STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: Other/Misc.

Tony Webster,

Plaintiff,

v.

The City of Bloomington,

Defendant.

Case No. 27-CV-15-10552
(The Honorable Laurie J. Miller)

CITY OF BLOOMINGTON'S RESPONSE TO BRIEF OF AMICI CURIAE PUBLIC RECORD MEDIA, THE MINNESOTA COALITION ON GOVERNMENT INFORMATION AND MR. WILLIAM BUSHEY

INTRODUCTION

The amici spend the entirety of their brief arguing that the MGDPA requires that the City provide metadata to members of the public for both inspection and copying. Whether a public entity must provide metadata is far from settled under the MGDPA, and its language suggests otherwise. But, more importantly, the amici's brief misses the point: as the City detailed in its memorandum in opposition to Webster's motion, this Court need not determine whether a public entity must provide metadata because the City allowed Webster to inspect metadata and offered Webster the ability to receive PDF copies of it.[1] And even the amici themselves agree with the City on one point: if the City makes electronic documents available to members of the public in native format—which the City did for Webster—then the City has fulfilled its obligations under the MGDPA with respect to inspection. The amici do not address the MGDPA's language regarding copies of electronic documents, presumably because its language is unhelpful. In particular, the MGDPA is clear that public entities may provide copies of electronic documents

[1] As the City detailed in its response memorandum, Webster did not ultimately seek copies from the City.

in an electronic format, but it does not require *copies* to be in native format. Thus the amicus brief should not alter this Court's analysis and it does not support Webster's motion.

ARGUMENT

I. WHETHER A PUBLIC ENTITY IS REQUIRED TO PROVIDE METATDATA IS FAR FROM SETTLED, PARTICULARLY BECAUSE THE MGDPA'S DEFINITION OF "DATA" DOES NOT INCLUDE METADATA.

Although the amici spend the majority of their brief arguing that the MGDPA requires public entities to allow members of the public to inspect metadata, the issue is far from settled. Indeed, as the City detailed in its response to Webster's motion, the MGDPA itself does not define "data," and the Minnesota Supreme Court has not addressed the issue. A strong argument can be made that metadata is not government data given the MGDPA's definition of "government data," which is "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. Metadata is not collected, created, received, maintained, or disseminated by a government entity itself. Instead, it is information that is automatically created by the computer programs themselves. The City does not take any affirmative steps to collect, create, receive, maintain, or disseminate metadata. Under these circumstances, the governmental unit plainly did not "collect," "receive," or "disseminate" metadata as it was generated by the software itself, and the words "create" and "maintain" both require some conscious choice by the City. *See Laabs v. Chicago Title Ins. Co.*, 241 N.W.2d 434, 439 (Wis. 1976) (construing the word "create" to refer to "a conscious, deliberate causation or an affirmative act"); *Sims v. Sperry*, 835 P.2d 565, 570 (Colo. App. 1992) ("Generally, the term 'created' has been construed to require a conscious, deliberate, and sometimes affirmative act 'intended to bring about the conflicting claim,' in contrast to merely an inadvertent or negligent act."); *In re Klein*, 9 F. Supp. 57, 60 (D. Minn. 1934) ("To maintain is to carry on; to continue. It contemplates some

affirmative act on the part of someone before the matter affecting the debtor or his property is finally terminated."). Thus, the metadata is not government data as contemplated by the MGPDA. *See State v. City of Clearwater*, 863 So. 2d 149, 155 (Fla. 2003) ("The fact that mail logs and phone records are *purposely compiled and maintained* by an agency distinguishes them from e-mail headers, which are by-products of the employee's use of the agency's e-mail system, and are neither *purposely* compiled nor maintained in the course of an agency's operations.") (emphasis in original). Although each of these cases—*Labbs*, *Sims*, *Klein*, and *City of Clearwater*—was cited and quoted in the City's September 29, 2015 responsive brief, none of them are mentioned, let alone distinguished, in the amici's October 20, 2015 brief.

