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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RICE | NINTH JUDICIAL DISTRICT
Case Type: Other Civil

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

Plaintiffs,

v.

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

Defendant.

Court File No. 66-cv-22-2022

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S EX PARTE MOTION

INTRODUCTION

On or about August 24, 2022 the Complaint and Petition for Correction of Errors and Omissions under Minn. Stat. § 204B.44 was served and filed on Denise Anderson, the Defendant elections official for Rice County. The undersigned was assigned to this matter by the County's insurer on August 24 and filed a notice of appearance on August 25.

Plaintiffs' counsel filed a Motion and Affidavit but failed to file any memorandum of law supporting the motion. The undersigned counsel for Defendant Anderson sent an e-mail to Plaintiffs' counsel on the morning of Monday August 29 requesting a hearing date and time and the memorandum in support of the motion. As of the filing of this memorandum, no memorandum of law in support of the Plaintiffs' motion setting forth any legal argument or standard for the relief sought has been received.

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FACTS

The Plaintiffs in this matter have made three data requests ("Requests"), which were responded to by Ms. Anderson or a designee ("Defendant"). Hundreds of pages of documents were produced in response to Plaintiffs' request. *Affidavit of Sean McCarthy.* The data includes letters, e-mails, election questionnaires, polling data, elections equipment and systems information, abstracts of votes cast, ballot box collection data, ballot box procedure, elections drop box information and logs, elections personnel and training information, elections audit and training materials and copies of various other responsive public data. *Id.* In response to the Requests, the Defendant, to the extent no data existed stated so, or in those instances where data was classified as other than public, stated so and referenced the statute. *Affidavit of Sean McCarthy.*

Despite providing complete responses to the data requests, Plaintiffs persisted in arguing that additional data must exist because they believed it to be so. Plaintiffs have produced no facts, other than their "belief" as to the existence of data not produced.

On multiple occasions, Plaintiffs have contended that a requirement exists to have a Cast Vote Record (CVR), and that Rice County's elections software is capable of producing said CVR. They have cited no statute or other source of law for this contention. They have produced a federal agency's standard for the production of such a record *if* one *were* to be produced. Defendant has repeatedly explained that while the vendor used by Rice County currently has software that could produce such a record, the version of the software used by Rice County in the 2020 general election did not produce a CVR, nor does Rice County possess or have the ability to produce a CVR for the 2020

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election. *Affidavit of Denise Anderson, Ex. H.* Despite this, Plaintiffs persist, without facts, with their "belief" that a CVR for the 2020 general election exists or can be produced.

ARGUMENT

I. Plaintiffs Have Failed to Meet the Dahlberg Factors for Injunctive Relief

When considering whether to grant injunctive relief, courts must analyze five aspects of the situation:

> (a) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
>
> (b) The harm to be suffered by the plaintiff if the temporary restraint is denied as compared to that inflicted on the defendant if the injunction issues pending trial.
>
> (c) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
>
> (d) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
>
> (e) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 314 (Minn. 1965).

As the Minnesota Supreme Court explained:

> Great caution and deliberation must be exercised by the trial court in the granting of an interlocutory injunction since the injunctive process is the strong arm of equity.
>
> Injunctive relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury.

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AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 110 N.W.2d 348, 351 (Minn. 1961). In the present matter, Plaintiffs have failed to produce evidence of great and irreparable injury and the likelihood of success on the merits warranting injunctive relief.

A. The Nature and Background of the Parties

The Plaintiffs are members of the public seeking government data. The relationship between the parties is not a relevant factor. The Plaintiffs made numerous requests for government data that have been responded to, with Rice County producing hundreds of pages of documents in response to their requests.

B. Harm to Be Suffered

The party seeking an injunction must establish that the injunction is necessary to prevent irreparable harm. The Plaintiffs have not articulated any harm. Rather, they state their "belief" that data exists and their fear that this non-existent data will be destroyed. "As a general rule, the failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction." *Eason v. Independent Sch. Dist. No. 11*, 598 N.W.2d 414, 418 (Minn. App. 1999).

Plaintiff sought and obtained an ex parte order staying the destruction of "any election materials" bar none, with no beginning or ending date. The order does not even exempt data that has already been produced and is not limited to the information requested by the Plaintiffs in the Minnesota Government Data Practices Act (MGDPA) requests set forth in the Complaint.

In contrast, the Minnesota Legislature and the Minnesota Records Disposition Panel have articulated the position that election materials are to be disposed of 22 months

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after the election. Minn. Stat. § 204B.40, 138.163-138.21; Minnesota Records Retention Schedule for Counties. The purpose is to ensure finality. The harm to the County includes continuing to respond to expansive and unreasonable requests for data that does not exist, expending resources. Moreover, the expansive and unreasonably broad nature of the order, which goes even beyond the MGDPA requests identified in the Complaint and includes data already produced, is a clear harm to the County and its taxpayers.

