

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Other Civil/Miscellaneous

Public Record Media,

Honorable Leonardo Castro

Plaintiff,

Court File No. 62-CV-18-4335

vs.

Minnesota Department of Employment and
Economic Development,**ORDER GRANTING
MOTIONS TO DISMISS AND
SUMMARY JUDGMENT**

and

Greater MSP,

Defendants.

The above entitled matter came before the Honorable Leonardo Castro, Judge of the District Court, on November 20, 2018, upon the motions to dismiss and for summary judgment by Defendants Minnesota Department of Employment and Economic Development (DEED) and Greater MSP. Assistant Minnesota Attorney General Christopher M. Kaisershot, appeared on behalf of DEED. Daniel Suppala, *Esq.*, and Erin Altman, *Esq.*, appeared on behalf of Greater MSP. Jonathan Thomas Haines, *Esq.*, appeared on behalf of Plaintiff Public Record Media (PRM). Based on the files, records, and proceedings herein, as well as the arguments and submissions of counsel, the Court makes the following findings of fact and conclusions of law¹:

FINDINGS OF FACT

1. PRM, a Minnesota nonprofit organization, has a self-described mission of advancing transparency and democracy through the use of freedom of information laws,

¹ The Court's Findings of Fact and Conclusions of Law are in large part adopted from Defendants' memoranda. This Court has, however, evaluated the evidence independently and has conscientiously considered all the issues.

including the Minnesota Government Data Practices Act, Minn. Stat. ch. 13 (2018). Am. Compl. ¶ 1.

2. DEED is a state agency. *Id.* ¶ 2. DEED’s mission “is to facilitate an economic environment that produces net new job growth in excess of the national average while improving the quality of the state workforce.” Minn. Stat. § 116J.011 (2018).

3. Greater MSP, is a private, 501(c)(3) nonprofit, nongovernmental entity, engaged in regional economic development opportunities in the Twin Cities metropolitan area. Am. Compl. ¶ 3; McKinnon Aff. ¶ 4. Greater MSP describes itself as a “private-public partnership whose mission is to stimulate economic growth in the MSP region by accelerating job growth and capital investment.”² It works in partnership with numerous state and municipal partners, and investors to fulfill its mission.

4. On September 7, 2017, Amazon invited government entities and private economic development organizations across North America to respond to its request for proposal (RFP) related to selecting a location for a second corporate headquarters (HQ2) (the “Proposal”). Am. Compl. ¶ 7, Ex. A. Amazon’s RFP indicated that its new headquarters could result in more than \$5 billion in capital expenditures and as many as 50,000 new fulltime employees. Am. Compl. Ex. A at 1. Responses to the RFP were due six week later, by October 19, 2017. *Id.*

5. The RFP requested information on Amazon’s eight key preferences and decision drivers: real estate location; capital and operating costs; summary of available incentives from state and local agencies; timetables for state and local incentive approvals and any necessary legislative approvals; existing labor force; commuting logistics related to airports, highways, and

² See IRS Form 990 for Greater MSP for the fiscal year ending December 2017, publicly available at <https://projects.propublica.org/nonprofits/organizations/274026636/201802219349301150/IRS990>, of which the Court takes judicial notice pursuant to Minn. R. Evid. 201.

bike lanes; cultural community fit, including programs and partnerships with higher education institutions; and quality of life. *Id.* at 5-7.

6. The RFP indicated that Amazon preferred a metropolitan area with a population more than one million and specified that only one response should be submitted for any area. Am. Compl. Ex. A. The only area within the State of Minnesota with a population more than one million is the Twin Cities metropolitan area. McKinnon Aff. ¶ 2.

7. PRM alleged in its amended complaint that Greater MSP and DEED coordinated in partnership to evaluate and address Amazon's RFP. Am. Compl. ¶¶ 8-10. PRM further alleged that, between September 7 and October 18, numerous state and local government entities met with and provided information to Greater MSP to include in its Proposal to Amazon. *Id.* ¶¶ 18, 22; *see also* McKinnon Aff. ¶¶ 5-6. While Greater MSP worked directly with cities and counties on potential real estate locations, DEED secured a supporting letter from the Governor and legislative leaders and provided a letter from DEED Commissioner Shawntera Hardy summarizing existing economic development programs to which Amazon could apply for funding. Am. Compl. ¶ 33, Ex. J.

