

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

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Tony Webster,

Court File No.: 27-CV-15-10552

Plaintiff,

v.

**ORDER AND  
MEMORANDUM**

The City of Bloomington,

Defendant.

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The above-entitled matter came before the Honorable Laurie J. Miller on October 28, 2015, for hearing on Plaintiff Tony Webster's motion to compel, or in the alternative, for summary judgment. E. Casey Beckett, Esq., appeared on behalf of Plaintiff. Jenny Gassman-Pines, Esq., appeared on behalf of Defendant.

Based upon the arguments of counsel and all of the files and proceedings herein, the Court makes the following:

**ORDER**

1. Plaintiff's motion to compel is **DENIED**.
2. Plaintiff's alternative motion for summary judgment is **DENIED**.
3. Defendant's request for judgment of dismissal is **DENIED**.
4. The Memorandum below is incorporated herein.

**BY THE COURT:**



Dated: January 26, 2016

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The Honorable Laurie J. Miller  
Judge of Hennepin County District Court

## MEMORANDUM

### I. Introduction and Procedural Background

This lawsuit arises out of Plaintiff Tony Webster's request that Defendant City of Bloomington produce a variety of data pertaining to a protest organized by the group Black Lives Matter Minneapolis at the Mall of America in December 2014. Webster made his request under the Minnesota Government Data Practices Act ("MGDPA"). The City began producing responsive data to Webster on a rolling basis beginning on February 20, 2015. Webster appeared to review a second production of responsive data on March 6, 2015. Webster failed to appear for other scheduled dates of inspection, and complained that the City was not producing all responsive data, including metadata. After an exchange of correspondence between counsel for the City and for Webster, Webster chose to commence this lawsuit instead of continuing to review the responsive data gathered for him by the City.

Webster's lawsuit contains two causes of action. Count 1 alleges that the City has violated the MGDPA by not producing all data sought by Webster and seeks an injunction barring further violation by the City. Count 2 seeks a declaratory judgment that the City must produce all data responsive to Webster's MGDPA request, including metadata.

Presently pending before the Court is Webster's motion to compel the City to produce all data responsive to his MGDPA request. In the alternative, Webster has suggested that summary judgment in his favor would be appropriate. The City opposed the relief sought by Webster, arguing that it gathered all responsive data, including metadata and that Webster chose to abandon his review by declining to appear on scheduled dates for inspection. To the extent that the Court might choose to view Webster's motion as a dispositive motion, the City asked the Court to dismiss Webster's lawsuit in its entirety.

## II. Factual Background

### A. Webster's December 23, 2014 MGDPA Request

Tony Webster is a public records researcher, software engineer, and an active member of a group advocating for open data and more transparency in government. Affidavit of Tony Webster (“Webster Aff.”) at ¶ 1. On December 23, 2014, Webster submitted a request to the City under the MGDPA, seeking 22 separately-numbered categories of data generally relating to the “Black Lives Matter” protest held at the Mall of America on December 20, 2014. Webster Aff. ¶¶ 5-6. (A copy of the request is attached as Exhibit A to the Complaint.) Webster stated that his request was for purposes of “news gathering and research,” not commercial purposes. *Id.* at ¶ 8. He asked for data to be produced, regardless of its physical form. *Id.* at ¶ 7. For electronic data, he asked to inspect it in “its original electronic form.” Compl., Exh. A at 1. The first numbered request sought “[a]ny and all data regarding or relating to” the protest, and stated that it “specifically includes but is certainly not limited to” 16 separately-lettered subcategories of data. *Id.* at 2. Those subcategories specified words and phrases such as “Black Lives Matter,” “protest,” “mall,” and “MOA,” which the City should use in searching all of its data, such as its communications, emails, letters, voicemails, and files. *Id.* Those subcategories also specifically sought “law enforcement data” relating to the Mall of America on or after December 20, 2014. *Id.*

