

No. A10-395

State of Minnesota
In Court of Appeals

RAMSEY COUNTY,

Appellant,

v.

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

Respondents

RESPONDENTS' BRIEF

RAMSEY COUNTY ATTY.'S OFFICE
Kevin M. Lindsey
Atty. Reg. No. 220796
50 West Kellogg Boulevard
Suite 560 West
St. Paul, MN 55102
(651) 266-3217

Attorney for Appellant

MARK R. ANFINSON
Atty. Reg. No. 2744
Lake Calhoun Professional Bldg.
3109 Hennepin Avenue South
Minneapolis, MN 55408
(612) 827-5611

Attorney for Respondents

TABLE OF CONTENTS

STATEMENT OF THE ISSUES, CASE, AND FACTS.....1

INTRODUCTION.....2

ARGUMENT.....6

I. Ramsey County’s Claim that the Senatorial Election is not Over, and that Consequently the Unopened Absentee Ballots may not be Disturbed, is Improperly Raised for the First Time on Appeal; the County’s Claim Fails on the Merits as well.....6

 A. Because the County did not Raise the Constitutional Claim in the District Court, it is Barred from doing so on Appeal.....6

 B. The 2008 Senatorial Election and Proceedings Contesting it were Concluded Long Ago.....7

 C. It is Doubtful that Mr. Coleman could still Pursue an Appeal to the United States Senate, even if he Chose to do so.....10

II. The December, 2008 Injunction Entered by the Supreme Court in *Coleman v. Ritchie* was Obviously not Intended to be Permanent, nor did it Involve the Merits of State Law Governing Access to Absentee Ballots; the Election Laws Referred to by the County do not Restrict Public Access once an Election is Over.....12

III. All Records Maintained by Government Agencies in Minnesota are Presumptively Accessible to the Public, including the Rejected and Unopened Absentee Ballots.....15

 A. The Operating Rules and Definitions of the MGDPA.....16

 B. The Absentee Ballot Materials that Respondents have Asked to Inspect are Public Data under the Data Practices Act.....20

C. Granting Respondents' Request will in no Way
Jeopardize Voter Privacy.....29

CONCLUSION.....32

TABLE OF AUTHORITIES

CASES

<i>Board of Education v. Pico</i> , 457 U.S. 854 (1982).....	18
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	28
<i>Carlisle v. City of Minneapolis</i> , 437 N.W.2d 712 (Minn. App. 1989).....	10
<i>Coleman v. Ritchie</i> , 758 N.W.2d 306 (Minn. 2008).....	12, 13
<i>Coleman v. Franken</i> , 767 N.W.2d 453 (Minn. 2009).....	8, 10
<i>Cox Broadcasting Corp. v. Cohen</i> , 420 U.S. 469 (1975).....	19
<i>Demers v. City of Minneapolis</i> , 468 N.W.2d 71 (Minn. 1991).....	18, 20
<i>Erlandson v. Kiffmeyer</i> , 659 N.W.2d 724 (Minn. 2003).....	28
<i>Genung v. Commissioner of Pub. Safety</i> , 589 N.W.2d 311..... (Minn. App. 1999)	7
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233 (1936).....	19
<i>Houchins v. KQED-TV, Inc.</i> , 438 U.S. 1 (1978).....	19
<i>Lifteau v. Met. Sports Facilities Comm.</i> , 270 N.W.2d 749 (Minn. 1978).....	9
<i>Met. Sports Facilities Comm. v. Minn. Twins</i> , 638 N.W.2d 214..... (Minn. App. 2002).	9
<i>Minneapolis Star & Tribune Co. v. Schumacher</i> , 392 N.W.2d 197..... (Minn. 1986)	18
<i>Northern States Power Co. v. Gas Services, Inc.</i> , 690 N.W.2d 362..... (Minn. App. 2004).	6, 7

<i>Northwest Publications, Inc., v. City of Bloomington</i> , 499 N.W.2d 509.....	16, 17, 23
(Minn. App. 1993)	
<i>Prairie Island v. Dept. of Public Safety</i> , 658 N.W.2d 876	17, 18
(Minn. App. 2003)	
<i>Prior Lake American v. Mader</i> , 642 N.W.2d 729 (Minn. 2002).....	18, 19
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	28
<i>Richmond Newspapers, Inc., v. Virginia</i> , 448 U.S. 555 (1980).....	19
<i>Roudebush v. Hartke</i> , 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972).....	11
<i>Teachers' Local 59 v. Special School District No. 1</i> , 512 N.W.2d 107.....	16, 20
(Minn. App. 1994)	
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988).....	6, 7
<i>Wiegel v. City of St. Paul</i> , 639 N.W.2d 378 (Minn. 2002).....	15, 17