8. DEED did not have any drafts of Greater MSP's Proposal, and therefore could not present any draft proposals to legislative leaders. McKinnon Aff. ¶ 6; Jones Aff. ¶ 6; Langley Aff. ¶¶ 4, 8; Akason Aff. ¶¶ 2-3. Rather, DEED received cursory outlines from Greater MSP with key points and discussed them during high-level briefings with legislative leaders on October 9 and 16. McKinnon Aff. ¶ 6, Ex. 1; *see also* Am. Compl. Exs. A at 5-7. Greater MSP's outlines effectively mirrored the data requested by Amazon's RFP. *See* Am. Compl. Ex. A at 5-7. During its meetings with legislative leaders, DEED answered questions to confirm that

Greater MSP would not promise transit packages or financial incentives to Amazon on the state's behalf. McKinnon Aff. ¶ 6.

9. DEED and other interested parties transmitted information to Greater MSP on its file-share system called the Box³. Am. Compl. ¶¶ 22, 27, 36, 38, Exs. W, BB; *see also* McKinnon Aff. Ex. 5 (email from Greater MSP to interested parties related to opening a folder on its file-share system). The undisputed facts establish that the administrative rights granted by Greater MSP to DEED allowed it to view, but not edit, materials uploaded to the Box. Ho-Kim Aff. ¶ 4. If DEED wished to edit materials it uploaded to the Box, it had to download them from the Box to a computer, edit them on the computer, resave as a new document, and then upload the new document to the Box. *Id.* DEED transmitted data to Greater MSP on the Box related to topics requested by the RFP, including Minnesota's workforce, quality of life, cultural diversity, leadership in sustainability and renewable energy, economy, educational institutions, transit, and attractions. *Id.* ¶ 3, Exs. 1-2.

10. In addition to DEED, multiple institutions of higher learning and cities within the Twin Cities metropolitan area provided information directly to Greater MSP. Langley Aff. ¶ 6. Greater MSP took all the information it received, created the Proposal, and submitted it Amazon. Am. Compl. Exs. S-T; Langley Aff. ¶ 4.

11. Greater MSP did not store drafts or the final version of its Proposal to Amazon on the Box. Akason Aff. ¶ 2; *see also* Am. Compl. Ex. BB (letter from DEED stating it did not know whether Greater MSP's response was on the Box).

³ Box allows you to share files without email attachments, instead sending the recipient a link to where they can preview files without downloading. To edit a file one must download, make the necessary changes, then upload it back to the Box. Expiration dates are set and passwords are assigned for files to outside parties for added security. <https://www.business.com/reviews/box-cloud-storage-and-online-backup-services/>

12. PRM alleged that more than 230 proposals were submitted in response to Amazon's RFP. Am. Compl. at 2. Amazon ultimately did not chose Greater MSP's Proposal to advance to the next selection round. *Id.*

13. In October 2017 and May 2018, PRM submitted data practices requests to DEED seeking information related to Greater MSP's Proposal to Amazon's RFP. Am. Compl. ¶¶ 29, 37, Exs. R, V. It is undisputed that DEED produced more than 7,600 pages of responsive documents to PRM before it commenced this lawsuit, including Greater MSP's cursory outlines, and drafts and letters from the legislative leaders and Commissioner Hardy that were attached to Greater MSP's Proposal to Amazon. Am. Compl. ¶¶ 33-36; McKinnon Aff. Exs. 1-3; Kaisershot Aff. ¶ 2. DEED informed PRM that Greater MSP, and not DEED, submitted the Proposal to Amazon and that the two letters it produced were the only documents in DEED's possession that were part of Greater MSP's Proposal. Am. Compl. ¶ 34, Exs. S-T.

14. PRM, having been under the assumption that Greater MSP's Proposal was at some point on the Box, argues that DEED's "access to the Box" transformed its entire contents into government data. *Id.* ¶ 38, Ex. W.

15. DEED again explained to PRM that it did not have a copy of Greater MSP's Proposal. *Id.* ¶ 41, Ex. X. DEED similarly notified PRM that it never collected, created, received, maintained, or disseminated any drafts or the final Proposal submitted by Greater MSP to Amazon. *Id.* ¶ 43, Ex. Z.