Furthermore, the cases that the amici cite to support their argument that the MGDPA requires public entities to allow the inspection of and copies of metadata are irrelevant. As an initial matter, they are based on interpretations of other states' public-information laws and do not interpret the particular language of the MGDPA. "Minnesota has a unique approach to handling access to public records." Margaret Westin, "The Minnesota Government Data Practices Act: A Practitioner's Guide and Observations on Access to Government Information," 22 Wm. Mitchell. L. Rev. 839, 840 (1996). And even if their reasoning were applicable to the MGDPA, their holdings are relatively narrow and, in some cases, do not apply to all of the metadata that the amici suggest should be made available to members of the public under the MGDPA. For example, in *Lake v. City of Phoenix*, the Arizona Supreme Court narrowly held that the metadata of particular public records that are otherwise sought is subject to disclosure:

> We accordingly hold that when a public entity maintains a public record in an electronic format, the electronic version of the record, including metadata, is subject to disclosure under our public records law.

218 P.3d 1004, 1008 (Ariz. 2009). The court did not conclude that metadata alone constituted "data" or a "public record," and, in fact, made a point of stating that metadata "does not stand on

its own." *Id.* Similarly, the court in *O'Neill v. City of Shoreline* concluded that metadata associated with a document otherwise required to be provided to a member of the public was also subject to disclosure. 240 P.3d 1149, 1154 (Wash. 2010); *see also Scott v. Southeastern Penn. Transp. Authority*, 2012 Phila. Ct. Com. Pl. LEXIS 471, at *15 (Phila. Ct. Com. Aug. 3, 2012) (discussing metadata associated with particular records already requested). In *Irwin v. Onondaga County Resource Recovery Agency*, the New York Supreme Court concluded that New York's public information law required the public entity to provide a copy of "system" metadata. 72 A.D.3d 314, 322 (N.Y. 2010). But the court was clear that its decision did not address "substantive" or "embedded" metadata. *Id.* Thus none of those cases stand for the proposition that metadata on its own constitutes "data" under the MGDPA or that a government entity is required to provide all types of metadata for all data requests.

Overall, the MGDPA may not require public entities to allow members of the public to inspect metadata. Regardless, this question and the amici's entire argument is ultimately irrelevant, because the City provided Webster with access to metadata for inspection and, had he requested it, Webster could have received paper copies or PDFs of it as well.

II. EVEN IF THE MGDPA REQUIRES THE CITY TO ALLOW MEMBERS OF THE PUBLIC TO INSPECT METADATA, THE CITY ALREADY ALLOWED WSEBSTER TO DO SO BY ALLOWING HIM TO INSPECT DATA IN NATIVE FORMAT—THE FORMAT THAT THE AMICI SAY WAS REQUIRED.

Although the amici submitted their brief in support of Webster, key portions of their argument advance the City's position. In particular, the amici assert that making electronic documents available in their original or native format allows for inspection of metadata:

- "This reality has led courts in four states to hold under state freedom-of-information laws that public records must be produced in their native format to

enable public *inspection* of these records' metadata." (Amici Br. at 4 (emphasis added).)

- "*Inspecting* metadata thus requires access to electronic documents in their 'native format.'" (Amici Br. at 8 (emphasis added).)

The amici's position is consistent with at least one of the cases they cite regarding metadata: "Only when an electronic document is produced in its 'native' form can metadata be disclosed." *Irwin*, 72 A.D.3d at 321-22. The amici (and the *Irwin* court) contrast inspection of native or original documents with "hard-copy printouts," "paper printouts," "an imaged file," and "screen printouts." (*See* Amici Br. at 6, 8.) Here, the City allowed Webster to inspect the electronic data he requested in its original, native format. The amici do not point to anything more that the City was required by the MGDPA to do related to Webster's inspection.