The subsequent numbered requests went on to request all data or communications sent to or from Bloomington City Attorney Sandra Johnson, including (without date or subject matter limitation) her complete email box, her calendar and schedule, her voicemails, text messages, and call logs. *Id.* at 3-4. Webster sought all call logs associated

with certain telephone numbers, a list of all City of Bloomington email addresses or accounts, and all emails sent to or received by the Mayor or Council Members from December 10, 2014 through December 23, 2014. *Id.* at 4. Webster sought all criminal charging data regarding charges of rioting or unlawful assembly from January 1, 2000 to the present. *Id.* Webster also included a number of other general requests, some connected to the Mall of America, and others not. *Id.* at 4-5. Webster stated that he expected the City to search databases, server email stores, paper files, and electronic storage systems, based on keywords, individual names, and other specific terms. *Id.* at 5. He asked the City to consider his request to be “a standing request through July 15, 2015,” and he asked to be notified “when new responsive data was collected, created, received, maintained, or disseminated.” *Id.* The Court’s summary of Webster’s request is not meant to be exhaustive, but rather to illustrate the scope and breadth of the data requested.

**B. The City First Produces Data for Webster’s Inspection on February 20**

City Clerk Janet Lewis began coordinating the City’s response to Webster’s request. According to Lewis, who has coordinated the City’s response to MGDPA requests since she became City Clerk in August 2011, this was the most extensive MGDPA request she had ever received. Affidavit of Janet Lewis filed on September 28, 2015 (“Lewis Aff.”), at ¶ 3. Lewis acknowledged receipt of Webster’s request in an email sent to him on December 26, 2014. *Id.* at ¶ 6. City employees began investigating Webster’s public online profile to determine if he was a subject of the data requested, as the MGDPA establishes different response times for a subject (10 days) as opposed to someone who is not a subject (a “reasonable” time). *Id.* at ¶ 7. *See* Minn. Stat. § 13.04, subd. 3. Throughout January and February, Lewis met with City employees in departments that potentially had responsive

data, and she sent an email following up on her inquiries about responsive data. Lewis Aff. at ¶ 8. Lewis estimated that several staff members spent 20-40% of their time on a weekly basis to collect and prepare the data responsive to Webster's request. *Id.* at ¶ 11.

On February 3, 2015, Lewis emailed Webster to ask if he wanted to wait until all data had been assembled before beginning his inspection, or if he would prefer a "rolling production" to begin earlier, given the large quantity of responsive data. Lewis Aff. at ¶ 9. On February 4, 2015, Webster replied that he preferred a rolling inspection. *Id.* On February 12, 2015, Lewis advised Webster that the first set of responsive data would be available for his inspection on February 20, 2015, from 9:00 a.m. to 4:00 p.m. *Id.* at ¶ 10.

When Webster arrived for the inspection on February 20<sup>th</sup>, Lewis provided him with a chart showing the categories of data that were being provided for him to review. The data itself was contained in four bankers boxes of paper files, emails from several different custodians, and a thumb drive with additional documents that were produced for Webster to inspect. Lewis Aff. at ¶ 10. The City provided a desktop computer for Webster to use in inspecting the electronic data. *Id.* at ¶ 12. The City assigned a monitor to sit in the inspection room with Webster, while he reviewed the City's original paper files and electronic documents on the City-owned computer. *Id.* at ¶ 13. Webster has asserted that the computer provided for his use had "multiple technical limitations and restrictions" that prevented his full inspection of the data. Webster Aff. at ¶ 12. He asked to use his own equipment, but the City would not permit him to do so. *Id.* at ¶ 13. According to the City's expert, Jerry DeWees, the desktop computer provided by the City to Webster allowed him to review the metadata for each email and attachment provided for his inspection. Affidavit of Jerry DeWees filed on September 28, 2015, at ¶ 8. DeWees further stated that allowing a

member of the public to inspect electronic data on a government entity's computer network, or to download and keep native files on outside computer equipment, would pose a security risk to the government entity. *Id.* at ¶ 11.