16. PRM argues that government data includes all data a government agency has ever had access to. *Id.* Ex. AA.

17. DEED replied that it provided copies of all government data responsive to PRM's requests, including any documents that DEED staff uploaded to or downloaded from the Box.

Id. ¶ 45, Ex. BB; *see also* McKinnon Aff. ¶ 8. DEED further explained that it did not know whether Greater MSP's Proposal was ever on the Box. Am. Compl. Ex. BB.

18. In June 2018, PRM sued DEED, claiming that Greater MSP's Proposal was government data because DEED had access to or reviewed drafts of it. Compl. at 2, 5-10, Exs. W, Y, AA. PRM admitted that DEED had produced thousands of pages of documents related to DEED's contributions to Greater MSP and specified that it sought a copy of Greater MSP's Proposal. *Id.* at 2. Count I of the complaint seeks a declaration that DEED violated the data practices and official records acts by failing to produce a copy of Greater MSP's Proposal; Counts II and III claim that DEED willfully violated the Data Practices Act and seeks an order compelling compliance and awarding costs, disbursements and attorney's fees; and Count IV seeks an injunction to preclude similar alleged violations of the Data Practices Act in the future. Compl. at 11-12.

19. DEED moved to dismiss or for summary judgment on the grounds that Greater MSP's Proposal was not government data and that PRM failed to join Greater MSP, a necessary party. DEED's Notice of Mot. and Mot. to Dismiss (filed July 9, 2018).

20. PRM timely amended its complaint by adding Greater MSP as a party. Am. Compl. PRM acknowledged that Greater MSP denied that it contracted with DEED, but nevertheless claims that Greater MSP's Proposal to Amazon is government data because it allegedly performed a government function for DEED. *Id.* at 2-3, 12. The amended complaint did not include any new counts and only added Greater MSP's name to the four existing counts alleged in PRM's initial complaint. *Id.* at 13-15.

21. DEED amended its motion to dismiss or for summary judgement on the amended complaint. DEED's Am. Notice of Mot. and Mot. to Dismiss (filed Sept. 5, 2018). After

initially filing a motion to dismiss, Greater MSP filed an amended motion to include summary judgment in the alternative. Greater MSP's Am. Notice of Mot. and Mot. to Dismiss (filed Oct. 9, 2018).

22. DEED and Greater MSP's motion pleadings included affidavits from involved personnel confirming that Greater MSP created, maintained, and disseminated the response to Amazon and that DEED never received a copy. McKinnon Aff. ¶ 7; Jones Aff. ¶¶ 6-7; Ho-Kim Aff. ¶¶ 2, 6; Langley Aff. ¶ 4; Akason Aff. ¶¶ 3-4. Similarly, DEED's and Greater MSP's affidavits confirmed that no contract, express or implied, existed between DEED and Greater MSP related to Amazon's RFP. McKinnon Aff. ¶ 5; Langley Aff. ¶¶ 10-12.

23. PRM did not attempt to raise genuine fact issues by submitting any affidavits in response to DEED's and Greater MSP's summary judgment motions. Similarly, PRM did not submit a Rule 56.06 affidavit stating that additional discovery was necessary or the evidence expected in discovery, the source of discovery necessary to obtain the evidence, and the reasons for its failure to complete the discovery since it filed this lawsuit in June. PRM's response memo nevertheless suggested that fact issues existed and that it required unspecified additional discovery on whether DEED received a copy of Greater MSP's final Proposal and whether a contract existed between DEED and Greater MSP. Pl.'s Resp. Mem. 10, 12. The Court heard arguments on November 20, 2018. PRM did not request leave to file additional evidence to oppose the Defendants' motions for summary judgment.

24. More than two weeks after oral argument on the motions, PRM filed unsolicited declarations from its attorney, Jonathan T. Haines, and its Executive Director, Matthew E. Ehling, along with more than 260 pages of new documents. Mr. Haines explained that the exhibits were intended to "address certain factual assertions made by Defendant Greater MSP"

and that PRM would reference the exhibits in its proposed findings, conclusion and order to be filed on December 21. Haines Decl. ¶ 2. PRM did not submit a motion or memorandum to explain how these materials were relevant or why they were not timely served and filed in compliance with the applicable rules. *See* Minn. Gen. R. Prac. 115.03 (requiring responses to dispositive motions to be filed and served 9 days before the hearing). Moreover, Mr. Ehling's declaration established that PRM's late-filed exhibits were not newly discovered evidence because he conceded that PRM had Exhibits DD-H4 since March 2018 and Exhibits K4-R4 since at least July 2018. Ehling Decl. ¶¶ 4-5, 8. Finally, Exhibits K4-R4 involve a proposal submitted by Greater MSP and DEED attempting to locate the Army Futures Command in Minnesota; it did not involve Amazon's RFP and this Court is unfamiliar with the facts leading up to that proposal. Nevertheless, the Court will consider PRM's untimely submissions.

