

No. A16-0736

**STATE OF MINNESOTA
SUPREME COURT**

Tony Webster,

Petitioner,

vs.

Hennepin County and the Hennepin County Sheriff's Office,

Respondents.

**BRIEF OF *AMICI CURIAE*
STAR TRIBUNE MEDIA COMPANY LLC, AMERICAN
PUBLIC MEDIA GROUP, AND MINNPOST**

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Introduction

Amici Star Tribune Media Company LLC, American Public Media Group, and MinnPost¹ agree with the Court of Appeals’ ruling that Hennepin County and the Hennepin County Sheriff’s Office (the “County”) “violated the MGDPA by failing to provide access to requested public government data.” (COA Op. at 2.) It does not appear that this ultimate conclusion from the Court of Appeals’ April 10, 2017, decision is on appeal. As the prevailing party, Tony Webster did not appeal it,² and the County filed no cross petition to bring it before this Court.³

Likewise, it does not appear that the Court of Appeals’ refusal to recognize an “unduly burdensome” exception to the Minnesota Government Data Practices Act (“MGDPA”) is on appeal. Webster does not raise this as an issue in his Petition for Review (“PFR”) or his merits brief—he won on this issue—and, again, the County filed no cross petition. (*See also* Webster Br. at 52.)

The MGDPA provides that a government entity must establish procedures that ensure data practices requests are complied with in an “appropriate and prompt manner,” Minn. Stat. §13.03, subd. 2(a), and that the entity must maintain its records so they are

¹ *Amici* certify that no counsel for any party authored this brief in whole or in part. No person other than *Amici*, their members, or its counsel made a monetary contribution to the preparation or submission of this brief.

² *See Hoyt Props., Inc. v. Prod. Res. Grp.*, 736 N.W.2d 313, 317, n.1 (Minn. 2007) (holding that issues not raised in appellants’ PFR are “beyond the scope of this appeal” and refusing to consider such issues); *Anderly v. City of Minneapolis*, 552 N.W.2d 236, 239–40 (Minn. 1996) (stating that “this court may decline to hear an issue if it is not raised in either a petition for further review or a conditional petition for further review” and refusing to consider a mootness argument raised by respondents where respondents did not file a petition or conditional petition for further review).

³ *See Anderly*, 552 N.W.2d at 239–40.

“easily accessible for convenient use,” Minn. Stat. §13.03, subd. 1. *Amici* agree with Webster that these provisions should be enforced firmly and consistently. Arguments regarding the fact-specific determinations of whether the County did so in this instance are beyond *Amici*’s policy interests and are best left to Webster’s briefing on this appeal.

Amici construe Webster’s broadly phrased third issue⁴ in the narrow context of his PFR: that the Court of Appeals’ opinion potentially created some leeway for government entities to make “relevancy determinations” when responding to MGDPA requests.⁵

Webster raised this concern at page 8 of his PFR, and it arises out of the following statement by the Court of Appeals:

[The County] also express concern that Request 14 requires a search for irrelevant emails, 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. [Webster’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 [Webster’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, [the County is] not required to craft a search that returns those e-mails.

(the “Statement”) (COA Op. at 9–10.)

⁴ Webster articulates that issue as follows: “Under the MGDPA, may a government entity refuse to comply with a data request when that request identifies the data sought by keyword?” (Webster Br. at 1.)

⁵ To the extent this Court engages in a more searching analysis of whether MGDPA requests that seek documents containing certain keywords are proper and/or overly burdensome, *Amici* refer the Court to the brief they filed in the lower court. That brief explains in detail why keyword-based requests are not only efficient for everyone involved but also essential to the news gathering and reporting process. It also explains why it would be inappropriate to read a burdensomeness exception into the law.

In Webster’s view, this constitutes an “inappropriate[] suggest[ion] that responsible authorities may withhold requested data that they deem irrelevant.” (PFR at 8.) *Amici* submit that Webster’s interpretation of the Statement is not imperative. The Court of Appeals did not *expressly* hold that the MGDPA permits a government entity to produce only “relevant” data, as opposed to all responsive data. Rather, it simply read Webster’s request “as a whole” and determined what was responsive based on that reading. Meanwhile, although the lower court perhaps could have chosen its words more carefully, it does not appear that Webster is actually seeking through this appeal access to a larger trove of data than the Court of Appeals granted him.

Regardless, going forward, the County and other government entities might read the Statement as Webster does and feel emboldened to withhold data responsive to an MGDPA request on grounds they do not appear relevant. Thus, there is value in this Court expressly overruling the Statement in a published opinion that states the MGDPA does *not* permit relevancy determinations by government entities. Absent such clarification, the current practice of cooperation between journalists and responsible authorities could suffer, resulting in wasted time and resources, delays in newsgathering and news reporting, protracted and costly litigation, and—ultimately—harm to taxpayers who rely on journalists to access, analyze, and disseminate public data.

