

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,	)	Judge Peter A. Cahill
)	
Plaintiffs,)	
)	
v.)	
)	
Nekima Levy-Pounds,	)	Court File Nos.
Kandace Montgomery,	)	27-CR-15-1307
Shannon Bade,	)	27-CR-15-1304
Todd Dahlstrom,	)	27-CR-15-1350
Amity Foster,	)	27-CR-15-1331
Adja Gildersleve,	)	27-CR-15-1346
Michael McDowell,	)	27-CR-15-1335
Catherine Salonek,	)	27-CR-15-1320
Pamela Twiss,	)	27-CR-15-1326
Jie Wronski-Riley,	)	27-CR-15-2766
Mica Grimm,	)	27-CR-15-1349
	)	27-CR-15-1829
Defendants.)	

**MALL OF AMERICA’S AMICUS CURIAE BRIEF IN OPPOSITION TO
DEFENDANTS’ MOTION TO COMPEL DISCLOSURE OF ITEMS 1, 2, 4, AND 5**

I. INTRODUCTION

Mall of America submits this Amicus Curiae brief in Opposition to Defendants’ Motion to Compel Disclosure and asks the Court to deny the motion with respect to items 1, 2, 4, and 5 listed in Defendants’ Motion.¹ Although Mall of America is not a party to this action, it has a direct interest in the outcome of this motion, which seeks to compel the State to disclose a number of documents—including four items created by Mall of America security personnel in

¹ The Court granted Mall of America permission to file this brief at the hearing on the motion on May 1, 2015.

preparation for the Black Lives Matter protest held at Mall of America property on December 20, 2014 from which the charges in these actions arise.

The items are outside of the scope of the limited discovery allowed by Minnesota Rules of Criminal Procedure for misdemeanor cases. Accordingly, the Court has the discretion to decline to order their disclosure if the Court deems this is not one of the “rare” misdemeanor cases in which broader discovery is necessary for the Defendants to prepare their defense. See Cmt.—Minn. R. Crim. P. 9. Nothing about this case, in which the Defendants are facing only misdemeanor charges, dictates extraordinary discovery procedures, nor have the Defendants explained why they need these items to defend against these charges. In fact, these four items lack relevance to the charges brought against Defendants. At the same time, the items include sensitive information relating to the process by which Mall of America prepares for and responds to potential disruptive events or security threats, and their release could compromise Mall of America’s ability to effectively respond to future events. Accordingly, Mall of America requests that the Court deny the motion with respect to these items. Alternatively, if the Court finds that the items should be disclosed, Mall of America requests that they be produced pursuant to a protective order prohibiting their public dissemination and their disclosure to anyone outside of the above-entitled actions because of the sensitive information they contain.

II. MOA ITEMS AT ISSUE IN DEFENDANTS’ MOTION TO COMPEL

The four items at issue are the following: Item 1, a PowerPoint presentation from Dec. 19, 2014; Item 2, a PowerPoint presentation from Dec. 30, 2014; Item 4, a Black Lives Matter Organizer Document from Dec. 19, 2014; and Item 5, a Document on Cat Salonek from Dec. 19,

2014 (all four items are referred to herein as the “MOA Items”).² All of the MOA Items were created by Mall of America security personnel, and they generally include information about Mall of America’s investigation into the protesters’ plans for the December 20, 2014 protest and Mall of America’s response to the protest. The purpose of Items 1, 4, and 5 was to prepare Mall of America security personnel for a coordinated response to the several thousand protesters who participated in the protest and to ensure the safety and security of all mall guests, and the protesters, on December 20, 2014. Item 2, although it includes some information gathered after the protest, consists of the same kind of investigative information as the other items. Accordingly, all of the MOA Items include information about how Mall of America security personnel conduct investigations of and plan responses to disruptive events or security threats. This information is confidential, and its release could potentially compromise Mall of America’s ability to respond to future incidents.

A fourth item listed on the privilege log, the Black Lives Matter Timeline (Item 3 on the Defendants’ Motion to Compel), has already been released to Defendants to Mall of America’s understanding, and Mall of America is not opposing its disclosure. The timeline does not contain information about Mall of America’s preparations for or planned response to the protest; instead it is simply a brief timeline of the events that happened on the date of the protest, compiled by Mall of America security personnel. This document differs from the MOA Items because it does not include any confidential information that, if released, could compromise Mall of America’s ability to respond to future disruptive incidents. Because the other four items,

² These items may be provided to the Court for in camera review if the Court finds this appropriate to determine their relevancy or the need for a protective order, pursuant to Minn. R. Crim. P. 9.03, subd. 6.

however, do contain this sensitive information, while also not including information that will aid the Defendants in preparing their cases for trial, they should be protected from disclosure.

III. ARGUMENT

A. **The MOA Items Do Not Fall Within the Limited Scope of Discovery Allowed in Misdemeanor Cases.**

First, Defendants are not entitled to production of the MOA Items because they do not fall within the scope of discovery allowed in misdemeanor cases. As recognized by the Defendants, the scope of discovery in misdemeanor cases is quite limited. The Minnesota Rules of Criminal Procedure call only for the production of police investigatory reports and, upon request, “any material or information within the prosecutor’s possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.” Minn. R. Crim. P. 9.04.