CONCLUSIONS OF LAW

Motion to Dismiss

1. Where a complaint fails to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000).

2. Under Rule 12.02(e) of the Minnesota Rules of Procedure, a party may move to dismiss a claim in lieu of filing a formal answer to test the claim's legal sufficiency. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Consequently, only documents embraced by the pleadings may be considered. *In re Hennepin Co. Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Documents that are central to the parties' claims and referenced in the complaint or counterclaim are embraced by the pleadings. *Id.* at 497 (“[t]he court may consider the entire

written contract when the complaint refers to the contract and the contract is central to the claims alleged.”).

3. When considering a motion to dismiss, the court must accept as true the factual allegations contained in the pleading, construing all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). However, the court is not bound by any legal conclusions asserted in the pleading. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). A sufficient complaint “requires more than labels and conclusions.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[L]egal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Id.* (quoting *Anspach v. City of Phila.*, 503 F.3d 256, 260 (3d Cir. 2007) (internal quotation omitted)).

4. Rule 8 of the Minnesota Rules of Civil Procedure requires every complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought.” Minn. R. Civ. P. 8.01. Applying the Rule 8 standard, the Supreme Court stated in *First National Bank of Henning v. Olson*: “[T]here is no justification for dismissing a complaint for insufficiency . . . unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.” 246 Minn. 28, 38, 74 N.W.2d 123, 129 (1955) (quoting *Dennis v. Vill. of Tonka Bay*, 151 F.2d 411, 412 (8th Cir. 1945)). In other words, a motion to dismiss should be denied “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *N. States Power Co. v. Franklin*, 265 Minn. 391, 394-95, 122 N.W.2d 26, 29 (1963) (citations omitted); see *Martens v. Minn. Mining & Mfg. Co.*, 616

N.W.2d 732, 748 (Minn. 2000) (if the complaint fails to state a claim upon which relief may be granted, a dismissal with prejudice is appropriate).

5. In *Walsh v. U.S. Bank, N.A.*, the Minnesota Supreme Court reaffirmed the interpretation of Rule 8 expressed in *Olson* and *Franklin* and rejected the “plausibility” standard applicable to federal cases:

In our view, the plain language of Rule 8.01, its purpose and history, and its procedural context make clear that the rule means today what it meant at the time *Olson* and *Franklin* were decided. A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.

851 N.W.2d 598, 603 (Minn. 2014).

6. A Rule 12.02 motion to dismiss should be treated as a motion for summary judgment once matters outside the pleadings are presented to and not excluded by the court. Minn. R. Civ. P. 12.02. “Rule 12.02 provides that such a motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 if matters outside the pleadings are submitted to the district court for consideration and not excluded.” *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004).

Summary Judgment

7. The Court will consider the additional affidavits and attached exhibits submitted by DEED, Greater MSP and PRM, on the motions. Defendants’ motions will be treated as motions for summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

8. Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of

material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). Summary judgment is not appropriate when reasonable minds could differ and draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citing *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978)).

9. A party opposing summary judgment may not rely merely on its pleadings, but must present specific facts demonstrating there is a genuine issue of material fact for trial. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998); Minn. R. Civ. P. 56.05. The court must view the facts in the light most favorable to the nonmoving party. *Bugge*, 573 N.W.2d at 680. “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *DLH, Inc.*, 566 N.W.2d at 69 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

10. Once the moving party has established a *prima facie* case that entitles it to summary judgment, the burden shifts to the nonmoving party to present specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001). A genuine issue of material fact exists when a fact may be reasonably resolved in favor of either party. *DLH, Inc.*, 566 N.W.2d at 69. However, there is no genuine issue of material fact for trial when the nonmoving party presents evidence, which merely creates a metaphysical doubt as to a factual issue. *Id.* at 71. If any legitimate doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that the fact issue exists. *Poplinski v. Gislason*, 397 N.W.2d 412, 414 (Minn. Ct. App. 1986), *rev. denied* (Minn. 1987).