Identification of *Amici*

The *Amici Curiae* are media companies and organizations of journalists, writers, and others dedicated to the protection of press and public access to government data. All are concerned about a possible implication by the Court of Appeals that a government

entity may withhold properly requested and otherwise responsive public government data that the entity deems irrelevant to a particular MGDPA request.

Star Tribune Media Company LLC (“Star Tribune”) is the upper Midwest’s largest source of news and information. In the 16th-largest U.S. market, Star Tribune reaches more consumers than any other media brand, with the country’s fifth-largest Sunday newspaper, the most-visited local website, numerous mobile and tablet apps, and a portfolio of print and digital products. More than 250 full-time journalists contribute to its platforms. In 2013 the company was recognized with two Pulitzer Prizes as well as the Minneapolis Regional Chamber of Commerce “Best in Business” award. Star Tribune’s goal is to enhance and strengthen the community it serves.

American Public Media Group (“APMG”) is the largest station-based public radio organization in the United States, combining multi-regional station operations, national programming creation and distribution, and innovative digital, social, and mobile services in one organization. Supported financially by contributions from individual donors, sponsors, philanthropic foundations, and the Corporation for Public Broadcasting, APMG’s operations include Minnesota Public Radio (“MPR”), a 45-station network serving nearly all of Minnesota and parts of surrounding states, and Southern California Public Radio, a four-station network serving Los Angeles, Orange County, Ventura County and the Inland Empire. Programs produced by MPR’s national programming division, American Public Media (“APM”), reach 19 million listeners via nearly 1,000 radio stations nationwide each week. APM is one of the largest producers and distributors of public radio programming in the world, with a portfolio that includes

A Prairie Home Companion, BBC World Service, Marketplace, and the leading classical music programming in the nation.

MinnPost is a nonprofit, nonpartisan enterprise whose mission is to provide high-quality journalism for people who care about Minnesota. It publishes online at www.minnpost.com Monday through Friday with a limited edition on Saturday and a Sunday Review. MinnPost provides news and analysis based on reporting by professional journalists, many of whom have decades of experience in the Twin Cities media. Its goal is to create a sustainable business model for its kind of journalism, supported by corporate sponsors, advertisers, and members who make annual donations. MinnPost believes that high-quality journalism is a community asset that sustains democracy and quality of life.

Argument

If this Court interprets the Statement as holding that the MGDPA permits government entities to decline to produce properly requested, responsive data based merely on their unilateral finding that the data is “irrelevant” to the requester’s purpose, then the Statement is wrong, and this Court should say so in a published opinion. Absent such clarification, responsible authorities might ask for or attempt to surmise a requester’s intent or purpose and then tailor their searches and responses accordingly. This approach would be antithetical to the plain language in the MGDPA and would impair journalists’ ability to efficiently and effectively report on government operations—in part by incentivizing journalists to be more circumspect about the reasons for their request and discouraging the collaborative relationships many journalists have

cultivated with responsible authorities. This, in turn, not only would impair the right of the public to know what their government is up to but also would increase the costs of responding to MGDPA requests, to the detriment of taxpayers.

As noted in Webster’s PFR, the plain language of the MGDPA contains no mention of relevancy whatsoever. Indeed, the MGDPA does not even require a requestor to divulge the purpose of her data request or her identity. *See* Minn. Stat. § 13.05, subd. 12. The bedrock of the MGDPA is that a requestor does not need to specify why she is requesting particular data, what she plans to use it for, or even who she is. Instead, government entities are obligated to provide public data in response to a valid MGDPA request regardless of who you are or why you request certain data. The notion of relevancy determinations by responding authorities is at odds with this fundamental premise of the MGDPA.

Beyond the clear mandate of the statute, permitting government entities to withhold data based on some sort of “relevancy determination” makes little practical or policy sense, for at least two reasons.

First, permitting such determinations would unnecessarily transform the current MGDPA request-and-response paradigm—which *Amici* submit works reasonably well—into an adversarial process that wastes everyone’s time.

As any journalist experienced with data-based reporting can explain, most MGDPA requests start relatively broad: The journalist is investigating some issue and knows that the government has some data about that issue. But often the journalist is operating in the dark: she may not know exactly what data is maintained, how far back it

goes, how it is stored, or even which government entities possess it. The initial, broad, request thus serves as the start to a larger conversation with the responsible authority about what data the government entity maintains and what would be most helpful to the journalist's news-reporting purposes. Often, the conversation leads to a narrowing of the initial request as essential information is exchanged and the journalist comes to understand what's available, what she needs, and what she doesn't need or want (indeed, this even happened in Webster's case). This, of course, is good for everyone. The journalist doesn't have to waste time combing through pages of useless data; the government entity only has to gather and review what the journalist actually cares about, saving taxpayers money; and the news consumer gets more timely, meaningful coverage on matters of public concern.