STATUTES

Minn. Stat. §13.01, subd. 1.....	15
Minn. Stat. §13.01, subd. 3.....	15, 16
Minn. Stat. §13.02, subd. 4.....	22
Minn. Stat. §13.02, subd. 5.....	22, 25
Minn. Stat. §13.02, subd. 7.....	16, 20
Minn. Stat. §13.02, subd. 9.....	21, 22
Minn. Stat. §13.02, subd. 11.....	15
Minn. Stat. §13.02, subd. 12.....	21, 22, 25

Minn. Stat. §13.03, subd. 1.....21

Minn. Stat. §13.03, subd. 3.....17

Minn. Stat. §13.08.....15

Minn. Stat. §13.37.....*passim*

Minn. Stat. §204B.40.....14

Minn. Stat. §204C.19, subd. 1.....27

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Article I, §5.....*passim*

STATEMENT OF THE ISSUES, CASE, AND FACTS

Given the nature of the questions presented, Respondents do not believe that a separate Statement of Issues, Statement of the Case, and Statement of Facts are necessary. To the extent Respondents have material disagreements with the Statements that appear in Appellant's brief, those disagreements are addressed in Respondents' Argument, which follows.

INTRODUCTION

The County offers two principal arguments in support of its contention that Respondents' request for access to the unopened absentee ballots from the 2008 election should be rejected: First, that since former Sen. Coleman can supposedly still "appeal" the outcome of the election to the full Senate under Article I, §5 of the U. S. Constitution, state and federal election statutes (along with a temporary injunction issued by the Supreme Court during the 2008 election recount) bar public access; and second, that language found in Minn. Stat. §13.37 (which is part of the Minnesota Government Data Practices Act) classifies the ballots as not publicly accessible.

In fact, these arguments come nowhere close to defeating Respondents' request, because they are derived from fundamental misinterpretations and mischaracterizations of the applicable law.

1. The County's reliance on Article I, §5 of the Constitution fails for two independent reasons: (a) the County never raised this argument in the district court, and thus may not invoke it for the first time on appeal; and (b) based on the undisputed facts, the County's constitutional argument is defective on the merits, because it is clear that the recount and ensuing election contest were concluded months ago, and that no plausible chance exists that former Sen. Coleman might still take the matter to the U. S. Senate, even if he still could (which is doubtful). Thus neither the federal and state election laws which the County refers to nor the

temporary injunction issued by the Supreme Court has any continuing function.

As the County acknowledges, the federal and state election statutes simply provide rules for administering elections with the aim of securing and preserving ballots and other election-related documents in order to insure the integrity of the initial tabulation and any recounts or contests that might follow. The function of the statutes is not to classify ballot materials as being public or private. Similarly, the injunction issued by the Supreme Court was clearly meant only to maintain the integrity of election materials until the recount was completed and the election contest resolved. Since those proceedings were concluded long ago, the Court's injunction and the election statutes have no practical application, and they cannot properly be transplanted to perform a data classification function because they were never intended to serve such purposes.

2. The County's reliance on Minn. Stat. §13.37 fails because its argument completely ignores the meaning of key statutory terms such as "private data," and "data on individuals," which are precisely defined in the Minnesota Government Data Practices Act (of which §13.37 is a part). The sometimes arcane provisions of the MGDPA cannot be correctly understood or properly applied unless the terminology on which those provisions are grounded is adhered to.

In contrast to the County's arguments, Respondents' legal position is directly rooted in the basic access rules of the Data Practices Act, the statute that primarily

governs the disposition of this action. In pertinent part, those rules provide that:

▶The data classifications imposed by the Act apply separately to individual items of information, regardless of form, and not to entire documents or records simply because they may contain some classified information.

▶Particular government documents, records, and files will often include both information that is publicly accessible, and information that is not. In such cases, the Act directs the government agency holding the record must separate the public and not public portions, and permit review of the public data. Thus the entire record cannot be withheld simply because it contains some private data.

The essence of the relief sought by Respondents is that these rules should be applied to the absentee ballot materials, just as with respect to other government records. Because the rejected absentee 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.

Finally, Respondents seek to emphasize that their desire to review the rejected absentee ballots (and related materials documenting the reasons for rejection) is hardly

prompted by idle curiosity, nor under the terms of the trial court's Order would that review cause any infringement on voter privacy. The rending effect on the state of the controversy over the results of the 2008 election for United States Senator requires no elaboration. Furthermore, it is clear that much of that controversy related to questions about the thousands of absentee ballots which were rejected and therefore never counted, and whether those rejections were proper. Indeed, the County acknowledges this in its own brief (at 5) discussing the recount and subsequent election contest.

