

NO. A10-395

State of Minnesota
In Supreme Court

KSTP-TV, KSTC-TV, WDIO-TV, KAAL-TV,
AND KSAX-TV,

Appellants,

vs.

RAMSEY COUNTY,

Respondent.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX

RAMSEY COUNTY ATTORNEY'S
OFFICE
Kevin M. Lindsey (#220796)
50 West Kellogg Boulevard
Suite 560 West
St. Paul, MN 55102
(651) 266-3217

Attorney for Respondent

MARK R. ANFINSON (#2744)
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, MN 55408
(612) 827-5611

Attorney for Appellants

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

Table of Authoritiesii

STATEMENT OF ISSUES1

STATEMENT OF THE CASE AND FACTS2

ARGUMENT4

I. INTRODUCTION4

II. DISCUSSION7

 A. Public Access to the Rejected Absentee Ballots Advances
 Vital Public Policies.7

 B. The Minnesota Government Data Practices Act
 and its Basic Operating Rules.12

 C. The Court of Appeals Erred in Construing §13.37 by
 Failing to Consider the Context in which the Statute Functions.14

 D. The Absentee Ballots once Removed from their Envelopes
 are Public Data under the Data Practices Act.21

CONCLUSION25

TABLE OF AUTHORITIES

CASES

<i>Board of Education v. Pico</i> , 457 U.S. 854, 867 (1982)	11
<i>Brayton v. Pawlenty</i> , 781 N.W.2d 357, 363 (Minn. 2010)	14
<i>Brua v. Minn. Joint Underwriting Ass’n</i> , 778 N.W.2d 294, 300 (Minn. 2010)	4, 15
<i>Burson v. Freeman</i> , 504 U.S. 191, 199 (1992)	7
<i>Coleman v. Ritchie</i> , 758 N.W.2d 306, 307 (Minn. 2008)	18
<i>Cox Broadcasting Corp. v. Cohen</i> , 420 U.S. 469, 491–92 (1975)	11
<i>Demers v. City of Minneapolis</i> , 468 N.W.2d 71 (Minn. 1991)	10
<i>Erlandson v. Kiffmeyer</i> , 659 N.W.2d 724, 729 (Minn. 2003)	7
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233, 250 (1936)	12
<i>Houchins v. KQED-TV, Inc.</i> , 438 U.S. 1, 32 (1978)	11
<i>ILHC of Eagan, LLC v. County of Dakota</i> , 693 N.W.2d 412 (Minn. 2005)	15
<i>Lenz v. Coon Creek Watershed District</i> , 153 N.W.2d 209 (Minn. 1967)	15
<i>Minneapolis Star & Tribune Co. v. Schumacher</i> , 392 N.W.2d 197, 202 (Minn. 1986) ...	10
<i>Northwest Publications, Inc., v. City of Bloomington</i> , 499 N.W.2d 509, 511 (Minn. App. 1993)	13, 14, 23
<i>Prairie Island v. Dept. of Public Safety</i> , 658 N.W.2d 876, 883-84 (Minn. App. 2003) ...	10
<i>Prior Lake American v. Mader</i> , 642 N.W.2d 729, 735 (Minn. 2002)	10

<i>Reynolds v. Sims</i> , 377 U.S. 533, 554-55 (1964)	8
<i>Richmond Newspapers, Inc., v. Virginia</i> , 448 U.S. 555, 572 (1980)	12
<i>Sheehan v. Franken</i> , 767 N.W.2d 453 (Minn. 2009)	2
<i>Teachers' Local 59 v. Special School District No. 1</i> , 512 N.W.2d 107, 111 (Minn. App. 1994)	13
<i>Wegener v. Commissioner of Revenue</i> , 505 N.W.2d 612, 617 (Minn. 1993)	15
<i>Wiegel v. City of St. Paul</i> , 639 N.W.2d 378 (Minn. 2002)	12

STATUTES

Minn. Stat., ch. 13 (Minnesota Government Data Practices Act)	<i>passim</i>
Minn. Stat. §13.01, subd. 1	12
Minn. Stat. §13.01, subd. 3	12
Minn. Stat. §13.02, subd. 5	23
Minn. Stat. §13.02, subd. 7	13
Minn. Stat. §13.02, subd. 9	15, 20
Minn. Stat. §13.02, subd. 11	12
Minn. Stat. §13.02, subd. 12	16, 20, 23
Minn. Stat. §13.03, subd. 3(c)	14
Minn. Stat. §13.04	19
Minn. Stat. §13.05.....	19
Minn. Stat. §13.37	<i>passim</i>

Minn. Stat. §204C.19, subd. 18

STATEMENT OF ISSUES

Are rejected absentee ballots cast in the 2008 Minnesota general election, once separated from their return envelopes so that voter identity cannot be determined, public and accessible pursuant to the Minnesota Government Data Practices Act (MGDPA), Minn. Stat., ch. 13?

