

**NO. A14-1957**

State of Minnesota  
In Supreme Court

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KSTP-TV,

Respondent,

vs.

Metropolitan Council,

Petitioner.

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**RESPONSE OF KSTP-TV TO METROPOLITAN  
COUNCIL'S PETITION FOR REVIEW**

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**TO: The Supreme Court of the State of Minnesota**

Respondent KSTP-TV does not contest Petitioner's statement of the legal issue or statement of the case. For the reasons described below, however, Petitioner's request fails to satisfy the criteria of Rule 117.

The Metropolitan Council's Petition for Review rests on a flawed legal argument having no support in the language of the Minnesota Government Data Practices Act, precedent construing it, or good public policy. That argument—relied on by Petitioner from the outset of this litigation—is that the classification of government records which are public and accessible when created can later be changed to private data (often permanently) simply because the agency claims they may be related to the investigation of a complaint against an employee.

Accepting Petitioner's argument would significantly alter the careful balance that has been crafted by the Legislature over many years between privacy protections for certain personnel data on government employees and the general presumption of public access to government records that is at the core of the Data Practices Act. It would also permit government agencies almost unbridled discretion in removing public data from the sphere of public access. Petitioner's claim that review by this Court is necessary in order to "clarify" the law is in reality a plea to materially change it. Because the decision of the Court of Appeals correctly applies the provisions of the Data Practices Act and precedents of this Court governing the balance between public access and private personnel data, review is not warranted.

Though Petitioner glosses it over, the real question presented on this appeal is whether government records that are indisputably public when created can later be permanently converted into private data simply because a government agency claims that the data may be relevant to the investigation of a complaint against one of its employees. Petitioner agrees that the video recorded on Metro Transit vehicles is public data when created and collected.<sup>1</sup> But Petitioner contends that if any portion of the video is later reviewed in conjunction with the agency's investigation of an employee, that portion becomes private personnel data on the employee within the scope of Minn. Stat. §13.43. This means that if—as in the present case—no disciplinary action is taken against the employee at the conclusion of the investigation, the video segments that were examined during the investigation are permanently reclassified as private data by operation of the statute. Thus under Petitioner's view of the law, a government agency would be able to claim in the course of a personnel investigation that virtually any of its public records were related to the inquiry, and by that simple and unilateral step, thereby reclassify them as private data, a practice that could easily be manipulated to withhold what should be public information, while also producing inconsistent classifications of the same kinds of data. Petitioner has cited nothing in precedent or in the Data Practices Act that supports such an interpretation, and given that A[a]t the heart of the act is the provision that all 'government data' shall be public unless otherwise classified," *Demers v. City of*

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<sup>1</sup> At the OAH hearing below, counsel for Petitioner stated that absent a personnel investigation, video requested by a member of the public "would be pulled and it could be given to you as just public data." (Emphasis added). See Transcript of hearing before Hon. Eric Lipman, Sept. 19, 2014, at 31-32 (which is in the case record).

*Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991), Petitioner’s interpretation turns the law on its head.

Petitioner’s argument conflicts with the core definitions on which the Data Practices Act is grounded, in particular, the definition of “personnel data.” For purposes of the Act, “‘personnel data’ means government data on individuals maintained because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity.” §13.43, subd. 1 (emphasis added). But as Petitioner acknowledged below and the Court of Appeals recognized, the surveillance recordings made on Metro Transit vehicles are not simply (or even principally) obtained for employee management purposes.<sup>2</sup> Instead, the recordings can serve a multitude of functions. Considering the diversity of the images captured by the video, the fact that all of the video is routinely preserved for a period of time by Metro Transit, and the many uses to which it may be put, it is evident that the recordings cannot fairly be described as data “maintained because the [driver] is or was an employee” of the agency—the statutory standard that must be satisfied.

If indeed the recordings were mainly focused on the drivers and obtained to monitor their performance, then all of the bus video—whether “pulled” to investigate a personnel complaint or not—would have to be considered private personnel data since under §13.43, personnel data is private unless specifically listed in the statute as being

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<sup>2</sup> At the OAH hearing, in response to questions from the Administrative Law Judge, counsel for Petitioner said “Yeah, I don’t dispute that the videos are on and they record for, you know, various reasons,” and that it was “Correct” that “the videos generally have lots of uses and purposes.” See Transcript of OAH hearing, *supra*, at 53.

public. But Metro Transit does not normally treat the video as personnel data, even though some of it would presumably show drivers performing their duties, since it agrees that the bus video is initially classified as public data. Thus the Court of Appeals correctly concluded that the language of the Act does not permit the video to become private personnel data simply because a particular segment happens to be consulted as part of the investigation of a driver.

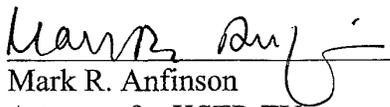
In conducting its analysis, the Court of Appeals relied on this Court's opinion in *Demers, supra*. There the Court recognized that "section 13.43 classifies some data as private in order to protect the privacy of government employees." *Id.*, at 73 (emphasis added). However, the actions of a Metro Transit bus driver when on duty are nearly always readily and publicly visible to anyone riding the bus. It is therefore difficult to see what real privacy interest is advanced by prohibiting access to a video record of those public actions, or to understand Petitioner's contention that the Court of Appeals' decision "significantly diminished" the "privacy protections afforded to public employees" (Petition, 3), especially since the "existence" of a complaint against a government employee is already classified as public data under §13.43, subd. 2(a)(4). The decision does not in any way dilute the Act's protection for sensitive information directly related to an employee that is collected as part of a personnel inquiry, and that is not already classified as public data.

This Court in *Demers* also made clear that simply because particular records are used in a personnel investigation does not by itself make those records personnel data, rejecting a simplistic approach grounded merely on how the data were used and filed, and

instead focusing on the nature and content of the data. The Court of Appeals appropriately applied that same principle to the argument made by Petitioner here, because it conflicts with the *Demers*' holding that the content and character of the data determines its proper classification, not simply whether an agency decides to review it in the course of a personnel investigation.

Operating a mass transit vehicle is important work, with considerable public safety ramifications. The Court of Appeals correctly decided that prohibiting any public access to video showing the operators performing their assigned duties in cases where a personnel complaint has been made but does not result in discipline is contrary to the express language of the statute, and elevates imaginary privacy interests above what are tangible and significant concerns related to public accountability respecting both the drivers and the management of Metro Transit.<sup>3</sup> The Petition for Review should therefore be denied.

DATED: October 13, 2015

  
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<sup>3</sup> In *Demers*, this Court based its decision in part on the “compelling need for public accountability.” 468 N.W.2d at 74.