Disputes about the state statutes that govern the casting and counting of absentee ballots have in fact simmered for years. As but one example of this, Respondents' Complaint cites a commentary published by the League of Women Voters Minnesota in the wake of the 2008 election, which expresses "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, A-6. It seems virtually certain that this issue will be a major topic of deliberation during coming sessions of the Legislature.

As the state's public officials consider revisions to Minnesota's "complicated absentee ballot laws," they will certainly benefit from the most comprehensive possible presentation of the facts and circumstances surrounding the events of the 2008 election, including why so many absentee ballots were rejected, and whether reasonable alternatives to the current statutory rules may be available. In other words,

the odds are good that with better facts will come better public debate, and eventually, better laws. It is to this end that Respondents seek access to the absentee ballot materials at issue in the instant action. Should Respondents succeed, those materials will then be available not just to Respondents but to all the citizens of the state.

ARGUMENT

I. Ramsey County's Claim that the Senatorial Election is not Over, and that Consequently the Unopened Absentee Ballots may not be Disturbed, is Improperly Raised for the First Time on Appeal; the County's Claim Fails on the Merits as well.

In seeking reversal, the County first argues that the U. S. Senate "election is not over as a matter of law because Coleman has not exhausted his right to file an appeal with the United States Senate." App. Br., 3. Since supposedly the "district court's analysis that it would be permissible to open the rejected absentee ballots is based upon the erroneous factual basis that the election was over," the trial court's decision "should therefore be reversed." *Id.* For a number of reasons, however, the County's argument on this point is completely fallacious.

A. Because the County did not Raise the Constitutional Claim in the District Court, it is Barred from doing so on Appeal.

"A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citation omitted). Thus "[p]arties are bound . . . by the arguments they make to the district court." *Northern*

States Power Co. v. Gas Services, Inc., 690 N.W.2d 362, 367 (Minn. App. 2004). “To argue a different theory on appeal typically precludes review.” *Genung v. Commissioner of Pub. Safety*, 589 N.W.2d 311, 313 (Minn. App. 1999).

In the present case, Ramsey County never previously advanced the argument now made on appeal that Article I, §5 of the U. S. Constitution bars the relief sought by Respondents. Specifically, the County’s memorandum submitted to the district court in support of its motion to dismiss for failure to state a claim makes no mention whatsoever of any such argument, nor does the County’s notice of motion and motion (dated September 2, 2009).¹

Furthermore, the Order and Memorandum of the district court from which this appeal is taken (A-43) contains no reference to such an argument being offered on the part of the County, nor does the district court address the issue on its own initiative. Thus because the County’s constitutional argument was not “presented and considered by the trial court in deciding the matter before it,” *Thiele*, 425 N.W.2d 582, the argument falls outside the scope of review on this appeal.

B. The 2008 Senatorial Election and Proceedings Contesting it were Concluded Long Ago.

More importantly, even if the County’s constitutional argument is not barred by failure to present it to the district court, it lacks any substantive merit regardless. As

¹The County never served or filed an Answer in the district court, opting instead to address the relief requested in Respondents’ Complaint by means of the motion to dismiss for failure to state a claim, as permitted by Minn. R. Civ. P. 12 .

the County's factual summary describes, the tiny margin separating Norm Coleman and Al Franken when the votes were counted on election night 2008 resulted in a protracted recount followed by a vigorous election contest. See App. Br., 4. Those proceedings continued for nearly eight months, culminating on June 30, 2009, when the Minnesota Supreme Court filed its decision in *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009). The next day, Gov. Pawlenty signed an election certificate for Al Franken. Shortly thereafter, he was seated in the United States Senate. *Id.*, at 7; Complaint, A-6.

Given these circumstances, and the fact that more than nine months have now passed since the high court ruled, with no attempt of any kind by Coleman to "file an appeal with the United States Senate," App. Br., 3, the County's contention that Coleman may still decide to pursue such a course of action, and that therefore the 2008 election materials must remain undisturbed, teeters on the brink of absurdity. If one also considers that Coleman expressly and unconditionally conceded the election to Franken within hours of the Supreme Court's decision and that in the many months since then has never offered the slightest hint that he might change his mind, the County's argument plunges over that brink.

Shortly after learning of the Court's determination on June 30, 2009, Sen. Coleman held a news conference in St. Paul. His remarks were documented by myriad news outlets and reported throughout the country. Coleman stated without

qualification that “the Supreme Court has made its decision and I will abide by the results.” Coleman Concedes, Sending Franken to Senate,

<http://kstp.com/news/stories/S1005084.shtml?cat=1>. “It’s time for Minnesota to come together under the leaders its has chosen and move forward. I join all Minnesotans in congratulating our newest United States Senator, Al Franken.” Franken Wins