Reversing the trial court, the Court of Appeals held that the ballots are not publicly accessible.

Apposite Statutes and Cases

Minnesota Government Data Practices Act (MGDPA), Minn. Stat., ch. 13, and in particular, Minn. Stat. §13.37.

Demers v. City of Minneapolis, 468 N.W.2d 71 (Minn. 1991); *Prairie Island v. Dept. of Public Safety*, 658 N.W.2d 876, 883-84 (Minn. App. 2003).

Northwest Publications, Inc., v. City of Bloomington, 499 N.W.2d 509, 511 (Minn. App. 1993).

STATEMENT OF THE CASE AND FACTS

Appellants KSTP-TV, KSTC-TV, WDIO-TV, KAAL-TV, AND KSAX-TV are television news organizations serving diverse areas of Minnesota. Complaint, AA-6. They frequently provide coverage relating to political activities and elections.

Appellants commenced this action in August, 2009, seeking a declaration that rejected and unopened absentee ballots cast in the 2008 state general election and maintained by Respondent Ramsey County were public data. The action was initiated after Respondent denied a June 2009 written request from Appellants for access to and inspection of the rejected ballots. That request was premised on the presumption of public access to government records found in the Data Practices Act. In submitting their request, Appellants emphasized that they did not seek any information by which individual voters could be identified.¹ The request was made only after this Court had issued its final decision in the Coleman–Franken election contest litigation. See *Sheehan v. Franken*, 767 N.W.2d 453 (Minn. 2009).

Ramsey County eventually moved for dismissal of Appellants’ action pursuant to

¹Appellants in fact mailed the same request to election officials in all 87 counties of the state. Within a few weeks, every county—including Ramsey—had rejected the request. Appellants initiated legal action only against Ramsey County, in the interest of judicial economy and believing that an authoritative resolution of the issues in district court there would likely receive deference from officials in the other counties. Based on the record developed during the Coleman–Franken election contest that was ultimately decided by this Court, there were about 285,000 absentee ballots cast across the state; approximately 12,000 were rejected, and remain in the custody of election officials, sealed in their return envelopes.

Minn. R. Civ. P. 12.02, or in the alternative for summary judgment under Rule 56. The district court, after concluding that no material facts were in dispute, treated the motion as one for summary judgment, and in Order and Memorandum filed on December 31, 2009, granted summary judgment to Appellants, declaring that the rejected absentee ballots, once separated from their envelopes, are public data. See AD-10. The court directed Ramsey County to allow public inspection of the ballots, but only after “tak[ing] all steps necessary, including redaction, to assure that the privacy of the voter and the sanctity of the ballot is maintained.” AD-11. Judgment was entered on March 15, 2010.

Ramsey County appealed from this ruling. On August 10, 2010, the Court of Appeals, in a published decision, reversed the district court. See AD-1.

As the decision of the Court of Appeals notes, in the absentee voting process, the absentee voter completes a ballot, places it into a ballot envelope, and then inserts the ballot envelope inside a return envelope for conveyance to local election officials. AD-2-3. Only the return envelope typically contains information identifying the voter. *Id.* When the return envelope is received by election officials and before it is opened, a determination is made as to whether it satisfies various statutory criteria. For those that do, the return and ballot envelopes are opened on election day, separated from the ballots, and the ballots counted. However, the rejected absentee ballots remain sealed in their envelopes.

On this appeal, there appear to be no disputed facts, and the principal issue is how

Minn. Stat. §13.37 should be construed with respect to the classification of sealed absentee ballots after an election. Appellate courts review the interpretation of statutes de novo. *Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010).