After the February 20<sup>th</sup> inspection was completed, the City discovered that some private, non-public, and privileged data had been provided to Webster inadvertently, due to a technical error. Affidavit of Anna Sullivan filed on September 28, 2015 (“Sullivan Aff.”), at ¶ 10. The City removed that data from the files prepared for Webster to review before Webster's second scheduled inspection. *Id.*

### **C. Webster's Second Inspection Occurs on March 6, 2015**

At 5:00 p.m. on Friday, February 20, 2015, Webster emailed Lewis that he appreciated the City's “considerable effort” in responding to his request. Lewis Aff. at ¶ 17. He said the volume of data produced “was not possible to get through today” and requested Lewis to offer future days and times for him to continue his inspection. *Id.* at Exh. 4. He indicated that he had not been able to listen to voicemails on the equipment provided, and asked for that problem to be remedied at his next inspection. *Id.* at ¶ 18. At 8:40 a.m. on Monday, February 23, Lewis replied that Webster would be able to listen to the voicemails at his next inspection during the week of March 2, and that all data previously provided would remain intact and complete for his upcoming inspections. *Id.* at ¶ 19 and Exh. 4. Lewis also replied to a question Webster posed about the costs of copying some portion of the data that was produced. *Id.*

Webster responded that same day, February 23, with an email confirming March 2 and March 6 for his next inspection dates. Lewis Aff. at Exh. 4. He also indicated that he had been unable to inspect all of the emails produced to him because of the “restricted

system” set up for his inspection on February 20. *Id.* at ¶ 19. He rejected the idea of printing out the emails, because printing them would eliminate “important metadata or attachments.” *Id.* at Exh. 4. This was Webster’s first reference to “metadata.” He did not define the “metadata” he was worried would be lost if the emails were printed out. His follow-up example of what he sought specified that he had seen an email with several photos attached, which he feared “wouldn’t come through well if printed.” *Id.* He asserted that he had the right to inspect the emails using his own equipment, but because he was willing to be flexible, he would agree to have them copied to “a USB stick” for his use. *Id.*

The City was ready to produce more data for Lewis to inspect on March 2, but that morning Webster emailed that he could not come, due to a sick family member. Lewis Aff. at ¶ 20 and Exh. 4. On March 3, Webster emailed Lewis a letter complaining that the emails produced to him on February 20 were in a form that did not permit him to open attachments, to listen to audio files, or to see “important metadata” that is part of the emails. *Id.* at ¶ 21 and Exh. 6. He did not define or give examples of the metadata he wished to see, but was unable to see. He objected that he was not permitted to inspect the data using his own equipment. *Id.* He proposed that the City copy the responsive emails onto a USB thumb drive, for him to inspect without the City’s software restrictions and limitations. *Id.* While Webster asserted that he should not be charged under the MGDPA for the copy he requested, because he asserted the copy was necessary for him to inspect the electronic data being produced by the City, he offered to pay up to \$100 for any copying costs. *Id.*

On March 4, City Attorney Sandra Johnson responded to Webster’s March 2 letter. Lewis Aff. at ¶ 22 and Compl. Exh. D. Johnson disagreed with Webster that the MGDPA entitled him to receive all documents in their original form for the purpose of accessing

metadata. *Id.* Johnson stated that attorney emails and other documents may not be produced in their original form, due to the lawyers' ethical obligations. *Id.* On March 4, Lewis sent a separate letter to Webster, summarizing the data compiled for Webster's inspection on February 20 and March 2. Lewis Aff. at ¶ 23 and Compl. Exh. E. Lewis confirmed that the City-owned laptop on which Webster would be permitted to inspect the electronic data would provide him with the capability to inspect that data, including audio files and email attachments. *Id.* Lewis provided a cost estimate for providing copies of emails to Webster in either hard copy format or electronically through PDFs. *Id.*

The City arranged the next document inspection for Webster to take place on March 6, 2015. Lewis Aff. at ¶ 24. Webster was there for approximately eight hours, and Lewis provided supervision for the inspection. *Id.* at ¶ 25. Lewis described Webster as argumentative and combative for at least the first twenty minutes of his inspection. *Id.* After the first hour, Lewis and Webster did not talk. *Id.* at ¶ 26. Webster asserted that the computer provided for him on March 6 was "a different, more difficult to use, computer screen" with "many of the same technical limitations and restrictions" that he had encountered on February 20. Webster Aff. at ¶ 19. He also found what he believed to be evidence of potential destruction or concealment of responsive data. *Id.* at ¶ 21.

