W.2d at 788. It may also be that the proposed exception reflects sound public policy. But when it comes to public-policy considerations, the task of extending existing law falls to the legislature or the supreme court, and not to this court. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (1987). Moreover, the Minnesota Supreme Court recently reiterated that if "there are countervailing policies at issue and the statutory scheme does not resolve the question—it is for the legislature, rather than this court, to weigh the competing policies at issue and determine the appropriate balance." *Stand Up Multipositional Advantage MRI*,

P.A. v. Am. Family Ins. Co., 889 N.W.2d 543, 551 (Minn. 2017) (quotation omitted). Given the competing policy considerations at stake, we decline to read an "unduly burdensome" exception into the MGDPA.

Affirmed in part and reversed in part.