ARGUMENT

I. INTRODUCTION

By failing to consider the context in which the absentee ballot classification language found in Minn. Stat. §13.37, subd. 2 functions, or the significance of the statute's reference to the actions of an election judge, the Court of Appeals misread the statute with respect to how rejected, unopened absentee ballots are to be treated after an election is over. It should not have reversed the district court, which correctly recognized that the statute's classification of sealed absentee ballots cannot sensibly be construed to impose a permanent ban on access to those ballots, but was simply meant to maintain the secrecy of the ballots until election day, and that the Legislature did not address the status of the rejected absentee ballots once an election is over.

Only by ignoring the context in which the statute operates and the significance of the statute's express terminology could the Court of Appeals conclude that there was no ambiguity with respect to whether public access should be permitted to the ballots after an election. Skepticism about the Court's reasoning is reinforced by the fact that under the interpretation it adopted, a distinct peculiarity results regarding public access to ballots

once an election is concluded, which is that of all the types of ballots that are cast in an election, only rejected absentee ballots would be *permanently* placed beyond the reach of public examination. In contrast, (a) absentee ballots that are accepted, opened, and counted, (b) ballots cast in person and counted, *and* (c) ballots cast in person that are rejected, all may be publicly inspected following an election. Such incongruity invites doubt as to whether the Court of Appeals did correctly discern the intent of the Legislature.

The Court's opinion dilutes the principle long embraced by both the judicial and legislative branches that there should be maximum transparency with respect to the election process, in order to foster the highest possible level of public confidence in that process. The reasoning of the Court of Appeals requires the conclusion that the Legislature somehow chose to make an exception to this principle in the context of rejected absentee ballots, despite the absence of any support for such an exception in either statute or policy.

In addition, the Court's decision creates precedential uncertainty about one of the central tenets of the Data Practices Act, which provides that because the Act classifies information and not documents, and because government records often contain information that is both public and not public, an agency is required to separate the two kinds of data and permit access to the public portions. In other words, the entire record cannot be withheld simply because it contains some private data. This principle is

important, since otherwise, government documents could be withheld in their entirety, simply because they might include small elements of private or confidential data. It takes on added significance in an era where rapidly increasing volumes of government records are maintained in electronic databases containing vast quantities of variably classified information.

The essence of the relief sought by Appellants is that Minn. Stat. §13.37 must be construed to give effect to its obvious purpose, and that the familiar and established principles which control access to government records generally should be applied with respect to the rejected absentee ballots. Because the rejected ballots *alone* do not identify the voters who cast them, they consist only of public data. It is the return envelopes in which the rejected ballots are currently enclosed that display information identifying the voters. The Data Practices Act and decisions interpreting it therefore require that the envelopes be separated from the ballots, a process that would be neither complicated nor unfamiliar, since it was routinely performed during the 2008 election vote count with respect to the tens of thousands of absentee ballots that were not rejected.

The rending controversy over the results of the 2008 election for United States Senator requires no extended description here, but it is relevant that much of that controversy related to questions about the thousands of absentee ballots which were rejected and therefore never counted—especially whether those rejections were proper. Furthermore, disputes about the statutes that govern the casting and counting of absentee

ballots have simmered for years. Respondents' Complaint, for example, cites a commentary published by the League of Women Voters Minnesota in the wake of the 2008 election, expressing "outrage that 12,000 voters who cast their ballots in good faith did not have their ballots counted due to violations of Minnesota's complicated absentee ballot laws." See Complaint, ¶20, AA-10. This issue was a major topic of deliberation during the 2010 session of the Minnesota Legislature, and is likely to arise there again.

Both the state's public officials and the public generally will benefit from the most comprehensive possible presentation of the facts and circumstances surrounding the events of the 2008 election. It is to this end that Appellants seek access to the rejected absentee ballots and related materials. A decision in Appellants' favor would make those materials available not just to Appellants but to all the citizens of the state.

II. DISCUSSION

A. Public Access to the Rejected Absentee Ballots Advances Vital Public Policies.

It is axiomatic that the right to vote and the effective conduct of elections are integral to the proper functioning of democratic societies. "No right is more precious in a free country than having a voice in the election of those who make the laws under which as good citizens we must live," and "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003), quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any

restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964).

Achieving the best possible understanding of why some votes were cast but not counted therefore implicates issues of indisputable importance. Accomplishing this requires access public access to all election materials that have been the focus of dispute, except where there is a clear voter privacy interest that must be protected.