Webster's next document inspection was scheduled for March 16, 2015. Lewis Aff. at ¶ 27. This inspection responded to a second request by Webster, which included a request for data of which Webster was the subject. *Id.* Webster did not appear on March 16 for the inspection. *Id.* In the afternoon of March 16, Lewis emailed Webster to inquire if he wished to reschedule the inspection for a later date. *Id.* Webster did not respond. *Id.* He never returned to the City for any additional data inspections. *Id.* He stated that he determined he



needed legal counsel to help him to enforce his right to inspect the responsive data. Webster Aff. at ¶ 28. When the City heard nothing further from Webster for 30 days, the City considered Webster’s MGDPA request to be closed, pursuant to what Lewis described as its “typical MGDPA protocol.” Lewis Aff. at ¶ 28.

**D. Lawyers Become Involved – June 4, 2015 Demand Letter and June 10, 2015 Response.**

On June 4, 2015, an attorney for Webster sent a letter to Johnson and to the City Manager, Jamie Verbrugge, asserting that the City had violated the MGDPA by withholding metadata and refusing to provide data responsive to Webster’s request in electronic form. Lewis Aff. at ¶ 29. The letter demanded that Webster be permitted to inspect all data, including metadata, in its original and native format, and that Webster be allowed to download it onto his own computer in his preferred format. *Id.* at Exh. 7. The letter also demanded that the City provide a log of any withheld data. *Id.* The letter stated that if the City did not provide access to the data by June 11, 2015, Webster would pursue legal action against the City. *Id.* On June 10, 2015, Johnson responded with a letter stating that the City was requesting an opinion from the Information Policy Analysis Division (“IPAD”) regarding its obligations to Webster, given his failure to appear for scheduled inspections and his silence for over three months following his March 6 inspection. *Id.* at ¶ 30 and Exh. 8.

On June 19, 2015, Webster commenced this action by serving the Summons and Complaint upon the City. Thereafter, IPAD notified the City that it would not respond to the City’s request while the lawsuit was ongoing. Sullivan Aff. at ¶ 13. The City answered the Complaint on July 9, 2015, and on August 26, 2015, Webster filed this motion, seeking to compel the City to allow access to the data he requested under the MGDPA. In the

alternative, if the Court were to determine that the relief sought by Webster is most appropriately ordered under Minn. R. Civ. P. 56, Webster asked the Court for summary judgment on his claim that the City had violated the MGDPA, Minn. Stat. § 13.01, *et seq.* Webster's motion was heard on October 28, 2015.

### **III. Standard Governing a Summary Judgment Motion**

While filed as a "motion to compel," Webster's motion in effect seeks the relief he sought through his Complaint – namely, a determination that the City violated the MDGPA by not providing all data and metadata responsive to his data request, as well as a ruling that the data and metadata must be provided in the manner and format sought by Webster. Because the motion seeks a ruling on the ultimate issues posed by the lawsuit, the Court deems it to be a motion for summary judgment, and applies the standard applicable to dispositive motions under Rule 56 of the Minnesota Rules of Civil Procedure.

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. In deciding a motion for summary judgment, the trial court does not resolve fact issues, but rather determines whether genuine issues of material fact exist. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). A fact is deemed material for summary judgment purposes if its resolution will affect the outcome of the case. *O'Malley v. Ulland Brothers*, 549 N.W.2d 889, 892 (Minn. 1996).

Summary judgment is the proper remedy where the facts are not in dispute and where the decision is made on questions of law only. *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 897 (1965). Summary judgment is "intended to secure a just, speedy, and inexpensive

disposition,” but “it is not intended to afford a substitute for trial where there are issues to be determined.” *Id.* (citing *Sauter v. Sauter*, 70 N.W.2d 351 (Minn. 1955)). In light of the presence of multiple disputed fact issues, which are apparent from the parties’ competing submissions, the Court cannot grant the relief sought by Webster, nor can it dismiss Webster’s lawsuit as requested by the City, for the reasons discussed below.

