

STATE OF MINNESOTA
IN COURT OF APPEALS

FILED

March 15, 2019

OFFICE OF
APPELLATE COURTS

Public Record Media,

Appellate File No: A19-0347

Appellant,

v.

Minnesota Department of Employment and
Economic Development and Greater MSP,

**PETITION OF TONY WEBSTER
FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF**

Respondents.

Tony Webster respectfully requests leave of this Court pursuant to Minn. R. Civ. App. P. 129.01 to file an amicus brief. If leave is granted, Mr. Webster's position will be most closely aligned with that of the Appellant Public Record Media, and will seek reversal of the district court's order for dismissal and summary judgment.

Mr. Webster's interest in this case is public in nature. The public has significant interests in ensuring the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13 ("MGDPA") works as intended, and that it is not sidestepped through advancements in technology. Mr. Webster, through his work and expertise in litigating MGDPA matters, and in using the MGDPA to request, analyze, and report on issues of public concern, will bring "citations to relevant precedent, arguments, and policy considerations not included in the primary briefs." *St. Paul Fire & Marine Ins. Co. v. API, Inc.*, 738 N.W.2d 401, 411 (Minn. App. 2007). This case also involves the intersection of technology and data governance, and Mr. Webster's professional experience as a software engineer will provide the Court with valuable insight into how cloud-based file-sharing works and on

why, by accessing, viewing, or storing data through or on such a service, the government entity has “received” or “maintained” the data as those terms are commonly understood.

The Prospective Amicus

Mr. Webster is a journalist and researcher with a background in software engineering. He has used the MGDPA in researching, reporting on, and assisting in Minnesotans’ understanding of important matters of public interest, such as law enforcement’s use of cloud-based mapping technologies to find suspects near crime scenes,¹ police use of internet users’ search history to locate suspects,² privacy issues surrounding automated license plate readers,³ government use of facial recognition technology,⁴ law enforcement investigation of police shootings,⁵ and more.

¹ Tony Webster, *How did the police know you were near a crime scene? Google told them*, MINNESOTA PUBLIC RADIO NEWS (2019), <https://www.mprnews.org/story/2019/02/07/google-location-police-search-warrants>.

² Tony Webster, *Minnesota judge signs a search warrant for personal information on anyone who Googled someone’s name* (2017), <https://tonywebster.com/2017/03/minnesota-search-warrant-anyone-who-googled/>; Miguel Otárola, *Police get search warrant for everyone who Googled Edina resident’s name*, STAR TRIBUNE (2017), <http://www.startribune.com/search-warrant-issued-to-edina-police-raises-privacy-concerns-of-internet-users/416442113/>.

³ Aaron Rugar, *MPD’s license plate data allows stalkers to track their victims using public data*, CITY PAGES (2012), <http://www.citypages.com/news/mpds-license-plate-data-allows-stalkers-to-track-their-victims-using-public-data-6556445>.

⁴ Tony Webster, *Hennepin County Sheriff circumvents state to expand facial recognition database* (2016), <https://tonywebster.com/2016/06/hennepin-sheriff-facial-recognition/>.

⁵ Rochelle Olson, *Government access crusader Tony Webster gets to heart of files investigating Philando Castile shooting*, STAR TRIBUNE (2017), <http://www.startribune.com/government-access-crusader-gets-to-heart-of-yanez-investigative-files/430020013/>.

Mr. Webster has testified before the Minnesota Legislature on numerous records management issues, such as the MGDPA's requirements surrounding data retention, auditing, and breaches.⁶ He has also litigated noncompliance with the MGDPA, including in *Webster v. Hennepin County*, 910 N.W.2d 420 (Minn. 2018), where the Minnesota Supreme Court affirmed an order compelling a sheriff's production of data in a technology dispute.⁷

Mr. Webster has spoken publicly about government accountability and freedom of information issues, such as at a University of Minnesota School of Journalism and Mass Communication roundtable, and on various radio news productions and podcasts.⁸ Reporters, researchers, the public, and the government routinely seek Mr. Webster's advice on public records issues, and in 2017, Mr. Webster was awarded the Minnesota Society of Professional Journalists' Peter S. Popovich Freedom of Information Award.⁹

⁶ See, e.g., Legislative Commission on Data Practices, 90th Minnesota State Legislature.