The state's commitment to this principle of transparency is evident throughout Minnesota election law, and it applies squarely to the counting and tabulation of ballots. For example, the entire ballot counting process must occur at the polling place "and shall be public," which would include decisions by the election judges as to whether a ballot cast in person should be rejected or not. See Minn. Stat. §204C.19, subd. 1. Furthermore, once the counting is completed, the ballots are subject to public inspection through the course of the post-election procedures. This includes ballots cast in person, *whether or not rejected*. Correspondingly, absentee ballots that are returned, accepted, and counted (the great majority) are also subject to full public inspection once the election to which they relate has been concluded.

While a percentage of the ballots cast in person are rejected for various defects, just as in the case of absentee ballots, no statute purports to classify these ballots as

inaccessible until some subsequent, purely clerical step occurs. According to the Court of Appeals, however, the Legislature intended to treat the category of rejected, uncounted absentee ballots differently, holding that public access to them is in effect permanently and unconditionally prohibited. Such an anomaly is supported by no logic or public policy that Appellants can discern, and the Court of Appeals offered none. However, the anomaly exists only under the Court of Appeals' view that the language of §13.37 was meant to address the issue of access to the absentee ballots even after an election is over. It disappears if the language in the statute is simply understood to maintain the status of returned absentee ballots until election day.

Appellants recognize that no matter how apparently incongruous the contrast between access to rejected ballots cast in person and those voted absentee might seem, it would not alone justify ignoring express and unambiguous statutory language. But the incongruity does accentuate the importance of carefully scrutinizing the statutory language. As described below, such scrutiny shows that §13.37 is no model of clarity, and that when examined in the context of the election process, it should not be interpreted in the way that the Court of Appeals did.

Consideration of how §13.37 should be construed and what the Legislature plausibly intended is also influenced by the vital policy considerations relating to the importance of the right to vote, as well as the presumption of public access found in the Data Practices Act and how the courts have said the Act is to be interpreted. The

sometimes arcane terminology of the MGDPA produces frequent uncertainties about the law's meaning and application. But the Act is anchored on a presumption that all government records are public and accessible, and the courts have held that for this reason and broader priorities of public policy, uncertainties about the law's meaning are to be resolved in favor of the public's right to know: "This law, together with statutes such as the Open Meeting Laws [], the campaign finance and public disclosure laws [], and public proceedings of the judiciary, are part of a fundamental commitment to making the operations of our public institutions open to the public. In recognition of this policy, the courts construe such laws in favor of public access." *Prairie Island v. Dept. of Public Safety*, 658 N.W.2d 876, 883-84 (Minn. App. 2003), citing *Demers v. City of Minneapolis*, 468 N.W.2d 71 (Minn. 1991).

This policy is affirmed in many other opinions. The purposes served by public access "are deeply rooted in the fundamental proposition that a well-informed populace is essential to the vitality of our democratic form of government." *Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). The "right to inspect and copy records is fundamental to a democratic state," and "serves to produce an informed and enlightened public opinion." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986) (citations and internal quotations omitted).

Indeed, the right to obtain information "is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Board of*

Education v. Pico, 457 U.S. 854, 867 (1982) (emphasis in original). “[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.” *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 491–92 (1975). “Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.” *Houchins v. KQED-TV, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting).²

Access to information about government and governmental operations fosters other salutary purposes as well, not the least of which is an elevated sense of public trust and confidence, a goal which (as noted) has no more urgent application than with respect to the conduct of elections. “People in an open society do not demand infallibility from their institutions, but it is difficult to accept what they are prohibited from observing.”

²These observations echo Madison’s oft-quoted comment that “A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.” Letter from James Madison to W. T. Barry (Aug. 4, 1822), in *3 Letters and Other Writings of James Madison* 276, 276 (Philadelphia, J. B. Lippincott & Co. 1865), cited in *Prior Lake American v. Mader*, *supra*, 642 N.W.2d at 735, n. 5.

Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 572 (1980). And, an “informed public opinion is the most potent of all restraints on misgovernment.” *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

Thus the presumption of public access found in the Data Practices Act and the policies summarized above suggest that in cases where some reasonable doubt exists as to what a particular section of the MGDPA may prescribe, that doubt should be resolved in favor of permitting access.