C. Likelihood of Success on the Merits

The MGDPA requires public entities to produce for inspection and copying public data. Minn. Stat. § 13.03. It does not require the public entity to create public data, make lists, or otherwise organize data in the format preferred by the requester.

> The Commissioner (of Administration) agrees with the County's position. Chapter 13 confers upon individuals the right to gain access to data that exist. Here, as the questions are written, they are not the type of requests that fall under the purview of Chapter 13. Rather, they appear to ask the Office to make a list, write a description, and create documentation.

Minn. Dept. Admin. Advis. Op. 06-0029; See also *Advis. Op. 03-008.*

The MGDPA authorizes the Commissioner of Administration to issue opinions "on any question relating to public access to government data, rights of subjects of data, or classification of data under this chapter or other Minnesota statutes governing government data practices." Minn. Stat. § 13.072, subd. 1. "Opinions issued by the commissioner under this section are not binding on the government entity or members of a body subject to chapter 13D whose data or performance of duties is the subject of the

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opinion, but an opinion described in subdivision 1, paragraph (a), must be given deference by a court or other tribunal in a proceeding involving the data." *Id.* at Subd. 2.

In the present matter, Defendant and Rice County have produced all data responsive to the requests referenced in the Complaint, consisting of hundreds of pages of responsive documents. The Defendant stated that other data that was requested did not exist. *Complaint, Exs. E and H.* In the case of Plaintiffs' requests for security logins and passwords, for example, they were told that such information was classified as non-public security data to which they were not entitled. *Complaint, Ex. E.* There is no obligation for the County to create data in order to satisfy the Plaintiffs' "beliefs" that more data exists or can be created. Plaintiffs' fanciful notion that a federal agency's guidance on a standard that might be helpful with respect to those entities using Cast Vote Records *is not* actual evidence that the Defendant has a CVR or the ability to produce it. *Affidavit of Denise Anderson.*

Under Dahlberg, Plaintiffs have little or no likelihood of success on the merits of this case. A lawsuit cannot prevail upon a " belief."

D. Public Policy Expressed in Statute

As discussed above, there must be finality in elections. This is recognized by both the Minnesota Legislature in its enactment of the statute disposing of election materials after 22 months and the Minnesota Records Disposition Panel in approving a records retention schedule for counties providing for the destruction of elections materials after 22 months. Minn. Stat. §§ 204B.40, 138.163-138.21; Minnesota Records Retention Schedule for Counties. Further, the MGDPA sets forth the public policy on responding

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to data requests and does not require public entities to create data that does not exist. In contrast, Plaintiffs have produced nothing except speculation.

E. Administrative Burden on the Court and Overbreadth

It is unclear what the administrative burden would be on the court. As currently written, the order is overly broad and contains no beginning or ending date regarding "election materials" nor does it exempt hundreds of pages of documents already produced to the Plaintiffs in response to their requests. Furthermore, this Court has jurisdiction only over the issues set forth in the Complaint. The Complaint related only to the three MGDPA requests, which necessarily limits any injunction to data responsive to those requests that have not already been produced, rather than "all election materials" in the possession of the County.

II. Plaintiffs are Not Entitled to Attorney's Fees

Plaintiffs appear to be making a claim for attorney's fees in bringing the present motion. Nothing in the MGDPA permits the award of attorney's fees for such a motion.

In their Notice of Motion and Motion, Plaintiffs cite to Minn. Stat. 13.08, subd. 4 for an award of costs, disbursements and attorney's fees associated with this motion. That provision, however, applies to only: 1) a motion to compel compliance; or 2) a prevailing Plaintiff against a Defendant who was the subject of a Department of Administration Opinion that the Defendant did not act in conformity with. There is no reference to a Department of Administration Advisory Opinion regarding Rice County, eliminating the second provision. With respect to the first provision, the present motion is *not* a motion to compel compliance with the MGDPA. Rather, it is quite plainly

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labeled as a Motion to Suspend the Destruction of Election Materials. Plaintiffs are not entitled to attorney's fees under the MGDPA, as the present motion is not an action to compel compliance with the MGDPA but rather one to seek an order of the Court compelling the Defendant to deviate from Minn. Stat. §§ 204B.40, 138.163-138.21 and the Minnesota Records Retention Schedule for Counties.

CONCLUSION

The Plaintiffs' Motion for an Order suspending the destruction of election materials must be denied. Plaintiffs have produced no evidence that the Defendant and her designee have failed to produce any existing public data responsive to their requests. They have failed to meet the Dahlberg factors of establishing irreparable harm, or any harm, the likelihood of success on the merits, or that any statute supports their argument. To the contrary, the Defendant has shown that she is likely to prevail on the merits, that Rice County will suffer harm, and that applicable statutes support the actions taken by the County.

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RATWIK, ROSZAK & MALONEY, P.A.

Dated: 9/6/2022

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