⁷ Mike Mosedale, *Data fight brings stampede of lawyers*, MINNESOTA LAWYER (2016), <https://minnlawyer.com/2016/06/09/data-fight-brings-stampede-of-lawyers/>.

⁸ See, e.g., Tom Weber, *One software engineer's fight for transparent government*, MINNESOTA PUBLIC RADIO NEWS (2017), <https://www.mprnews.org/story/2017/07/03/tony-webster-interview-open-government-data-foia>.

⁹ Minnesota Society of Professional Journalists, *Tony Webster Receives 2017 Peter S. Popovich Award for Fighting for First Amendment Rights* (2017), <http://www.mnspj.org/2017/06/01/webster-receives-popovich-award/>.

Mr. Webster also has a background in software engineering, having previously worked and consulted for healthcare and financial companies, nonprofits, and household brands, developing web and mobile applications.

Statement of Interest

If allowed to participate, Mr. Webster will address an issue of public concern that is of critical importance to the functioning of the MGDPA, and to Minnesotans' ability to hold their government accountable: what is the definition of "government data"? Specifically, Mr. Webster seeks to address whether data that is created, stored and/or accessed on cloud-based services, like file-sharing websites and document collaboration sites, falls within the MGDPA's definition of "government data": "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.

In this case, the Minnesota Department of Employment and Economic Development ("DEED") organized the drafting and submission of the State's bid response to a Request for Proposal from Amazon, pitching Minnesota as home for the company's second headquarters, "HQ2." Minnesota cities, state agencies, the Minnesota Legislature, and the Governor were all involved in the process.

Ordinarily, such a governmental bid would be accessible to the public. But DEED—instead of keeping copies of the Amazon bid on their employees' computers, DEED's file servers, or even on paper in a file cabinet—engaged a third-party, Respondent Greater MSP, who set up a cloud-hosted file-sharing account on a service

provided by a company called Box. DEED was then given access to this account in order to view, upload, and download data and documents via a web browser.

DEED alleged that its accessing, reviewing, and providing input on the bid through Box did not make the bid or any drafts thereof “government data” because DEED allegedly did not collect, create, receive, maintain or disseminate it. The district court agreed with DEED and dismissed Public Record Media’s lawsuit. The district court’s order, paragraph 23, held: “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.’”

The district court’s holding means that government data stored on cloud and web-based services operated by third-parties can be exempt from the MGDPA’s reach. The result of such holding has far-ranging implications. Many Minnesota government entities are already using such technologies to manage and interact with government data, sometimes without a formal written contract. And the features and cost-savings delivered by the internet will only further shift everyday operation of government to the cloud.

For example, the City of Watertown’s email system (Gmail) is hosted by a third-party company on third-party servers. The Minneapolis Police Department has engaged the services of a third-party, Axon’s Evidence.com, to manage the department’s body-worn camera online. The service offers features to automatically generate metadata tags to assist in organization, to create written transcripts from the audio, to automatically detect and redact faces, and to share material with prosecutors. The Minnesota

Department of Transportation uses the services of SurveyMonkey, an online tool that collects information from third-parties and compiles charts and reports. And the Brooklyn Park Police Department uses web-based software from ZetX to upload raw cell phone location data from search warrants, and the service generates maps and reports to assist with analysis.

This case presents an important opportunity for the Court to provide clarity on what data is subject to the MGDPA's disclosure requirements and enforcement remedies, data classification structure, privacy rights, and mandatory preservation requirements.

Consistent with *State v. Finley*, 243 Minn. 28, 64 N.W.2d 769 (1954), Mr. Webster's brief will be written in a non-adversarial manner in order to advise and inform the Court of legal and technology principles relevant to the issues in this case. The contemplated brief will be written in accordance with the requirements in Minn. R. Civ. App. P. 132.01, subd. 3.

Conclusion

Mr. Webster respectfully requests that the Minnesota Court of Appeals grant his petition to appear as *amicus curiae* in this case.

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.

Dated: March 15, 2019

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