Permitting responsible authorities to make "relevancy determinations," however, would jeopardize this process, which hinges on journalists' *willingness* to disclose to responsible authorities the issues they are investigating and/or how they plan to use responsive data. If the message to journalists is that responsible authorities can withhold otherwise responsive data based on a unilateral "relevancy" determination—guided perhaps by little more than supposition and speculation and without a journalists' nose for news—then journalists will have reduced incentive to engage in dialogue with the responsible authority. In the end, the government, journalists, and the public will suffer.

Second, permitting responsible authorities to make relevancy determinations will not only delay the information gathering process but also could change the overall character of what news gets published. Although the dialogue between journalists and

responsible authorities usually leads to a narrowing of the data sought, every journalist is taught to “follow the story.” Thus, sometimes, the conversation leads the journalist to change course, as she exhumes unexpected information and realizes the real story is something other than what she originally conceived.

Indeed, Webster’s own experience demonstrates the potential for this, as the response to his MGDPA requests revealed not only the type of biometric technologies the County uses but also the view of certain County employees that such technologies were “scary” and should not be “advertised” to anyone outside the Sheriff’s Office. (Webster Br. at 21–23.)⁶ For his efforts bringing this and other information to light, Webster won at least two prestigious awards: The 2017 Peter S. Popovich Award from the Minnesota Society for Professional Journalists and the 2017 John R. Finnegan FOI Award from the Minnesota Coalition on Government Information.

It is one thing for a responsible authority to explain what she thinks would be most helpful to the journalist and for the journalist to agree that the disclosure of data may be

⁶ See <http://www.mnspj.org/2017/06/01/webster-receives-popovich-award/> and <http://www.mncogi.org/2017-john-r-finnegan-foi-award-ceremony/>.

His doggedness in pursuing public data also led to multiple news reports educating the public on matters of significant public concern, including not only how the County uses biometric technologies but also how the County responds to MGDPA requests and its decision to limit the amount of information available to the press and public in the future by automatically purging emails. *See, e.g.*, Susan Du, “As facial recognition gains popularity with cops, the public is just catching on,” *CityPages.com* (June 20, 2016), <http://www.citypages.com/news/as-facial-recognition-gains-popularity-with-cops-the-public-is-just-catching-on-8364538>; Kelly Smith, “Hennepin County to follow Sheriff’s Office in automatically deleting e-mails sooner,” *StarTribune.com* (Nov. 29, 2016), <http://www.startribune.com/hennepin-county-sheriff-s-office-automatically-deleting-e-mails-sooner/403686806/>; Eric Golden, “Minnesota Legislature will likely take on e-mail deletion rules,” *StarTribune.com* (Dec. 8, 2016), <http://www.startribune.com/minnesota-legislature-will-likely-take-on-e-mail-deletion-rules/405547726/>.

so limited. It is quite another for the responsible authority to make that call without the journalist's consent. Without a doubt, most public employees try to do the right thing—but they are not immune from the natural inclination we all face to protect our employers and/or ourselves from embarrassment or censure by keeping “bad documents” under wraps. Unilateral relevancy determinations will inevitably result in journalists never even learning of otherwise responsive information that would change the course their reporting and result in an entirely different story. Ultimately, the public stands to suffer when these stories go untold.

Conclusion

Amici are concerned at the Court of Appeals' suggestion that a government entity may withhold responsive public data that it deems irrelevant to an MGDPA request. *Amici* submit that this suggestion arises from little more than dicta and creates no binding precedent, and urges the Court to state as much. But if the Court of Appeals did make an express ruling on relevancy determinations under the MGDPA, the Court should overrule it, and should clarify that such relevancy determinations are impermissible. Absent such clarification, the current, successful MGDPA request-and-response paradigm utilized by journalists and the reporting process itself stand to suffer.

Dated: July 14, 2017

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Certificate of Compliance with Rule 132.01

I certify that the Brief of *Amici Curiae* Star Tribune Media Company LLC, American Public Media Group, and MinnPost complies with the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3. The length of this brief is 2,876 words. The brief was prepared in a proportionally spaced typeface using Microsoft Office Word 2010 and 13-point Times New Roman font.

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STATE OF MINNESOTA
SUPREME COURT

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vs.

**AFFIDAVIT OF SERVICE BY
U.S. MAIL**

Hennepin County and the Hennepin
County Sheriff's Office,

Appellate Case No.: A16-0736

Respondents.

I, Shelley Beety, of the city of Shakopee, County of Scott, in the State of Minnesota, being duly sworn, on the 14th day of July, 2017, served a copy of the **BRIEF OF AMICI CURIAE STAR TRIBUNE MEDIA COMPANY LLC, AMERICAN PUBLIC MEDIA GROUP, AND MINNPOST** by first class mail, postage prepaid, to the following non-EMACS File & Serve participants:

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Subscribed and sworn to before me
this 14th day of July, 2017.

Terry L. Conn
Notary Public

US.113249956.01