The Minnesota Government Data Practices Act (“MGDPA”)

11. The Minnesota Government Data Practices Act (the “MGDPA”) “governs public access to information maintained by governmental agencies.” *Demers v. City of Minneapolis*, 468 N.W.2d 71, 72 (Minn. 1991); *see also* Minn. Stat. § 13.01, subd. 3 (The MGDPA “regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities”).

12. “Government data” is defined 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. But a government employee’s mental impressions do not constitute government data. *See Harlow v. State Dep’t Human Servs.*, 883 N.W.2d 561, 569 (Minn. 2016) (holding that opinions and mental impressions are not government data); *Keezer v. Spickard*, 493 N.W.2d 614, 618 (Minn. App. 1992) (“information is not ‘government data’ until the information is recorded somewhere other than the human brain”).

13. A “government entity” is “a state agency, a statewide system, or political subdivision.” Minn. Stat. § 13.02, subd. 7(a). DEED is a government entity under the MGDPA. Greater MSP is not a government entity under the MGDPA.

14. “The purpose of the MGDPA is to balance the rights of individuals . . . to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing.” *Demers*, 468 N.W.2d at 72.

15. The MGDPA “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.

16. When first enacted in 1974, the Data Practices Act did not provide for the disclosure of public data held by private entities. Act of Apr. 11, 1974, ch. 479, 1974 Minn. Laws 1199. In 1999, the Legislature added a provision relating to the privatization of government functions. Act of May 25, 1999, ch. 250, art. 1, § 42, 1999 Minn. Laws 2728, 2756–57. A private entity, like Greater MSP, is only subject to the MGDPA when it enters into a contract with a government entity to perform a government function. The MGDPA’s privatization provision provides:

If a government entity enters into a contract with a private person to perform any of its functions, all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and the private person must comply with those requirements as if it were a government entity.

This subdivision does not create a duty on the part of the private person to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract.

Minn. Stat. § 13.05, subd. 11(a) and (b).

17. Although the MGDPA does not define “government function,” the Minnesota Supreme Court described a governmental act as an act that is “equally for the common good of all.” *Heitman v. Lake City*, 225 Minn. 117, 120, 30 N.W.2d 18, 21 (1947) (maintenance of a public park serves “the public as a whole,” and therefore, is a governmental act); *see also Brantman v. City of Canby*, 119 Minn. 396, 398–99, 138 N.W. 671, 672 (1912) (maintaining a board of health or a police or a fire department is a governmental function); *WDSI, Inc. v. Cty. of Steele*, 672 N.W.2d 617, 621 (Minn. App. 2003) (constructing a jail “to isolate from the public[,] persons who arguably pose a threat to society serves the common good and is a clear governmental function.”).

18. When an act serves private consumers' interests, it is not a government function. *Brantman*, 119 Minn. at 398–99. This is true even when an act partially serves the public, in addition to private consumers. *Id.* This Court need not decide if submitting the Proposal was a government function.

19. Assuming, for the sake of argument, that DEED and Greater MSP had entered into an implied contract, and further assuming for arguments sake that Greater MSP was performing a government function, PRM's claim would still fail as a matter of law because there are no contract terms that impose a duty upon Greater MSP to disclose. *See Helmberger v. Johnson Controls, Inc.*, 893 N.W.2d 527, 532 (Minn. 2013) (“The Data Practices Act simply does not state that data held by a government contractor performing a government function are public. Further, Johnson did not agree to be bound by the Act. Johnson has neither a contractual nor a statutory duty to disclose If the Legislature had intended to create a new category of public data or impose direct obligations on government contractors, the Data Practices Act would contain express language to that effect.”).

PRM's MGDPA Claims

20. PRM claims that Defendants violated the MGDPA by failing to produce the Proposal in response to PRM's requests. The Proposal, which was never collected, created, received, maintained or disseminated by DEED, is not subject to the MGDPA, and therefore, PRM's claims fail as a matter of law.

21. Defendants submitted evidence that Greater MSP alone drafted and submitted the Proposal to Amazon. Further, the evidence in the record establishes that Amazon and only a few select individuals at Greater MSP had access to, and viewed the Proposal.

