

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF RICE

THIRD JUDICIAL DISTRICT

Case Type: Other Civil

Benda for Common-sense, a Minnesota
Non-Profit Corporation, and Kathleen
Hagen,

Court File No. 66-CV-22-2022
Assigned to: The Honorable Carol M. Hanks

Plaintiffs,

vs.

Denise Anderson, Director of Rice County
Property and Tax Elections,

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR JOINDER AND TO
COMPEL DISCLOSURE OF
INFORMATION**

Defendant.

and

Minnesota Secretary of State,

Proposed Intervenor- Defendant

Plaintiffs are presenting to the Court a series of motions relating to their claim for relief under the Minnesota Government Data Practices Act (“MGDPA”). Defendant Anderson, through the Rice County MGDPA designated Responsible Authority and Data Practices Compliance Official, Sean McCarthy, has submitted a sworn statement to the Court that Rice County has disclosed “all data responsive to the data requests referenced in the complaint.” Since this September 6, 2022 sworn submission to the Court, Plaintiffs have identified the location of multiple documents and in many cases have discovered documents that were actually withheld from disclosure to Plaintiffs, but disclosed to other parties. Despite these revealing discoveries, Defendant Anderson continues to take the position that there are no documents to disclose, and if there are, she is not the correct party to disclose them. Further, as the argument goes, even if she has the documents and is a proper party, she is not subject to discovery under the Rules of Civil Procedure.

Most recently, Plaintiffs served a simple request for Rule 34.01 Inspection for the limited purpose of viewing and documenting the locations where any Election Materials are stored. Defendant Anderson has refused to comply with this request.

The instant motions consist of a series of important steps to provide a framework for compelling compliance with the MGDPA.

ARGUMENT

I. SEAN MCCARTHY SHOULD BE JOINED AS A PARTY/DEFENDANT IN THIS ACTION.

As the record in this matter evolves, it appears that Sean McCarthy, as the Rice County MGDPA Responsible Authority and Data Practices Compliance Official, will continue to play a pivotal role in identifying and compiling government data subject to this action. Although Defendant Anderson has been assigned the role of Responsible Authority Designee under the MGDPA, she continues to rely upon and defer to the judgement and actions of McCarthy.

Rule 19.01 Minn. R. Civ. Pro. Provides the authority to order the joinder of a party if, “in the person’s absence complete relief cannot be accorded amount those already parties.” Many of the letters and correspondence from Rice County are addressed to or authored by Sean McCarthy. See Complaint, Exhibit B (Complaint_0006), Exhibit C (Complaint_0025), Exhibit H (Complaint_0044), Exhibit I (Complaint_0060), Exhibit J (Complaint_0156).

Plaintiffs request that the Court order that Sean McCarthy be made a party/defendant in this action.

II. DEFENDANT ANDERSON SHOULD BE REQUIRED TO DISCLOSE THE LOCATION OF EMAILS AND ELECTRONIC DATA AND THE INDIVIDUAL WHO IS ABLE TO COMPILE SUCH DATA FOR DISCLOSURE.

The Plaintiffs have requested, among other things, electronic data and emails that are classified as government data under the MGDPA. For example, the April 18th, 2022 MGDPA request included a request for, “any documentation, emails or letters.” See Complaint, Exhibit A

(Complaint_0002). This request was followed up with more specificity to include, “all Minnesota Data Practice Act requests and all communications with any vendors, consultants or employees of the Minnesota Secretary of State’s Office.” See Complaint Exhibit C (Complaint_0026).

Plaintiffs further requested, “incident logs, inspections, reports, and upgrade logs of Rice County’s election computer network and all election equipment. See Complaint Exhibit C (Complaint_0026).

Such “public government data in a computer storage medium” shall be disclosed under the MGDPA. Minn. Stat. 13.03, Subd. 3(c). It is the expectation of Plaintiffs that the email and electronic data for Rice County is stored and maintained on a Rice County Server, controlled by their IT Director. For the Rice County election equipment, such electronic data is potentially accessible by the Rice County IT Director, the vendor ES&S and a third-party vendor called SeaChange.

Defendant Anderson has knowledge and access to all of this information and should be compelled to identify and disclose such information.

III. DEFENDANT ANDERSON SHOULD BE REQUIRED TO DISCLOSE PREVIOUSLY COMPILED DOCUMENTS PARTIALLY RESPONSIVE TO PLAINTIFFS’ MGDPA CLAIMS.