Minnesota Senate Seat, State Supreme Court Rules,

<http://abcnews.go.com/print?id=7968420>. Coleman also made clear in his remarks that he would not attempt to appeal the Supreme Court’s ruling, as Gov. Pawlenty acknowledged shortly afterwards: “In light of [the Court’s decision] and Senator Coleman’s announcement that he will not be pursuing an appeal, I will be signing the election certificate today.” Coleman Concedes Race to Franken,

<http://politico.com/printstory.cfm?uuid=325FE6B>.²

Furthermore, in the many months that have elapsed since Coleman conceded,

²Respondents submit that the Court may take judicial notice of these developments. While Minn. R. Civ. App. P. 110 generally limits the Court’s review to the record on appeal, narrow exceptions have been recognized. These include “cases involving uncontroverted documentary evidence that would support an affirmance.” *Met. Sports Facilities Comm. v. Minn. Twins*, 638 N.W.2d 214, 229 (Minn. App. 2002). Certainly the numerous and unfailingly consistent news accounts of Sen. Coleman’s concession qualify under this standard, as confirmed by precedent relating to other contexts receiving widespread news coverage: “We take judicial notice of the fact that for two legislative sessions no proposal received broader coverage both in the news media and within the legislative process itself than the proposed stadium bill.” *Lifteau v. Met. Sports Facilities Comm.*, 270 N.W.2d 749, 753 (Minn. 1978). Respondents would also emphasize that the reason no evidence about Sen. Coleman’s concession comments and related developments were made part of the record below is because the County had never raised the constitutional argument when before the district court, and thus there was no reason to do so.

there has not been the slightest indication that he might have altered his view, nor does the County cite any evidence to the contrary. While the County refers to portion of the decision in *Coleman v. Franken* (767 N.W.2d at 458, n. 5) where the Supreme Court recognizes that an appeal to the Senate and transmission of the disputed election materials occurs “only on request of either party,” it provides no evidence that Coleman has ever made such a request.

It is therefore clear beyond any rational debate that an appeal to the U. S. Senate will never occur, and that the 2008 election was over last summer. Rarely does the law indulge claims that depend for their legitimacy entirely on sheer speculation (*cf. Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989), noting that in opposing summary judgment, a party “must do more than simply show that there is some metaphysical doubt as to the material facts.”). At some point, common sense should prevail over argumentative hypothecating. Because the County has not offered a scintilla of evidence suggesting that Mr. Coleman might still ask the Senate to review the election outcome, the County’s argument premised on the possibility of such an appeal necessarily collapses.

C. It is Doubtful that Mr. Coleman could still Pursue an Appeal to the United States Senate, even if he Chose to do so.

There are relatively few precedents interpreting the scope and procedural contours of Article I, §5 to the federal Constitution. Certainly that provision confers

ultimate jurisdiction over disputes involving senatorial elections on the United States Senate itself. But implicit in Ramsey County's argument is the notion that a senatorial candidate's right to bring such an appeal continues indefinitely. Despite the scarcity of precedent, there are decisions that cast considerable doubt on this assumption.

For example, in *Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972), the Supreme Court considered an election contest arising out of the closest senatorial election in Indiana history. The incumbent (Vance Hartke) led by a small margin after the initial vote count; Hartke was issued an election certificate and seated before the recount had been completed. He then contended that because he had already been seated, the courts were without authority through any election contest to alter the Senate's judgment: "Since the Senate has now seated Hartke, and since this Court is without power to alter the Senate's judgment, it follows, [Hartke's] argument goes, that the case is moot." 405 U.S. 19-20, 92 S.Ct. 807.

The Supreme Court eventually disagreed with Hartke, but only because "the Senate has postponed making a final determination of who is entitled to the office of Senator, pending the outcome of this lawsuit." 405 U.S. 20, 92 S.Ct. 808. In other words, the Senate had seated Hartke conditionally. Absent that, the clear implication of the Court's decision is that once the Senate actually accepts *and seats* a senator unconditionally, the Senate's final judgment on the election has been rendered, and no further appeals may be brought to that body.

In the instant case, there were no conditions attached when Sen. Franken was seated (certainly none have been identified by the County or made part of the record). Thus even if Mr. Coleman did somehow decide to pursue an appeal to the Senate after all this time, it is doubtful that it would be considered valid, or that the Senate would accept it.

II. The December, 2008 Injunction Entered by the Supreme Court in *Coleman v. Ritchie* was Obviously not Intended to be Permanent, nor did it Involve the Merits of State Law Governing Access to Absentee Ballots; the Election Laws Referred to by the County do not Restrict Public Access Once an Election is Over.

As the County notes (App. Br., 4), during the early stages of the recount which followed the November 4, 2008 general election, the Supreme Court issued an Order in response to a petition from the Coleman campaign, which in part “enjoined” election officials “from opening any previously rejected absentee ballot envelopes.” *Coleman v. Ritchie*, 758 N.W.2d 306, 308 (Minn. 2008). It appears that this injunction was never formally dissolved by the Court. While Respondents recognize the uncertainty this created for the County in responding to the initial request for access to the absentee ballots, it does not represent a substantive barrier to that request, nor should it be considered dispositive of this litigation, as the district court concluded.