B. The Minnesota Government Data Practices Act and its Basic Operating Rules.

The Minnesota Government Data Practices Act, Minn. Stat., ch. 13 (MGDPA) “regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities.” *Wiegel v. City of St. Paul*, 639 N.W.2d 378 (Minn. 2002), quoting Minn. Stat. §13.01, subd. 3. The Act prescribes that “[a]ll government entities shall be governed by this chapter,” §13.01, subd. 1. Counties are included in the definition of “government entity.” §13.02, subd. 11. “The Act operates through a system of classification and how the data are classified ultimately determines who has access to the data.” *Wiegel*, 639 N.W.2d at 382.

The Act is, as noted, grounded on a presumption that records maintained by governmental agencies are open and accessible to the public. Section 13.01, subd. 3 expresses this principle in unambiguous terms, stating that Chapter 13 “establishes a presumption that government data are public and are accessible by the public for both

inspection and copying unless there is a federal law, a state statute, or a temporary classification of data that provides that certain data are not public.” §13.01, subd. 3.

“The core of the Data Practices Act is the provision that all ‘government data’ shall be public unless otherwise classified by statute or other law.” *Teachers’ Local 59 v. Special School District No. 1*, 512 N.W.2d 107, 111 (Minn. App. 1994) (citations omitted).

“Government data” subject to the Act and its presumption of public access is defined broadly. It includes “*all* data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media, or conditions of use.” §13.02, subd. 7 (emphasis added). As a result, virtually any record or document in the possession of a government agency is covered by the Data Practices Act, no matter what its form. Plainly this would include absentee ballot materials.

The manner in which “data” is defined under the MGDPA means that the Act’s classification scheme applies to individual items of information, and not simply to entire government records or files. “The focus of [the Data Practices Act] is information, not documents.” *Northwest Publications, Inc., v. City of Bloomington*, 499 N.W.2d 509, 511 (Minn. App. 1993). “The Data Practices Act itself contemplates the possibility of documents containing both public and nonpublic data and provides for their separation.” *Id.* Furthermore, “Minnesota case law supports an interpretation that results in separating public from nonpublic data when both are contained in the same document.” *Id.* Thus,

as a rule, “[e]ntire documents may not be withheld under the Minnesota Government Data Practices Act merely because they contain both public and non-public data.” *Id.* at 509. An exception occurs “only when the public and not public information is so inextricably intertwined that segregating the material would impose a significant financial burden and leave the remaining parts of the document with little informational value.” *Id.*, at 511.³

C. The Court of Appeals Erred in Construing §13.37 by Failing to Consider the Context in which the Statute Functions.

There is no question that §13.37 imposes some restriction regarding access to unopened absentee ballots, and thus modifies the general presumption of public access on which the Data Practices Act is grounded. The issue is the exact scope of that restriction. Contrary to the conclusion reached by the Court of Appeals, the language of §13.37 is not at all clear with respect to the critical issue of classification in at least two dimensions. Most importantly, if the context in which it operates is properly understood, it does not unambiguously address the classification of rejected absentee ballots after an election is over.

Whether a statute is ambiguous and thus requires some judicial interpretation hinges on a variety of factors. Ultimately, a statute is ambiguous if the language is susceptible to more than one reasonable meaning. *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010). The goal is to determine and effectuate the intention of the

³The language of the Act corroborates this analysis in providing that a government agency “may not charge for separating public from not public data.” Minn. Stat. §13.03, subd. 3(c).

Legislature. *Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294 (Minn. 2010). If the result of applying a statute's apparently literal meaning is unreasonable or absurd, that result will generally not be given effect. *Wegener v. Commissioner of Revenue*, 505 N.W.2d 612, 617 (Minn. 1993). Particular provisions of a statute are to be read in context with other provisions of the same statute, and statutes covering the same subject matter should be construed consistently. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412 (Minn. 2005); *Lenz v. Coon Creek Watershed District*, 153 N.W.2d 209 (Minn. 1967).

Section 13.37 is one of the older sections of the Data Practices Act, enacted when the law was only a few pages in length and before the Legislature moved towards the practice of separately addressing in distinct sections and subdivisions particular categories of data (the main reason that the Act has become so long). See Laws 1980, ch. 603. Section 13.37 is plainly a catchall, containing several different types of records having virtually no relationship to each other. Titled "general nonpublic data," §13.37 encompasses "security information," "trade secret information," "parking space leasing data," "labor relations information," "sealed bids prior to opening," and "sealed absentee ballots prior to opening by an election judge." Some, but not all, of these categories of data are defined in subdivision 1 of the statute. Subdivision 2 then imposes a single classification provision purporting to cover all of them, without any distinction or discrimination, stating that all are "classified as nonpublic data with regard to data not on

individuals, pursuant to section 13.02, subdivision 9, and as private data with regard to data on individuals, pursuant to section 13.02, subdivision 12.” This structure alone produces inevitable uncertainty about exactly how the Legislature meant the statute’s classification language to work in all of the instances covered.