22. PRM claims that emails from DEED staff discussing and outlining the Proposal prove that DEED had access to the Proposal. These emails, which PRM has been provided, however, only demonstrate that DEED had a high-level outline of the topics covered in the Proposal; the same topics outlined in Amazon's RFP. *See* Am. Compl., Ex. A at 5–6. DEED did not have drafts or the final Proposal. DEED did not have access to, nor did it view the Proposal.

23. It is immaterial whether DEED “viewed” or had “access” to the drafts or final Proposal because the MGDPA does not cover data that a government entity merely accessed or viewed. Rather, the MGDPA covers only data that a government entity “collected, created, received, maintained or disseminated.” Minn. Stat. §13.02, subd. 7. The Court may not add words to the MGDPA's definition of “government data.” *In re Annexation of Certain Real Prop. to City of Proctor From Midway Twp.*, 910 N.W.2d 460, 463 (Minn. App. 2018). Therefore, the Proposal is not “government data” subject to disclosure. *See Carufel v. Minn. Dep't Public Safety*, No. A18-0476, 2018 WL 6596287, at *10 (Minn. Ct. App. December 17, 2018) (“Appellants' claim fails because the MGDPA regulates the public's access to government data, and does not regulate the government's *ability* to access data. [G]overnment data does not include data to which the government has access.”).

24. PRM received over 7,600 pages of documents from DEED in response to its MGDPA requests. DEED has established that all data that DEED collected, created, received, maintained or disseminated that concerned the Proposal was produced to PRM. DEED has satisfied its obligation to produce all government data to PRM.

25. The Proposal is also not subject to disclosure under the MGDPA's privatization provision because Greater MSP and DEED did not enter into a contract as to the Proposal. PRM's complaint contains no factual assertions that Defendants entered into a contract. PRM

has admitted that it did not know whether DEED and Greater MSP entered into a contract, and PRM has failed to provide this Court with any evidence of the creation of a contract.

26. To form a contract, there must be “communication of a specific and definite offer, acceptance, and consideration.” *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008).

27. Consideration to form a contract “may consist of either a benefit accruing to a party or a detriment suffered by another party.” *Kielley v. Kielley*, 674 N.W.2d 770, 777 (Minn. App. 2004).

28. A contract cannot be formed in the absence of mutual assent by the contracting parties as to the contract’s essential terms. *SCI Minn. Funeral Servs., Inc. v. Washburn–McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011). Mutual assent requires the parties to agree with “reasonable certainty about the same thing and on the same terms.” *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 914 (Minn. App. 1988). Further, mutual assent cannot be established when essential terms of a contract are vague. *Druar v. Ellerbe & Co.*, 222 Minn. 383, 395, 24 N.W.2d 820, 826 (1946). In other words, a contract is not formed when essential terms are incomplete, indefinite, or uncertain. *Id.*

29. PRM claimed that Greater MSP and DEED “collaborated” or “partnered” on efforts to draft and submit the Proposal. But partnership and collaboration alone are not enough to establish a contract was formed under Minnesota law. DEED and Greater MSP have provided sworn testimony that no contract existed between them concerning the Proposal. Langley Decl. ¶ 10; McKinnon Aff. ¶ 5. PRM has not provided any testimony or other documentary evidence to create a genuine issue of material fact as to the formation of a contract between DEED and Greater MSP.

30. To establish Greater MSP and DEED entered into a contract, there must be consideration. *Kielley*, 674 N.W.2d at 777. PRM has not provided evidence or argument about why there was consideration exchanged between the Defendants. *See Carufel v. Minn. Dep't Public Safety*, No. A18-0476, 2018 WL 6596287, at *8 (Minn. Ct. App. December 17, 2018) (“Because the complaint did not allege any facts establishing that consideration was exchanged when the state certified Intoxalock’s device, we conclude that Intoxalock did not enter into a contract with the state respondents; therefore, Intoxalock is not subject to the MGDPA.”). Greater MSP submitted evidence that it was not compensated for its work on the Proposal. Langley Decl. ¶ 12. Because there was no consideration, no contract was formed between Greater MSP and DEED.

31. PRM has not provided any evidence or argument as to a specific and definite offer and acceptance, which is a requirement to contract formation. *Thomas B. Olson & Assocs.*, 756 N.W.2d at 918.