In fact, the County does not really disagree with this interpretation, but instead simply argues that because former Sen. Coleman could supposedly still “appeal” the

results of the election recount to the U. S. Senate, the Supreme Court's injunction must stay in place for so long as that possibility exists. However, (as discussed in the previous section) there is no validity to the premise from which this argument is derived. All election disputes were concluded long ago, and thus the utility and purpose of the December, 2008 injunction as well.

It can hardly be disputed that the Supreme Court never meant for its injunction to be permanent. Clearly it was issued as a means of preserving the status quo until the recount could be completed and any subsequent election contests resolved. This is abundantly evident from the nature of the issues addressed in the Order granting the injunction, as well as from the Court's description of the relief that was sought in the Coleman campaign's petition ("that all rejected absentee ballot envelopes and corresponding ballots be preserved and kept segregated in a manner permitting the ballot to be linked to its envelope *in the event of a future election contest*," 758 N.W.2d at 307). Furthermore, the Court's Order does not in any way deal with the question of data classification generally, or the merits of those statutes that are at issue in the instant litigation which govern access to absentee ballots after an election is over.³

³Respondents would note that until the instant action was commenced, they did not have standing to ask that the injunction be formally withdrawn in any event. If this Court should conclude that the injunction may still be in effect and that it limits the Court's ability to reach the merits of how the Data Practices Act and the state campaign laws are to be construed with respect to the relief sought in the Complaint, Respondents ask that the Court permit them to bring a motion before the Supreme Court requesting that the injunction be

Though the County's brief also repeatedly refers to "federal and state election laws" that supposedly block any public access to the unopened absentee ballots, the brief actually discusses only one such law, Minn. Stat. §204B.40. App. Br., 17. But as the trial court found, in relying on this statute, the County improperly attempts to conflate laws meant solely for election management purposes with those controlling the classification of and access to election materials after an election has been concluded.

It is obvious that §204B.40 serves only a limited ballot security function, and that it does not supersede state public access laws. The statute applies to *all* ballots cast in an election (and not just to uncounted absentee ballots). It simply directs county election officials to secure all of the ballots once they have been counted or otherwise dealt with for a period of 22 months after the election. The self-evident purpose of the statute is to preserve the ballots so that should there be a recount, election contest, or other post-election proceeding, the integrity of the ballots will be unchallengeable. Again, the statute is clearly not meant to classify data, and should not be construed to do so.

formally dissolved, since its obvious purpose has long since expired. In the alternative, this Court itself could of course direct an enquiry to the Supreme Court about the status of the injunction. In either case, while such a request was pending, this Court could presumably delay any decision on the merits of the underlying action. Such a procedure would seem distinctly preferable in terms of efficiency, cost, and time, since the only other available course would presumably be an appeal to the Supreme Court, were this Court to reject Respondents' claims primarily on the basis of the injunction.

III. All Records Maintained by Government Agencies in Minnesota are Presumptively Accessible to the Public, including the Rejected and Unopened Absentee Ballots.

The County additionally argues that a section of the Data Practices Act classifies the absentee ballots as not public data. Again, however, an understanding of the governing legal principles and relevant facts demonstrates the lack of merit in this argument.

The starting point for any discussion about access to records held by state and local agencies is the Minnesota Government Data Practices Act, Minn. Stat., Chapter 13 (MGDPA), which “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. 11.⁴

The Act is not neutral on the issue of public access, being grounded on a strong 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

⁴The Data Practices Act also provides for various remedies described in Minn. Stat. 13.08, which authorizes actions to compel compliance, injunctive relief, awards of costs, disbursements, and attorney’s fees, as well as a civil penalty of up to \$300 for each violation.

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).

**A. The Operating Rules and Definitions of the MGDPA,
and the Policies Served by Public Access.**

“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). Thus effectively 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, rejected or counted, opened or unopened.

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 511.⁵

In the three decades since originally enacted, the Data Practices Act has become both long and complex, features of the statute which are mainly the product of legislative efforts to make specific determinations about the way in which particular government records are treated. “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 scope and subject matter of the Data Practices Act (combined with the vagaries of the English language) also produce frequent uncertainties about the law’s meaning and application. However, the Courts have concluded that for vital reasons of public policy, the interpretive dilemmas prompted by the Act must be resolved in favor of the public’s right to know: “This law, together with statutes such as the Open

⁵The Act states explicitly that a government agency “may not charge for separating public from not public data.” Minn. Stat. 13.03, subd. 3(c).

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).