Furthermore, the amici do not address whether the MGDPA required the City to provide Webster what he demanded of the City and what he continues to seek today with respect to his inspection: that he be allowed to inspect the electronic data on his own personal computer equipment or that the City have additional software to allow him to perform detailed searches of the data. The amici likely do not address Webster's argument because the MGDPA does not support it. (*See* Response Br. at 14-17 (explaining that the MGDPA's discussion of inspection on a member of the public's own equipment is a requirement only when that member of the public is inspecting the data on a remote access basis and that the MGDPA does not require a public entity to provide a computer for inspection that contains equipment with specifications from the member of the public).) In short, even if the MGDPA requires public entities to allow members of the public to inspect metadata, the City already did so by allowing Webster to inspect native

copies of the electronic documents, which even the amici agree allows for the inspection of metadata.

III. CONTRARY TO THE AMICI'S ASSERTION, THE MGDPA DOES NOT MANDATE THAT PUBLIC ENTITIES ALLOW INDIVIDUALS TO RECEIVE COPIES OF ELECTRONIC DOCUMENTS IN NATIVE FORMAT.

Although the amici argue that the MGDPA requires that public entities provide members of the public with copies of electronic data in their native format, the language of the MGDPA demonstrates why the amici are incorrect. The amici seek support for their assertion that the MGDPA requires public entities to provide native copies of data, including metadata, in Minn. Stat. § 13.01, subd. 3, which states that "government data are public and are accessible by the public for both inspection and copying." (*See* Amici Br. at 15.) But while Minn. Stat. § 13.01, subd. 3, provides that general guidance, Minn. Stat. § 13.03 details the particular requirements that public entities must follow in fulfilling that general purpose. As the Minnesota Supreme Court recently reaffirmed, "the principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling is well settled." *Connexus Energy v. Comm'r of Revenue*, 868 N.W.2d 234, 242 (Minn. 2015) (internal quotation omitted); *see also* Minn. Stat. § 645.26 subd. 1 ("When a general provision of the law is in conflict with a special provision of the same or another law, the two shall be construed, if possible, so that effect may be given to both."). Indeed, one of the cases cited by the amici provides a clear example of how the Minnesota Supreme Court has relied upon this canon of construction when interpreting potentially-conflicting provisions of the MGDPA. In *Westrom v. Minnesota Department of Labor & Industry*, the Supreme Court concluded that the language of Minn. Stat. § 13.39, subd. 2 "prevails" over "the general provisions of Minn. Stat. § 13.02 subds. 3 and 13" because "it deals specifically with the subject of civil investigative data." 686 N.W.2d 27, 36 (Minn. 2004). This

canon applies even where "the general and the specific provisions 'exist side by side,' *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, — U.S. —, 132 S.Ct. 2065, 2071, 182 L.Ed.2d 967 (2012), and the 'two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme],' *HCSC–Laundry v. United States*, 450 U.S. 1, 6, 101 S.Ct. 836, 67 L.Ed.2d 1 (1981) (per curiam). *Id.*

Here, as the City detailed in its response to Webster's motion, the MGDPA states clearly that when a government entity maintains data in a computer storage medium, it must provide a copy of the data "in electronic form." *See* Minn. Stat. § 13.03, subd. 3(e); *see also* Response Br. at 17-20. Although the MGDPA does not define "electronic form," other Minnesota statutes make clear that PDFs—which the City offered to provide to Webster—meet the legislature's definition of electronic form. (*See* Response Br. at 17-20.) The amici do not address this language, likely because there is simply no way around it. Had the legislature intended for public entities to provide electronic copies of documents in their native format, it could have so stated. The MGDPA does not require public entities to provide copies of electronic data to members of the public in native format, or in whatever format they choose. Instead, it allows public entities the discretion to select the appropriate electronic format. The City's choice to offer Webster to inspect PDFs does not amount to a violation of the MGDPA.

CONCLUSION

The brief submitted by the amici is ultimately irrelevant to the questions that this Court must address: (1) did the MGDPA require the City to allow Webster to inspect the native documents it provided to him on his own computer equipment; and (2) did the MGDPA require the City to provide *copies* of the electronic data to him in native format? Without assistance from the amici, this Court can determine that the answer to both questions is no. The City complied

with its obligations under the MGDPA and this Court should deny Webster's motion and dismiss his action.

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The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.

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