#### **IV. Analysis**

Webster brought his motion seeking a finding that the City violated the MGDPA by its incomplete past production of data in response to Webster’s request. He asked the Court to compel the City to comply with the MGDPA by producing all of the data he has requested in the format he has demanded. The City responded that it had complied with the MGDPA by producing both data and metadata, but that Webster effectively abandoned his request before the City completed its production of data responsive to his massive request. Accordingly, the City asked the Court to dismiss the Complaint, contending that it did not violate the MGDPA. The Court finds that disputed issues of material fact exist, and that neither party is entitled to judgment as a matter of law.

##### **A. MGDPA**

The MGDPA is codified at Chapter 13 of the Minnesota Statutes. It classifies data created and collected by various state and local government entities in connection with the myriad functions which they perform, and sets rules for public access to such data.

Chapter 13 regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities. It establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.

Minn. Stat. § 13.01, subd. 3. The purpose of the MGDPA is to “reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing.” *KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 788 (Minn. 2011).

Webster contends that, as a matter of law, the MGDPA requires the City to produce its electronic data in the format that he has requested, for him to review both the substantive data and all of its accompanying metadata. He asks the Court to declare that he has a right to access all data responsive to his request, including all metadata, regardless of its format or description, and that he be allowed to perform the inspection using his own equipment or, alternatively, by requiring the City to provide necessary and sufficient equipment or software to inspect the responsive data in the manner he wishes. He also asks the Court to find that the City improperly withheld metadata from his inspection, and that the City covertly deleted responsive data from its second production. Webster seeks to compel Defendants’ compliance with the MGDPA under Minn. Stat. § 13.08, subd. 4, which permits an “aggrieved person” to enforce his right to obtain access to government data by having a court “compel compliance” with the MGDPA by the entity maintaining government data subject to the MGDPA.

#### **B. Government Data and Metadata**

The MGDPA defines “government data” as “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. While the term “metadata” appears nowhere in the MGDPA, Webster argues that the requested data, as well as all associated metadata, are “government data” under the MGDPA, Minn. Stat.

§ 13.02, subd. 7, because the MGDPA does not condition or limit access to inspect government data on the physical form of that data. In addition, the statute states that the person requesting government data “shall be informed of the data’s meaning.” Minn. Stat. § 13.03, subd. 3(a). Webster asserts that access to metadata is necessary for him to fully understand the meaning of the electronic data he has requested, because the metadata is what could enable him to learn when electronic files were created, how they were created, when they may have been changed or moved, and, in the case of files he could not open, what they contained.

Neither side identified any Minnesota case law defining or addressing the status of metadata under the MGDPA. To the best of the Court’s knowledge, there is none. Instead, Webster cited several cases from other jurisdictions, which he asked the Court to find persuasive in finding that statutes providing public access to government data require access to metadata as well as data. *See, e.g., Lake v. City of Phoenix*, 207 P.3d 725 (Ariz. Ct. App.), *vacated in part*, 218 P.3d 1004 (Ariz. 2009); *O’Neill v. City of Shoreline*, 240 P.3d 1149 (Wash. 2010); *Irwin v. Onondaga Cnty. Res. Agency*, 72 A.D.3d 314 (N.Y. App. Div. 2010); *Fagel v. DOT*, 991 N.E.2d 365 (Ill. App. Ct. 2013). The City sidestepped this argument, and instead contended that it provided Webster with access to metadata as well as data on both dates when he came to inspect the City’s information. Webster countered that he believed he had been denied access to all of the metadata he wanted to see. He questioned the conclusions reached by the City’s computer expert, DeWees, that full metadata access was provided by the City. Webster argued that DeWees was granted broader access rights than the rights provided to Webster during his February 20 inspection.

On the present record, the Court finds that the metadata issue presents a factual question, not a legal question. The City has not asked the Court to find that metadata falls outside the scope of the MGDPA. Notwithstanding Webster's argument that the Johnson letter of March 4, 2015 (Exh. D to the Complaint) asserted that metadata was not covered by the MGDPA, the City's position in this litigation does not mirror the argument made in the Johnson letter. In response to Webster's motion, the City argued that it did provide complete access to its metadata to Webster. Webster disagrees. The Court finds that the issue of whether metadata was provided presents a genuine issue of material fact which cannot be resolved on a dispositive motion.