The reasons for this commitment are well documented. According to the Minnesota Supreme Court, 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).

Correspondingly, the United States Supreme Court has observed that 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).⁶

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. “People in an open society do not demand infallibility from their institutions, but it is difficult to accept what they are prohibited from observing.” *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).

The presumption of public access found in the Data Practices Act can be

⁶These 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.

overcome. But that is hardly automatic given the strength of the presumption and the important policies which it serves. A “political subdivision resisting disclosure of data bears the burden of identifying the law preventing its disclosure.” *Demers*, 468 N.W.2d at 73. Most importantly, if the presumption means anything, it requires that in cases where some reasonable doubt exists as to what the law may prescribe in a given situation, that doubt must be resolved in favor of permitting access.

B. The Absentee Ballot Materials that Respondents have Asked to Inspect are Public Data under the Data Practices Act.

The legal analysis that supports Respondents’ request for access to the absentee ballots is not especially complicated, and relies primarily on well-established rules governing the classification of government records in Minnesota.

That analysis begins with the Data Practices Act’s definition of “government data” found in §13.02, subd. 7, which encompasses “all data” collected, received or maintained by a government entity in Minnesota, “regardless of its physical form, storage media, or conditions of use.” Since Ramsey County is plainly a “government entity” for purposes of the Act, all of the absentee ballot materials collected, received, and still maintained by the County relating to the 2008 general election are government data subject to the statute’s prescriptions.

Correspondingly, those materials are covered by the presumption of public accessibility lying “at the core of the Data Practices Act.” *Teachers’ Local 59, supra*,

512 N.W.2d at 111. Thus Respondents must be allowed to inspect and copy them unless they are clearly “classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.” Minn. Stat. §13.03, subd. 1.

In Respondents’ view, no such statute, temporary classification, or federal law plausibly exists, if the explicit operating rules of the Data Practices Act are correctly applied. The County nonetheless cites Minn. Stat. §13.37 in seeking to satisfy the statutory criterion.

Section 13.37 is a catchall enactment that offers some of the most notoriously ambiguous classifications found in the Act. Titled “general nonpublic data,” its coverage meanders from “security information” to “trade secret information” to “parking space leasing data,” while also including labor relations information, sealed bids prior to opening, and, as noted by the County, “sealed absentee ballots prior to opening by an election judge.” Some, but not all, of these categories are defined in subdivision 1. Subdivision 2 then purports to provide a classification covering *all* of them, without distinction or discrimination, stating that they 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.”

The language of §13.37, subd. 2 does reflect the fact that the terms “nonpublic

data” and “private data” have a specific and technical meaning under the MGDPA.

Thus in order to decipher the correct classification for any one of the diverse items of government data covered by that provision, it is first necessary to understand the definitions of those terms.

According to §13.02, subd. 9, “nonpublic data” means “data *not on individuals* that is made by statute or federal law” not accessible to the public, but accessible to the subject of the data. By contrast, §13.02, subd. 12 defines “private data” as consisting only of “private data *on individuals*,” meaning “data which is made by statute or federal law applicable to the data (a) not public; and (b) accessible to *the individual subject of the data*.”

In addition, the terms “data on individuals” and “data not on individuals” used in these definitions are also specifically defined in the Act. “Data on individuals,” according to §13.02, subd. 5, means “all government data *in which any individual is or can be identified as the subject of the data*” (emphasis added). By extension, “data not on individuals means “all government data which is not data on individuals.”

§13.02, subd. 4.

Taken together, these definitions make clear that particular information cannot simultaneously be “data on individuals,” and “data not on individuals,” but rather will be one or the other. For this reason, the catch-all classification provided in §13.37, subd. 2 that might superficially seem to categorize the many varied types of

government records covered by that section as both nonpublic and private data must instead be understood to classify the enumerated categories as consisting of one or the other. For example, a trade secret (such as a computer program) would be nonpublic data under §13.37 since 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 under the statute, since individuals are the subjects of that kind of information.

Consequently, there can be little doubt that “sealed absentee ballots prior to opening by an election judge” quintessentially comprise “data on individuals”—a packet of documentation *that taken* together identifies a single voter and how he or she voted. Therefore, under the language of §13.37, subd. 2, that documentation would consist only of private data.

This conclusion leads to the next step in the legal analysis. Since “private data” is “data on individuals,” and since “data on individuals” is defined as consisting only of “data in which any individual is or can be identified as the subject of the data,” it necessarily follows that particular documents which do not contain information permitting such identification cannot consist of private data.

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.

Respondents’ request for access to the sealed, uncounted absentee ballots is governed squarely by these principles. Respondents seek to inspect and copy the ballot itself, which in no way identifies the voter when separated from other materials such as the envelopes. Thus Respondents have asked the County to “separat[e] public from not public data,” as the Data Practices Act directs.