Other discovery is not allowed, unless the parties consent (and the State has not consented to the release of these items) or the Court grants a motion for additional discovery. *Id.*; see *State v. Hawkinson*, 829 N.W.2d 367, 378 (Minn. 2013) (holding that state did not violate any discovery rules by destroying the defendant’s blood sample, as it had made all disclosures required by the Minnesota Rules of Criminal Procedure for a misdemeanor case). The trial court has discretion to determine what discovery is appropriate pursuant to such a motion, and it is not required to permit discovery in a misdemeanor case simply because that discovery would be required in a more serious criminal matter. See *State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999). The Minnesota Rules of Criminal Procedure recognize that additional discovery will be necessary only in “rare” cases. (Cmt.—Rule 9.)

The MOA Items requested by the Defendants do not constitute police investigatory reports, nor do they include information that tends to negate Defendants’ guilt. Recognizing this fact, the Defendants have attempted to argue that broader discovery should be allowed in their

cases by asserting that their cases are “extraordinary” in scope. However, Defendants’ misdemeanor charges—for common-place offenses including trespass, disorderly conduct, and unlawful assembly—have not become extraordinary actions entitling them to broader discovery solely based on the amount of publicity garnered by Defendants. This is the only factor distinguishing these cases from typical misdemeanor cases. Mall of America security personnel deal with cases of trespass and disorderly conduct routinely, and requiring broad production of documents in all such cases would be incredibly burdensome for mall personnel.

First, the fact that each defendant is facing multiple misdemeanor counts does not automatically entitle Defendants to broader discovery—all counts remain misdemeanors. Nor, despite Defendants’ assertions, is it out of the ordinary for restitution to be sought in misdemeanor cases. *See* Minn. Stat. § 609.125, subd. 1(4) (allowing restitution as a sentence for a misdemeanor, in addition to either imprisonment or payment of a fine, or both). Accordingly, the State’s decision to seek restitution for the expenses incurred by the City of Bloomington does not mean Defendants should have broader discovery.³ Finally, although the Defendants argue that additional discovery is merited because of the in-depth investigation by the Bloomington Police Department, Minnesota Rule of Criminal Procedure 9.04 already required the production of the police investigative reports. Therefore, broader discovery is not needed simply because the police investigation was more detailed than usual in a misdemeanor case—as it would have to be, considering that an estimated three thousand people attended the protest.

The Minnesota Rules of Criminal Procedure are clear about what discovery the Defendants need in order to effectively defend themselves from these charges, and the MOA

³ As stated by Defendants, Mall of America is not seeking restitution in this case, even though the expenses for extra security and other related costs to Mall of America totaled tens of thousands of dollars.

Items do not fall within that scope. Considering the lack of relevance and confidential nature of the MOA Items as explained below, the Court should decline to order their production.

B. The MOA Items Are Not Relevant to Any Issues in the Defendants' Cases.

The MOA Items have little, if any, relevance to the Defendants' charges and will not assist the Defendants with defending themselves. A fact is relevant when it, in some degree, "advances the inquiry" in a case. *State v. Carlson*, 268 N.W.2d 553, 559 (Minn.1978). In other words, a relevant fact, either alone or in connection with other facts, must warrant a jury in drawing a logical inference assisting in the determination of an issue in question. *State v. Upson*, 162 Minn. 9, 12-13, 201 N.W. 913, 914 (Minn. 1925); *State v. Lee*, 282 N.W.2d 896, 901 (Minn. 1979) ("Any evidence that logically tends to prove or disprove a material fact in issue is relevant."). Information that is not relevant is not admissible at trial. Minn. R. Evid. 402.

Examining the elements of the counts brought against the Defendants, it is clear that the MOA Items, which include information about Mall of America's preparations for and response to the protest, will not assist a jury with any of the issues in question. This information has no bearing on whether (1) the Defendants trespassed on Mall of America property and refused to depart from it upon demand (*see* Minn. Stat. § 609.605, subd. 1(b)(3)); (2) the Defendants assembled without a lawful purpose and then conducted themselves in a disorderly manner so as to disturb or threaten the public peace (*see* Minn. Stat. § 609.705 (unlawful assembly)); (3) the Defendants engaged in offensive or noisy conduct tending to reasonably arouse alarm in others, in a private place, knowing or having reasonable grounds to know that it will alarm others (*see* Minn. Stat. § 609.72 (disorderly conduct)); or (4) the Defendants intentionally obstructed a

public right-of-way (*see* Minn. Stat. § 609.74(2) (public nuisance)).⁴ Mall of America's advance investigation into what the protesters might do and the plans created by Mall of America for responding to the protesters' actions in order to keep everyone safe have no relations to these charges, which all are based on the actions of the protesters themselves on December 20, 2014. The information gathered by Mall of America prior to the protest does not—and cannot—be relevant to the subsequent conduct of Defendants at the actual protest.