In the case of rejected absentee ballots, construing the language of §13.37 as the the Court of Appeals did produces a result that is effectively nonsensical, when applied to the actual process of counting votes after an election is concluded. The Court of Appeals rejected the district court’s more sensible determination that the classification in §13.37 “only provides for the handling of absentee ballots while the election process, including any recount or legal challenge, is under way.” It countered that the “statute contains no time limitation of its application, and even if we agreed that a time limitation on the classification would be appropriate or consistent with the purpose of the data classification provided in the statute, courts cannot “supply what the legislature purposely omits or inadvertently overlooks.” AD-7 (citation omitted). But this conclusion fails to account for the manner in which absentee ballots were actually counted during the 2008 election.⁴ Most importantly, it neglects to consider the chronologically limited role played by election judges.

As the 2008 election for Minnesota’s U.S. Senate seat graphically demonstrated,

⁴The 2010 Legislature enacted extensive changes to Minnesota election law, including those provisions governing absentee ballots. See, in particular, Laws 2010, ch. 162. However, those changes were not retroactive, and in any event would not seem to affect the disposition of the present action. Nothing in the 2010 legislation amended the provisions of section 13.37.

the ballot tabulation that occurs on election day itself—especially with regard to absentee ballots—can sometimes be only the beginning of a long process of deciding which ballots are finally counted. After the initial calculation is finished, county canvassing boards meet to consider the results, followed by the state canvassing board. In addition, election contests may ensue, as in the case of the Coleman–Franken matter.

However, election judges participate for a very limited portion of this process. As a rule, they serve only on election day, and are discharged when the initial count that occurs on election day is completed. Therefore, a literal adherence to the language in §13.37 stating that sealed absentee ballots are classified until opened by an election judge would mean that sealed absentee ballots opened *by any other person* remain classified, even when they are later accepted and counted in the course of the post-election process. Yet it is often the case, especially when an election contest occurs, that sealed absentee ballots *are* opened by other persons, after election day and after the election judges have been discharged. Thus the Court of Appeals interpretation produces absurd results in practice, as specific examples amply demonstrate.⁵

One illustration may be derived from a decision of this Court that was issued during the course of the Franken–Coleman election contest, where the Court held that county canvassing boards lacked authority to identify, open, and count absentee ballots

⁵In the proceedings before the trial court, Appellants cited a brochure published by the Minnesota Secretary of State that was available on the agency’s Web site titled “Serve as an Election Judge,” www.sos.state.mn.us, which stated that “[e]lection judges serve on Primary Election Day, September 9, 2008, and General Election Day, November 4, 2008.”

that had been previously rejected in error during the initial ballot counting. *Coleman v. Ritchie*, 758 N.W.2d 306, 307 (Minn. 2008). The Court, however, said that where local election officials and the parties agreed that an absentee ballot was improperly rejected, the envelopes in those cases could be unsealed and the ballots counted. *Id.* But since in those cases, the absentee ballots would not have been opened by election judges, under the Court of Appeals' interpretation, that group of ballots—unlike all other counted absentee ballots—would remain private or nonpublic data. This in turn would mean that they not only could not be *publicly* examined, but that considerable care about disclosure would need to be taken even with respect to those among government officials or representatives of the candidates and political parties who might want to review them.

Another example would be where a group of absentee ballots was somehow overlooked and therefore not even considered on election day, which can periodically happen with all categories of ballots. Once discovered, that group would be reviewed and then accepted or rejected, as with other absentee ballots. Again, however, the opening of those that were accepted would not be done by election judges, because they would have been discharged, and so under the Court of Appeals' interpretation, the ballots would remain in a data practices Twilight Zone, subject to the strict rules governing access to private or nonpublic records, since according to the appellate court, only election judges have the power to terminate the private–nonpublic data classification of §13.37 by opening the ballots.