Both in their initial request letter to Ramsey County, and in their Complaint initiating this litigation, Respondents 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 to Ramsey County dated June 22, 2009, A-27; Complaint, A-4.

In Respondents’ view, separating the ballots from the ballot envelopes would not be a particularly difficult process. It would simply require that the envelopes in which the rejected absentee ballots were returned to the County be opened, and that the envelopes—which typically do include data identifying the voter—be segregated

from the ballots themselves.⁷ Again, since the ballots in isolation cannot identify the voter, they are no longer classified as “private data on individuals” pursuant to §13.02, subds. 5 and 12 (i.e., no individual “can be identified as the subject of that data”), and they are therefore covered by the general presumption of public access.

In rejecting this interpretation, the County relies on the language in §13.37, subd. 2 stating that “sealed absentee ballots” remain classified “prior to opening by an election judge.” The County suggests this means that until the physical act of opening a ballot envelope occurs, the entire ballot package remains forever beyond the reach of public access. That interpretation is defective for a number of reasons.⁸

Most importantly, it seems obvious that the statutory language was intended to limit access to the sealed ballots only until the election was over and tabulation of the votes completed. 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 as private data prior to that point, they

⁷Respondents suggest that this process is not particularly difficult because it presumably occurs many thousands of times during every election cycle, when for accepted ballots, election officials open the absentee ballot return and security envelopes, and remove the enclosed ballots.

⁸In support of its argument, the County refers to an opinion of an assistant Minnesota attorney general. App. Br., 8. However, as the County acknowledges, the opinion is an “informal” one, neither requiring nor warranting deference from the Court. Substantively, the analysis offered in the opinion is barely a page long, and addresses in little more than perfunctory fashion the legal principles at issue in this action.

would be accessible before the election occurred. Since the statute 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 and counted, the unstated premise of the statute is plainly that the restriction is needed only through the time that ballots—absentee or otherwise—are counted.

The unreasonableness of hinging the classification of the absentee ballots on the ministerial act of opening them, rather than on the conclusion of the election to which they relate, is corroborated by the fact that election judges serve for a very brief period of time—apparently only on election day itself.⁹ Thus if, for example, a large group of absentee ballots were somehow overlooked and therefore not opened or counted on election day, they would under the County’s interpretation remain inaccessible to anyone else (including other election officials), because according to the County, only election judges have the power to terminate the private data classification by opening the ballots, and they would have been discharged before the ballots were found.

Respondents’ interpretation is also buttressed by considering how ballots cast *in person* on election day are treated. A certain percentage of those ballots are also rejected for various defects, just as in the case of absentee ballots. But no statute

⁹According to a brochure published by the Minnesota Secretary of State and available on the agency’s Web site (titled “Serve as an Election Judge,” www.sos.state.mn.us), “[e]lection judges serve on Primary Election Day, September 9, 2008, and General Election Day, November 4, 2008.”

classifies the rejected ballots cast in person on election day as inaccessible until some subsequent administrative step occurs. Indeed, the entire ballot counting must occur at the polling place “and shall be public,” which would include decisions by the judges as to whether a ballot cast in person should be rejected or not. See Minn. Stat. §204C.19, subd. 1. The evident reason for this is that once the votes at a particular election are in fact being counted, there is no further prospect of improperly tainting the election with premature tabulation, and thus the balance tips decisively in favor of full public access in order to maximize accountability and promote public confidence in the outcome.¹⁰

In short, there is no discernible logic or public policy served by permanently prohibiting public access to rejected and uncounted absentee ballots. By contrast, however, there are compelling reasons for permitting such access once an election (and any associated recounts and contests) are concluded, given the singular importance of the electoral process and public confidence in it.¹¹

¹⁰Support for the interpretation suggested by Respondents is also reinforced by the classification immediately following the one covering absentee ballots in §13.37, subd. 2, which restricts access to “sealed bids . . . prior to the opening of the bids.” The proximity of the two classifications in the statute is probably no coincidence, since they serve obviously parallel purposes—temporarily limiting public access so as to avoid tainting an important, impending governmental function. But once that function has been performed—whether an election or the awarding of bids—the need for secrecy is replaced by the imperatives of government accountability served by public access, which not coincidentally, in both contexts have historically been frequent targets of corruption and undue influence.