**C. The Status of Webster's Request – Continuing or Abandoned?**

Another hotly disputed factual issue is whether Webster abandoned his request by failing to appear at the inspection scheduled for March 16, or to communicate with the City about his inspection for 30 days thereafter. Webster argued that because his original request stated that it was a "standing request through July 15, 2015," the City should have deemed that it remained open at least through that date. The City stated that when Webster failed to appear for scheduled inspections on March 2, 2015 and March 16, 2015, and then failed to communicate with the City to set up another inspection date for 30 days, the City considered the request to be closed, under its "typical MGDPA protocol."

Whether Webster's original request was continuing or abandoned is not a question that can be resolved on summary judgment. At oral argument, the Court inquired whether Webster could, in effect, resurrect his request by simply asking the City to recommence its production of the data he requested. The City did not agree with that procedure. Because the City deemed Webster's request to be closed, it argues it was not required to maintain,

indefinitely, the set of data he requested. Webster could, of course, make a new request, and the City would be required to respond to that in due course, but the City objected to going back to “do over” its response to Webster’s original request.

The issue of whether Webster’s original request was open or closed, and if closed, whether it could be reopened after having been closed for many months, presents another genuine issue of material fact, which the Court cannot resolve on a dispositive motion.

**D. The City’s Withdrawal of Material Claimed to be Privileged**

Webster suggested that the City improperly withdrew from the data gathered for his inspection certain items which were present on February 20, which had been removed from the dataset when he returned on March 6. The City responded that the data gathered on February 20 inadvertently included material protected by the attorney-client privilege, and that an inadvertent disclosure of privileged material does not necessarily waive the privilege. When the City discovered that material it believed to be privileged had been included in the dataset produced for Webster’s inspection on February 20, it removed that material before the next inspection date. Webster responded that the City should have to certify which data was withheld and segregate it for an *in camera* review by the Court.

The Court is not in a position, on the present record, to find as a matter of law that the City violated the MGDPA by withdrawing from its production materials which it claims are privileged. Once again, the issue presented raises a genuine issue of material fact, which the Court cannot resolve on a dispositive motion.

**E. Webster’s Desire to use his own Equipment**

Webster argued that the City’s refusal to allow him to use his own computer equipment to inspect the City’s electronic data somehow impaired his ability to access the

metadata. The City's expert, DeWees, asserted in his affidavit that Webster had full access to the metadata associated with the electronic files provided for his inspection on February 20 and March 6. Webster responded that DeWees appeared to have been given broader access than he was. He asked the Court to order that the City either provide him what he deems to be necessary and sufficient equipment and software to inspect the responsive data, or that it allow him to inspect the data using his own equipment. The City responded that it has legitimate concerns about data security if outsiders were to be allowed to bring in their own equipment to inspect and access government data. The City also objected to Webster's request to install outside software on the City's computer, for purposes of his data review.

This issue, like the first issue discussed above, centers on the factual dispute of whether or not the City provided metadata to Webster. If the City is correct in its assertion that Webster was given full access to metadata, then Webster has little basis for claiming he should have been allowed to use his own equipment or software, instead of that provided by the City. On the record before the Court, this issue presents a genuine issue of material fact, which cannot be resolved on a dispositive motion.

## **V. Conclusion**

Plaintiff has not shown that he is entitled, as a matter of law, to compel the City to produce additional data under the MGDPA. He has not demonstrated the absence of any genuine issue of material fact as to whether the City failed to provide metadata, whether the City improperly deemed his request to be closed when he stopped coming to scheduled inspections and failed to follow up to schedule any future inspections, whether the City improperly withdrew material claimed to be privileged from inspection, or whether he has a right to insist on using his own equipment to inspect the City's electronic data. Disputed fact



issues are present regarding all of these issues. Therefore, Plaintiff's motion to compel, which the Court has construed as a motion for summary judgment, is denied. Defendant's responsive request that the Court enter judgment of dismissal likewise is denied.

L.J.M.