32. PRM has not established mutual assent. There are no claims or evidence that Greater MSP and DEED discussed and agreed to terms essential to a contract covering work on the Proposal. The absence of mutual assent bars the formation of a contract between Defendants. For these reasons, DEED and Greater MSP did not enter into a contract as to the Proposal, and therefore, the Proposal is not subject to the MGDPA privatization provision.

33. PRM’s argument that Greater MSP and DEED had a contractual relationship based on principles of agency is not supported by the pleadings, facts, or law. There is no evidence that DEED or the State of Minnesota ratified or in some way bound itself to the Proposal submitted by Greater MSP. Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and

subject to his control, and consent by the other so to act. *Jurek v. Thompson*, 308 Minn. 191, 241 N.W.2d 788 (1976); *Lee v. Peoples Cooperative Sales Agency*, 201 Minn. 266, 276 N.W. 214 (1937); Restatement (Second) of Agency s 1 (1958). To support a finding of agency, two elements must be satisfied. *Teeman v. Jurek*, 312 Minn. 292, 299, 251 N.W.2d 698, 702 (1977). First, it must be shown that there is a manifestation by the principal that an agent act on behalf of the principal. *Id.* Second, it must be shown that the principal has a right of control over the agent for the purpose of the undertaking. *Id.* No such relationship existed between DEED and Greater MSP.

ADDITIONAL DISCOVERY IS NOT NECESSARY

34. In its opposition to Defendants' alternative motions for summary judgment, PRM argued that additional discovery is necessary in order to determine, among other things, whether DEED and Greater MSP entered into a contract related to work on the Proposal. The Court does not find PRM's argument persuasive.

35. PRM first argued that Defendants had not moved for summary judgment. However, both DEED and Greater MSP filed timely, amended motions to dismiss, or for summary judgment.

36. PRM was required by Rule 56.04 of the Minnesota Rules of Civil Procedure to submit an affidavit explaining why additional discovery is needed. A Rule 56.04 affidavit "must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for failure to complete the discovery to date." *Alliance for Metro Stability v. Metro Council*, 671 N.W.2d 905, 919 (Minn. App. 2003). At the time of the hearing, PRM had not submitted the required 56.04 affidavit.

37. The declarations and exhibits filed late by PRM do not affect the Court's decision in this case. The materials support Defendants' arguments that Greater MSP took the lead on this project, the State of Minnesota did not offer Amazon any special financial incentives, and Greater MSP and DEED did not enter into a contract. *See, e.g.*, Ehling Decl. Ex. TT (email from DEED confirming that "GMSP is taking the lead on this, as it is a regional opportunity."); Ex. XX (email from DEED stating, "Communities, developers, etc. can submit ideas, including proposed sites, to Greater MSP."); Ex. ZZ (email from Commissioner Hardy to legislative leaders stating, "Legislative action will likely be required to move the above-mentioned forward."); Ex. K3 (email from Greater MSP to interested parties stating that it would open a folder on its file-share system, the Box, to receive information); Ex. L3 (email from DEED to *Star Tribune* indicating, "Regarding any proposed financing or incentives, it's really too early to tell what they would look like. We have existing business finance tools available to us at the moment (Job Creation Fund, Minnesota Investment Fund, etc.) but anything beyond that would require legislative action."); Ex. A4 (email from Greater MSP to City of Bloomington declining to allow it to review its draft proposal); Ex. J4 (letter from Greater MSP to PRM confirming that "there is no contract between Greater MSP and DEED as to the" proposal).

38. Additional discovery is unnecessary. On March 12, 2018, DEED produced to PRM over 7,600 pages of documents related to the Proposal. PRM has had months to review these documents. In addition, PRM served no discovery after being served with the summary judgment motions. PRM has had ample time to conduct discovery and this Court will not stay Defendants' motions for summary judgment to allow PRM to pursue its claims.

IT IS HEREBY ORDERED:

1. Defendants' motions for summary judgment are **GRANTED**;
2. PRM's amended complaint is **DISMISSED** in its entirety, with prejudice; and
3. PRM may not recover its costs and attorneys' fees.

LET JUDGMENT BE ENTERED ACCORDINGLY.**BY THE COURT**

Castro, Leonardo (Judge)
Jan 2 2019 3:51 PM

The Honorable Leonardo Castro
Judge of District Court