Defendants have argued that the MOA Items are relevant to the charges of aiding and abetting each of these misdemeanor offenses that have been brought against them. However, the aiding and abetting charges are based on the Bloomington Police Department's investigation of Defendants' actions before and during the protest, not Mall of America's. The Statements of Probable Cause in the charging documents do not state that they are relying upon any facts allegedly uncovered by Mall of America security personnel investigations; instead, they rely upon the Bloomington Police Department's investigations.

As the MOA Items are outside of the scope of misdemeanor discovery, the Court would have to find that the production of these items was in some way needed for the defense in order to justify broadening the discovery allowed. But because these items have extremely limited, if any, relevance to the issues in the cases, a departure from the ordinary rules of disclosure for misdemeanor cases is not merited. Accordingly, Defendants' motion should be denied.

⁴ Only certain of the Defendants have been charged with public nuisance and aiding and abetting a public nuisance, because these charges arise from actions taken by protestors who blocked Mall of America's internal ring road after the initial portion of the protest. None of the MOA Items relate in any way to the blocking of the ring road, which was apparently not planned in advance.

C. If the MOA Items Are Disclosed, a Protective Order Prohibiting Their Public Dissemination Is Appropriate.

Considering the private and sensitive nature of the information included in the MOA Items, if the Court finds they should be disclosed, Mall of America requests that the disclosures occur subject to a protective order that would prevent their public dissemination or any use of the documents outside of the above-entitled actions. Under the Minnesota Rules of Criminal Procedure, a court “may order disclosures restricted, deferred, or made subject to other conditions” when appropriate. Minn. R. Crim. P. 9.03, subd. 5. For example, a court may grant a protective order limiting the use and distribution of sensitive information based on privacy concerns. *See State v. Johnson*, 659 N.W.2d 819, 822 (Minn. Ct. App. 2003) (use of videotaped statements of alleged victims of child sex abuse could be limited by protective order, even without a particularized showing that a party intended to misuse the videotapes in some way).

While this rule is most often used to protect the private data or identities of individual crime victims, the Minnesota Supreme Court has recognized that a protective order may be appropriate in criminal cases in order to protect a *private company*’s sensitive data. In *State v. Schwartz*, a laboratory conducted DNA testing on blood-stained clothing belonging to a murder suspect. 447 N.W.2d 422, 423-24 (Minn. 1989). The laboratory disclosed some information about its protocol and analysis to the defense but refused to produce more specific information regarding its methodology and population data base. *Id.* at 427. The Minnesota Supreme Court recognized that a commercial laboratory’s proprietary information could be at stake in such cases and stated that a protective order could be appropriate to provide protection to the laboratory while ensuring the defense had access to information it needed. *Id.*

In this case, the MOA Items include sensitive information relating to Mall of America’s processes of preparing for and responding to potential disruptive events or security threats. The

public release of this data will in no way further the Defendants' ability to defend themselves in court. *See Sheppard v. Maxwell*, 384 U.S. 333, 350-351 (U.S. 1966) ("Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper;" instead, a jury's verdict must be "based on evidence received in court, not from outside sources."). It may, however, harm Mall of America's ability to appropriately prepare for the next disruptive event or security threat. If protesters—or someone planning something nefarious—have access to information about how Mall of America prepares for and responds to such events, they may be able to thwart the response and make the mall less secure for all guests. In addition, the public release of the information could undermine future cooperation between Mall of America security personnel and the Bloomington Police Department. Currently, Mall of America security personnel regularly communicate with Bloomington Police Department and coordinate responses to disruptive events. If, however, Mall of America knows that any information it gives to the Bloomington Police Department could be subject to public release, it will have to reevaluate how it shares information with the department. This could impair the effectiveness and efficiency of both Mall of America and the Bloomington Police Department in dealing with incidents at the mall, which would not be in the public interest.

If the Court believes that information should be disclosed, Mall of America asks for entry of a protective order that would (a) prohibit the public dissemination of the MOA Items to anyone not a party, attorney, witness, or Court employee involved in this proceeding, and (b) prohibit any use of the MOA Items, by anyone who received them under paragraph (a), outside of the above-entitled action, including but not limited to any dissemination to members of the media or posting of the MOA Items on social media. Such a protective order would not affect

the Defendants' defense but would provide important protections for Mall of America's confidential information.

III. CONCLUSION

Mall of America thanks the Court for the opportunity to present its arguments on this issue. Because of the limited scope of misdemeanor discovery, the lack of relevance of the items at issue, and the sensitive nature of the information included in the documents, Mall of America requests that the Court deny the Defendants' motion to compel disclosure with respect to items 1, 2, 4, and 5. Alternatively, Mall of America requests that any such disclosures be made subject to a protective order as described above.

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

Date: May 15, 2015

By /s/Susan Gaertner
Susan Gaertner (#123882)
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 632.3355
Facsimile: (612) 632.43555
Email: susan.gaertner@gpmlaw.com

ATTORNEYS FOR MALL OF AMERICA