¹¹Respondents are of course cognizant of the statutes of statutory construction, and are not asking the Court to ignore the language of the statute in preference for public policy arguments. Instead, they contend that because there is considerable ambiguity surrounding

It is elemental that the right to vote and the 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). Thus achieving a better understanding of why some votes were not counted implicates issues of indisputable importance. Accomplishing this requires public access to all of the election materials that have been the focus of dispute, excepting only where there is a clear voter privacy

the meaning and application of §13.37, the vital policy considerations relating both to the importance of the right to vote and of public access to government records are properly considered in construing the statute. As noted above, §13.37 is hardly a model of clarity, lumping together as it does all of the diverse categories of data covered by the statute without specifically distinguishing which are subject to the nonpublic classification and which are private. More fundamentally, because the Data Practices Act does not classify documents but information, and because under the language of §13.37, subd. 2, absentee ballots could only be categorized as “private data on individuals,” the purported classification of the *entire* “sealed absentee ballot[]” prior to being opened conflicts with the express definitions found in the Act, stating that once particular data cannot identify the individual subject of the data, it is no longer classified as private but becomes public.

interest that must be protected.

C. Granting Respondents' Request will in no Way Jeopardize Voter Privacy.

Finally, the County contends (with much rhetorical emphasis) that the “trial court’s opinion threatens to undermine this cornerstone of our democracy by allowing the MGDPA to be used as a sword to pierce the veil of privacy surrounding votes cast by absentee ballots” and that “[i]f one individual absentee ballot can be inspected and copied, voter privacy would cease to exist for any citizen who wished to vote by absentee ballot.” App. Br., 3. However, an understanding of the facts as well as the limitations on access imposed by the trial court’s Order demonstrates just how specious these claims are.

As described in the County’s own Appendix (at A-35-38), the absentee ballot itself is typically returned enclosed in two envelopes. While the envelopes include information that identifies the voter, the ballot itself does not, no more so than does a ballot that is cast in person on election day. If the absentee ballots are physically separated from the envelopes, then the ability to identify the voter who returned a particular ballot is eliminated in the vast majority of cases. And, as the trial court concluded, “the identity of the voter and the content of his ballot are at no greater risk whether opened by an election judge or by an authorized individual after the election has ended.” Tr. Ct. Mem., A-48. Respondents have asked only to inspect the ballots separated from the envelopes, and agree that the separation process itself would be

conducted confidentially by election officials, without Respondents' involvement—just as is done on election night with respect to returned absentee ballots that are not rejected.¹²

In fact, the County does not even attempt to refute Respondents' argument that the great majority of ballots, once separated from the return envelopes, could not be used to identify the voters. Instead, the County seeks to blur this by contending that “[t]here is no protocol that can be established to completely avoid infringing upon the privacy of *certain voters* because their ballots have been segregated in such a fashion that their candidate preference will be ascertained.” App. Br. 23 (emphasis added). This is because “each ballot identifies the ward and precinct of the voter.” *Id.* Combined with the fact that during the recount process, the names of absentee voters whose ballots were rejected became public, and that in some instances only one absentee ballot in a precinct was rejected, the County contends that Respondents (or other members of the public) could determine voter identity by asking for the ballots from a particular precinct where only one ballot (or a small number of them) were rejected. *Id.*

This argument, however, has no application with respect to most of the rejected

¹²Again, Respondents have made clear that they have no interest in knowing about the decisions made by individual voters. See, e.g., Complaint, para. 12, at A-4 (“Plaintiffs emphasized in their request letter—and do so again here—that they fully respect the vital principle of voter confidentiality, and do not seek access to any information that would allow determination of the decisions made by identifiable voters.”).

ballots. Furthermore, it ignores both the operation of the Data Practices Act and the parameters imposed by the trial court in granting Respondents' request. As discussed earlier in this brief, the MGDPA and decisions construing it require that public and private data be separated where they appear in the same document or record, and that the portions which would not identify the subject of the data be disclosed.

Here, as the trial court stated (A-48), information on a ballot such as the ward and precinct number "can be redacted and separated from the public information." This can be accomplished by the simple expedient of blacking out the ward and precinct data.

In addition, the trial court's ruling effectively gives the County considerable discretion in making judgments about what disclosures could threaten to infringe on voter confidentiality. For this reason, not only can the County redact the ward and precinct information on individual ballots, but it could also decline to respond to requests that are tailored to a particular precinct or other small geographical area. Nothing in the Data Practices Act compels the County to respond to such inquiries if the requester could reasonably deduce the identity of the voter from obtaining that information.

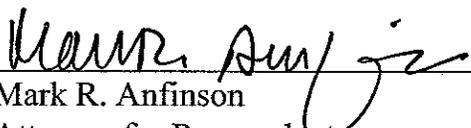
Respondents emphasize however that, as the County itself concedes, this issue would only exist in the case "of certain voters," which almost certainly amounts to a very small number. For the vast majority of rejected absentee ballots, no such concern

would arise, and the fact that in a few instances more care would be required to protect voter privacy hardly justifies a complete prohibition on any public access to the rejected ballots.

CONCLUSION

For the reasons described, Respondents respectfully request that the judgment of the district court be affirmed.

DATED: April 16, 2010



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