Following the 2020 election, Ward 4, Precinct 1, City of Northfield, Rice County was selected for a post-election review by the Office of the Secretary of State. A copy of the written response from Rice County is attached to the Affidavit of Kathleen Hagen in Support of Motion to Compel Disclosure of Information as Hagen Exhibit 16. (“**2020 Post-Election Review Response Form**”). The **2020 Post-Election Review Response Form** contains reference to multiple documents classified as Election Materials as described in the August 31, 2022 Order to Suspend the Destruction of Election Materials; and the September 13, 2022 Order Following

Hearing on Ex Parte Motion. The documents identified in the **2020 Post-Election Review Response Form** were to be compiled electronically and made available for upload and review.

Plaintiffs are requesting an order requiring Defendant Anderson to disclose these documents. These documents are readily available and are clearly subject to the orders of the Court prohibiting them from being destroyed.

IV. DEFENDANT ANDERSON SHOULD BE REQUIRED TO COMPLY WITH THE RULE 34.01 INSPECTION.

Pursuant to Rule 34.01 Minn. R. Civ. Pro., “Any party may serve on any other party a request within the scope of Rule 26.02... to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection...photographing.... The property or any designated object or operating thereon.” The Rules of Civil Procedure do not require leave of the Court to complete such inspection.

On November 15, 2022, Plaintiffs served a Notice of Rule 34.01 Inspection for the entry upon land controlled by Defendant Anderson, to “inspect, and inventory” Election Materials located thereon. See Benda Exhibit 7. On November 30, 2022, Defendant Anderson submitted a convoluted and lengthy “Response to Plaintiffs’ Notice of Rule 34.01 Inspection. See Benda Exhibit 8. The primary objection appears to be that the request, “seeks to impose upon Defendant obligations that are greater, different, and inconsistent with the obligations imposed by the Minnesota Rules of Civil Procedure and the Court’s Order.” Plaintiffs are simply asking for access to any location where Election Materials are stored to view, inspect and inventory (through photograph and/or video) their existence and location. Except for a momentary pullback of Defendant Anderson’s curtain of secrecy, this request for minimal inspection imposes no unreasonable burden upon the parties.

Further, Defendant Anderson continues to incorrectly assert that the Court’s Order Following Hearing dated September 13, 2022 imposes a stay on discovery in this matter. The

motion made by Plaintiffs was for the issuance of a scheduling order and a court ordered discovery plan. Defendant has repeatedly refused to respond or cooperate with any attempt to complete the required Rule 26.06 Discovery Conference and Discovery Plan. While this motion was reserved by the Court, such reservation does not suspend the Rules of Civil Procedure. Likewise, an obstinate refusal to cooperate with the Rule 26.06 Discovery Conference requirement is not intended to be rewarded with a stay on discovery.

As throughout this action, Defendant Anderson continues to blatantly ignore any attempt to obtain even minimal disclosures or discovery. Court intervention is now necessary.

V. **PLAINTIFF IS ENTITLED TO COSTS AND ATTORNEY FEES IN PURSUING MGDPA CLAIM AGAINST DEFENDANT**

Finally, Plaintiffs are requesting an order for costs, disbursements, and attorney fees in pursuing compliance by Defendant Anderson. As provided under the MGDPA, in any action in district court to compel compliance with this chapter, the requesting party may recover costs and disbursements, including reasonable attorney fees. Minn. Stat. 13.08, Subd 4.

As detailed in the Affidavit of Matthew L. Benda in Opposition to Motion for Judgment on the Pleadings, Plaintiffs incurred an \$80.00 filing fee and \$1,280.00 in attorney fees. As further detailed in the Affidavit of Matthew L. Benda in Support of Motion to Compel Disclosure, Plaintiffs incurred an \$80 filing fee and \$960.00 in attorney fees. Plaintiffs request an order requiring Defendant Anderson to pay a total of \$2,400.00 as reimbursement to the Plaintiffs in pursuing their MGDPA claims.

CONCLUSION

Plaintiffs are continuing their slow journey towards obtaining compliance with the MGDPA. For Plaintiff Kathleen Hagen, this journey started on October 23, 2021 and for Plaintiff Benda for Common-sense the journey began on April 18, 2022. See Complaint Exhibits A (Complaint_0002) and D (Complaint_0029). Plaintiffs continue to establish the untruthfulness

of the statement that, “Rice County has provided all data responsive to the data requests referenced in the complaint.” The motions presented herein provide an important step towards identifying government data that is subject to the MGDPA and helping the Court craft a remedy to compel the required disclosure.

Respectfully submitted,

PETERSON, KOLKER, HAEDT & BENDA, LTD.

Dated: November 30, 2022

By: /s/ Matthew L. Benda

Matthew L. Benda (#026376X)

Attorney for Plaintiffs

1811 Broadway Avenue S.E.

Albert Lea, MN 56007

(507) 373-6491

Fax: (507) 373-7863

Email: mbenda@albertlealaw.com

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