

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Other Civil/Miscellaneous

Public Record Media,
Plaintiff,

Honorable Leonardo Castro
Court File No. 62-CV-18-4335

vs.

Minnesota Department of Employment and
Economic Development,

**DEFENDANT DEED'S
REPLY MEMORANDUM**

and

Greater MSP,

Defendants.

The Court is not bound by the legal conclusions in Plaintiff Public Record Media's (PRM) amended complaint when considering Defendant Minnesota Department of Employment and Economic Development's (DEED) motion to dismiss for failure to state a claim. *See Finn v. Alliance Bank*, 860 N.W.2d 638, 653-54 (Minn. 2015) (affirming dismissal because the complaint improperly relied on an invalid legal theory to support a claim element). Similarly, PRM cannot create disputed issues of material fact to defeat DEED's summary judgment motion by relying on the mere allegations in its amended complaint or other general assertions. Minn. R. Civ. P. 56.05. The Court should dismiss PRM's amended complaint because it is undisputed that DEED produced all the data it had responsive to PRM's data practices request and that DEED did not violate the Minnesota Government Data Practices Act.

ARGUMENT

The Court should grant DEED's motion to dismiss as to PRM's claims that a private company's records automatically become government data if a state agency has "access to" them. The Court should also grant DEED's summary judgment motion as to PRM's claims that DEED collected, created, received, maintained, or disseminated Defendant Greater MSP's (GMSP) proposal to Amazon and that GMSP contracted with DEED to perform its governmental functions. DEED fully responded to PRM's requests under the data practices act by producing the more than 7,600 responsive pages of documents it had related to Amazon's search to select a location for its second headquarters. DEED did not and could not produce Greater MSP's proposal to Amazon because DEED never received a copy. DEED's motions to dismiss and for summary judgment should be granted because PRM has not and cannot establish that DEED violated the data practices act.

I. GOVERNMENT DATA DOES NOT INCLUDE ALL DATA ACCESSIBLE TO STATE AGENCIES.

PRM undeniably claimed that GMSP's proposal is government data because DEED allegedly had "access to" it. Am. Compl. 2, 7-10, 36, 38, 44, Exs. W, Y, AA. PRM's legal theory is not recognized by Minnesota law. Without disputing DEED's legal analysis, PRM asserted that DEED mischaracterized its allegations and that it apparently no longer alleges that GMSP's proposal is public "solely because a government employee had access to it." Pl.'s Mem. 11. PRM explained that it anticipated "arguing *at the appropriate time* that it is not the downloading of individual bits of data from the Box to a desktop computer that converts such data into government data -- it is the password-enabled access granted to DEED employees by [GMSP] that makes Box data government data, by virtue of DEED's collection and receipt of the Box contents as a whole." *Id.* (emphasis added). PRM did not explain its refusal to fully address

DEED's motion at this time and, in any event, cited no legal authority for its modified legal argument.

The Court should not countenance PRM's attempt to delay these proceedings or to modify its pleaded legal theories in its response brief. Minnesota law does not recognize any theory that a private entity's data automatically becomes government data if a state agency has "access to" it, regardless if the data are password protected. Something substantially more than alleged access to or mere review of data on a computer screen must occur to convert private materials into government data that are accessible to the public. Indeed, the phrases "reviewed" and "accessible to" are not among the specific action verbs selected by the legislature when it defined government data. Minn. Stat. § 13.02, subd. 7 (2016). All the claims in PRM's amended complaint premised on the theory that government data includes any data accessible to a state agency should be dismissed as a matter of law.

II. DEED DID NOT COLLECT, CREATE, RECEIVE, MAINTAIN, OR DISSEMINATE GMSP'S PROPOSAL.

PRM does not contest DEED's legal arguments related to the definitions of received, maintained, or disseminated and that a government employee's mental impressions are not government data as a matter of law. As such, DEED's summary judgment motion should be granted in the absence of a genuine issue of material fact.

DEED filed affidavits supporting its motion to establish that it did not collect, create, receive, maintain, or disseminate GMSP's proposal. McKinnon Aff. ¶¶ 6-8; Jones Aff. ¶¶ 3, 6; Ho-Kim Aff. ¶ 6; *see also* Akason Decl. ¶¶ 2-4; Langley Decl. ¶ 4. PRM may not rest upon the allegations of its amended complaint to oppose the motion and, instead, must present specific facts showing that there are genuine issues for trial. *See* Minn. R. Civ. P. 56.05 (prohibiting party opposing summary judgment from relying on the mere averments of the party's pleadings).

“Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial.” *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

The Court should enter summary judgment because PRM failed to present admissible facts to support its speculative claim that DEED collected, created, received, maintained, or disseminated GMSP’s proposal. Instead, PRM merely reasserted its allegations without supporting the facts it claims are disputed. *See* Pl.’s Mem. 6-7. PRM also did not present any specific facts to contest DEED’s affirmation that it produced all government data responsive to PRM’s data requests long before PRM filed this lawsuit. *See* McKinnon Aff. ¶ 8; *see also* Pl.’s Mem. 12 (arguing, “What exactly constitutes data received by DEED in the Box is not timely to this motion.”).

Rather than addressing the merits of DEED’s summary judgment motion, PRM seeks to delay adjudication to conduct further discovery. As an initial matter, PRM failed to submit the required affidavit stating why it could not present facts essential to its opposition. *See* Minn. R. Civ. P. 56.06 (requiring party opposing summary judgment to submit an affidavit explaining why additional discovery is necessary). *See also* *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 919 (Minn. Ct. App. 2003) (holding “A rule 56.06 affidavit must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete the discovery to date.”). More importantly, DEED already produced more than 7,600 pages of documents responsive to PRM’s data request long before it filed this lawsuit. *See* Am. Compl. Ex. BB; McKinnon Aff. ¶ 8; Kaisershot Aff. ¶ 2.

For example, PRM attached an email chain, Exhibit CC, to its response memo that DEED had produced in response to PRM's data practices request long before it filed this lawsuit. In that email, a DEED employee explained to a city administrator that GMSP's proposal to Amazon was not being provided to any government entities, in part, based on GMSP's desire to ensure it did not become government data publicly available to GMSP's competitors. Exhibit CC does not support PRM's speculative theory that DEED received, collected, or disseminated GMSP's proposal. Exhibit CC establishes, at best, that both GMSP and DEED understood that the data practices act would apply to GMSP's proposal if received by DEED or any other government agency. There is nothing nefarious about GMSP or DEED understanding how chapter 13 operates and, moreover, nothing required GMSP to provide a copy of its proposal to DEED.

Courts should not condone discovery fishing expeditions, especially when additional discovery will not change the results of a summary judgment motion. *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982) (observing that courts should strictly refuse continuances where the party opposing summary judgment desires to engage in a fishing expedition); *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471, 477 (Minn. Ct. App. 1985) (denying continuance because additional discovery would not impact the court's ruling on the motion). DEED should not be exposed to a fishing expedition and ongoing litigation expenses just because PRM refuses to accept the indisputable fact that DEED never collected, created, received, maintained, or disseminated GMSP's proposal.

III. GMSP IS NOT DEED'S PRIVATE CONTRACTOR.

PRM's claims under Minn. Stat. § 13.05, subd. 11, should be dismissed because it failed to allege that a contract existed between GMSP and DEED or to articulate adequate facts to support its belief that GMSP performed DEED's government functions. PRM's response

conceded that it has no facts to support its contract theory by acknowledging that “the yet-to-be-determined exact nature of the relationship between the Defendants, including the existence of an express or implied contract between them, is a matter properly for discovery.” Pl.’s Mem. 10. This concession does not exonerate PRM’s failure to allege adequate facts to support its claim that a contract existed between GMSP and DEED. *See Finn*, 860 N.W.2d at 653-54 (affirming dismissal because the complaint failed to allege adequate facts to support the elements of a claim). Similarly, the Court is not bound by PRM’s legal conclusion that GMSP performed a government function on behalf of DEED. *See Walsh v. U.S. Bank*, 851 N.W.2d 598, 603 (Minn. 2014) (observing the “common-sense proposition” that a court is not bound by the legal conclusions stated in a complaint). The Court should dismiss the allegations related to PRM’s claim under Minn. Stat. § 13.05, subd. 11.

Even if the Court construes the amended complaint to state a claim, summary judgment is appropriate because PRM failed to provide factual support for its claim. This is despite DEED and GMSP submitting affidavits establishing that no contract existed between them and that GMSP received no consideration to prepare and submit the proposal to Amazon. McKinnon Aff. ¶ 5; Langley Decl. ¶ 10-12. Summary judgment is appropriate because, in the absence of an alleged contract, no claim exists under Minn. Stat. § 13.05, subd. 11. Finally, as with its other data practices act claims, PRM also failed to submit an affidavit stating why it could not present facts to support this claim. Minn. R. Civ. P. 56.06.

CONCLUSION

PRM’s amended complaint alleging that GMSP’s entire proposal to Amazon is government data because DEED had “access to” it should be dismissed because it fails to state a claim upon which relief may be granted. DEED’s summary judgment motion should be granted

because it is undisputed that DEED never collected, created, received, maintained, or disseminated GMSP's drafts or final proposal. Finally, DEED did not contract with GMSP and GMSP did not perform any functions on DEED's behalf.

Dated: November 15, 2018

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
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