In short, a simplistically literal reading of the statutory language would place local and state election officials in the position of violating the Data Practices Act when, after election day and the discharge of the election judges, they opened absentee ballots and disclosed them to members of the public, or even to official participants in the election process, many of whom might not be authorized under the complex rules of the Data Practices Act to have access to private or nonpublic data. See, e.g., Minn. Stat. §13.04 (“Rights of Subject of Data”), and §13.05 (“Duties of Responsible Authority”). It seems self-evident that the Legislature could not have meant to place election officials in such a conundrum, thus suggesting that a more careful examination of the language of §13.37 is required than accorded by the Court of Appeals. That examination supports the conclusion reached by the district court—that the statute in effect provides that the absentee ballots remain classified until the ballot counting on election day, a conclusion that avoids the absurdities described above.

Section 13.37 exhibits another ambiguity as well. In light of the discussion just preceding, Appellants do not believe that it is necessary to rely on it. Nonetheless, it casts further doubt on the conclusion reached by the Court of Appeals.

The language of §13.37, subd. 2 reflects the fact that the terms “nonpublic data” and “private data” have a specific and technical meaning under the MGDPA. The definitions of these terms make clear that particular information cannot simultaneously be “private data” and “nonpublic data,” but rather will be one or the other—they are mutually

exclusive categories under the definitions found in §13.02, subs. 9 and 12. Yet unlike most other sections of the Data Practices Act, §13.37 does not specify exactly which of the diverse kinds of records listed in the statute are “classified as nonpublic data with regard to data not on individuals” and which “as private data with regard to data on individuals.” The statute’s directive in subdivision 2 is simply that all of the listed categories of data are classified “as nonpublic data . . . *and* private data.” The use of the word “and” creates distinct uncertainty as to the statute’s meaning and the scope of the classification, because again, records cannot simultaneously be both private and nonpublic.

This uncertainty is avoided if the classification provided in §13.37, subd. 2 is understood to classify the enumerated categories as either nonpublic or private data. The logic of such a reading is borne out in considering the different kinds of records described in the statute. For example, a trade secret (such as a computer program) would be nonpublic data under §13.37 given that no individual would be the subject of such data, while information about the holder of a government parking lease or a community crime prevention volunteer would plainly fall within the ambit of private data, since individuals are the subjects of that kind of information.

One could argue (as the Court of Appeals effectively did) that with respect to the categories of records listed in the statute which are related to individuals (such as community crime prevention volunteers), the Legislature intended to keep classified not

only information identifying those volunteers, but *all* other information relating to that category as well—which would include potentially useful data such as the number of volunteers in various communities, the average time that volunteers serve, or the impact of their efforts. Because such information would not identify any particular individuals, it would no longer consist of “private data.” But it could still be nonpublic data, and under the reading of §13.37 adopted by the Court of Appeals, would therefore continue to be inaccessible by the public. However, Appellants submit that it is absurd to believe that the Legislature intended any such classification once the individually identifying information is removed with respect to the categories of records found in §13.37 relating primarily to individual privacy concerns. Again though, the Court need not reach this nuanced level of analysis concerning the statute, since the Court of Appeals interpretation may be separately rejected on the basis of the discussion appearing above with respect to the practical effects of that interpretation.

D. The Absentee Ballots once Removed from their Envelopes are Public Data under the Data Practices Act.

If as Appellants suggest, the packet consisting of a rejected absentee ballot along with its ballot and return envelopes is not private and nonpublic data until opened by an election judge but only until an election is concluded, the question then becomes what classification applies once the election is over. As noted previously, Appellants agree that until the counting of ballots commences on election day, the ballot packets are not accessible.

If the full context is considered, it seems reasonably evident that the classification in §13.37 was intended simply to limit access to the sealed absentee ballots until the election was over and tabulation of the votes commenced. Because absentee ballots are nearly always returned to election officials before election day (indeed, ballots not received by a certain hour on election day must be rejected), were they not classified prior to that point, they would theoretically be accessible before the election occurred. Since §13.37 maintains the restriction on access to an absentee ballot only “until opening by an election judge,” and since the great majority of absentee ballots are opened on election day, are counted, and become publicly accessible, the unstated premise of the statute is that the restriction on access is needed only through election day. In fact, given the election context and counting process discussed above, it is entirely plausible to conclude that the Legislature never really considered the ongoing classification of the small percentage of absentee ballots that are rejected and thus never “open[ed] by an election judge.” But given that the context indicates that they should not be considered permanently classified until opened by an election judge, then under the general presumption found in the Data Practices Act holding that government records are public absent a specific law to the contrary, the ballots would be considered public after the election.

There would seem little doubt that the sealed absentee ballot packet (the ballot and the envelopes) quintessentially comprises data on individuals as defined in §13.02, subd.

5—a collection of documentation that *taken together* identifies the subject of the data (a particular voter) and how he or she voted. Under §13.02, data on individuals can only be classified as private, confidential, or public. Therefore, pursuant to the classification language of §13.37, subd. 2, the packet would consist only of private data.

However, because the portions of the absentee ballot packet that could be used to identify the voter can easily be separated from the ballot (which itself contains no identifying information), once that separation occurs, the ballot becomes public and accessible. Since a ballot in isolation does not identify the voter, it is no longer classified as “private data on individuals” pursuant to §13.02, subs. 5 and 12 (i.e., no individual “can be identified as the subject of that data”), and it is therefore covered by the general presumption of public access found in the Data Practices Act.

As noted earlier, “[t]he focus of [the Data Practices Act] is information, not documents,” *Northwest Publications, Inc., supra*, 499 N.W.2d at 511, and “[t]he Data Practices Act itself contemplates the possibility of documents containing both public and nonpublic data and provides for their separation.” Thus, “Minnesota case law supports an interpretation that results in separating public from nonpublic data when both are contained in the same document.” *Id.* For this reason, “[e]ntire documents may not be withheld under the Minnesota Government Data Practices Act merely because they contain both public and non-public data.” *Id.* at 509.

Appellants’ request for access to the sealed, uncounted absentee ballots is

governed by these principles. Appellants seek to inspect and copy the ballot itself, which in no way identifies the voter when separated from other materials such as the envelopes. Appellants have asked the County to “separat[e] public from not public data,” as the Data Practices Act directs, and in its Order, the district court required this as well. Both in their initial request letter to Ramsey County, and in their Complaint initiating this litigation, Appellants have emphasized that they “are not seeking access to any information by which the decisions of individual voters could be determined,” and that they “fully respect the sanctity of the private ballot, and the importance of voter confidentiality in the electoral process.” See letter from Mark Anfinson to Ramsey County, June 22, 2009, Exhibit C to Affidavit of Darwin J. Lookingbill, submitted to the district court in support of the County’s motion to dismiss. AA-14.

It is also clear that separating the ballots from the ballot and return envelopes would not be a difficult procedure. It would simply require that the envelopes in which the rejected absentee ballots were returned to the County be opened, and that the envelopes be segregated from the ballots themselves.⁶

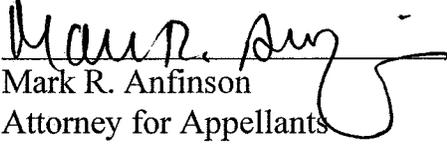
⁶Appellants suggest that this process is not particularly difficult because it presumably occurs thousands of times during every election cycle, when for accepted ballots, election officials open the absentee return and ballot envelopes, and remove and separate the enclosed ballots. The County has also argued that even if the ballots were separated from the envelopes, “the ballots themselves potentially contain identifying information concerning voters,” since “each ballot identifies the ward and precinct of the voter.” According to the County, because the names of absentee voters whose ballots were rejected became public during the recount process, and because in “some instances” only one absentee ballot per precinct was rejected, “[a]n industrious individual” could compare the names with precinct voting records, and “discern how various individuals voted.” Ramsey County brief to Court of Appeals, at 23. However, this kind

In sum, the rejected absentee ballots, once separated from the envelopes that may contain information identifying a voter, are public data. Thus they have the same classification as do all other ballots cast in an election.

CONCLUSION

For the reasons described, Appellants respectfully request that the decision of the Court of Appeals be reversed, and that the judgment of the district court be reinstated.

DATED: November 23, 2010


Mark R. Anfinson
Attorney for Appellants
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, MN 55408
Phone: 612-827-5611
Atty. Reg. No. 2744

of argument hardly supports a wholesale restriction on access to all of the rejected absentee ballots; the County concedes that this potential concern would arise only in “some instances.” Furthermore, in those probably very few precincts where the concern had merit, the simple expedient would be to redact or conceal on the ballots the ward and precinct information—again, the exact separation procedure that the law expressly requires where a document contains both private and public data.