STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1200

Jill Krout, et al.,
Appellants,

vs.

City of Greenfield,
Respondent.

Filed April 16, 2012
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-10-13395

Todd M. Johnson, Scott A. Johnson, Johnson Law Group LLP, Minnetonka, Minnesota (for appellants)

Paul D. Reuvers, Amanda L. Stubson, Iverson Reuvers, Bloomington, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Toussaint, Judge.*

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellants Jill Krout, Howard Veldhuizen, and Mark Lee were elected city council members for respondent City of Greenfield. As a result of contentious city

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

government proceedings, a citizen of Greenfield submitted a data request under the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §§ 13.01-.90 (2010), for appellants' private cell-phone records. The city attorney asked appellants to submit their private cell-phone records so that the city could comply with the request. Krout and Veldhuizen provided their records; Lee did not. The city then disclosed the records to the citizen. Appellants subsequently sued the city, claiming that the city violated the MGDPA by disclosing their phone records. The district court ruled that appellants, as elected officials, were not employees under the MGDPA and that the data were public. As a result, the district court granted summary judgment to the city and dismissed the suit. We affirm.

FACTS

The Greenfield city council consists of a mayor and four members. In 2009, Krout was the mayor of Greenfield, and Veldhuizen and Lee were council members. Under the Greenfield City Code, Krout was paid $400 per month as mayor, and Veldhuizen and Lee were paid $300 per month as council members. They were also eligible to participate in a retirement plan administered by the Public Employees Retirement Association (PERA). During appellants' terms in office, the city experienced considerable turmoil in its government and was involved in multiple lawsuits. At a city council meeting in October 2009, the council, without discussion, terminated the employment of the acting interim city administrator by a 3-2 vote, with Krout, Veldhuizen, and Lee voting in support of the termination. On November 4, 2009, the Board of Trustees for the League of Minnesota Cities Insurance Trust cancelled insurance coverage for the city following a meeting

where the board discussed possible open-meeting-law violations made by the city council.

On November 9, 2009, C.A., a citizen of Greenfield, submitted a data request under the MGDPA. C.A. suspected that appellants had violated the Minnesota open-meeting law by the decision to terminate the city administrator without council discussion. To investigate his suspicion, C.A. requested appellants' cell-phone records, text messages, and e-mails from November 2008 through November 17, 2009, for Krout (the day she resigned as mayor) and through December 31, 2009, for Veldhuizen and Lee.

Because the city does not provide its elected officials with cell phones or reimburse them for cell-phone charges, all of the requested records existed in appellants' personal accounts. The city attorney contacted appellants and asked them to provide their phone records so that the city could comply with the data request. Krout and Veldhuizen provided their cell-phone records, but Lee refused. The deputy city clerk, who is the data-practices compliance official for the city, redacted Krout's and Veldhuizen's cell-phone records so that only phone calls potentially concerning city business would be disclosed.[1] The city then provided the records to C.A.

Appellants sued the city, claiming that the city violated the MGDPA by disclosing the cell-phone records. During the first summary-judgment hearing, appellants argued that their cell-phone records were not "government data" under the MGDPA. The district

[1] The city clerk made one error in failing to redact a phone number that was unrelated to city business, which was the phone number of one of Veldhuizen's business clients.

court held that appellants' personal cell-phone records were not created or maintained by appellants in their official capacities and therefore were not "government data" subject to the MGDPA. The district court left open the question of whether the records became government data under the MGDPA upon receipt or dissemination by the city.

The parties subsequently brought cross-motions that were heard in a second summary-judgment proceeding. For the purpose of those motions, the parties stipulated that appellants' private cell-phone records became government data under the MGDPA upon receipt by the city. Appellants argued that they were city employees, and, therefore, their cell-phone records constituted personnel data that are presumed to be private under Minn. Stat. § 13.43, subd. 1. Respondent moved for dismissal. The district court held that appellants, as elected officials, were not employees under the MGDPA, and, therefore, their cell-phone records were not personnel data under Minn. Stat. § 13.43. As a result, appellants' cell-phone records were subject to the statutory presumption that government data are public. Minn. Stat. § 13.01, subd. 3. The district court determined that the city did not violate the MGDPA by disseminating the cell-phone records and dismissed the suit with prejudice. This appeal follows.[2]

D E C I S I O N

"On appeal, we review a grant of summary judgment 'to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.'" *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quoting

[2] The district court noted in the second order for summary judgment that appellant Mark Lee had abandoned his claim. But because Lee's claim was never formally dismissed, he remains a party on appeal.

K.R. v. Sanford, 605 N.W.2d 387, 389 (Minn. 2000)). Appellants contend that the district court erred in its ruling that their cell-phone records were not "personnel data" under Minn. Stat. § 13.43 (that would be presumed to be private) because of its determination that elected officials are not city employees under the statute.

Statutory interpretation is a question of law, which we review de novo. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). When this court interprets a statute, it must ascertain and give full effect to the intent of the legislature. Minn. Stat. § 645.16 (2010).

We begin our analysis with Minn. Stat. § 13.01, subd. 3, which addresses the scope of the MGDPA:

> This chapter regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities. It establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.

The term "government data" is defined as "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7.

The MGDPA distinguishes between "data on individuals" and "data not on individuals." *Id.*, subds. 4, 5. Data pertains to an individual if "any individual is or can be identified as the subject of that data." *Id.*, subd. 5. Data on individuals are public if they are not designated private or confidential. Minn. Stat. § 13.03, subd. 1.

The parties agree that resolution of this issue is dependent upon the term "personnel data" in Minn. Stat. § 13.43. "Personnel data" are defined as "government

data on individuals maintained because the individual is or was an employee of . . . a government entity." Minn. Stat. § 13.43, subd. 1. Appellants contend that because they were employees of the city, the content of their cell-phone records is personnel data and, therefore, private under Minn. Stat. § 13.43, subd. 4.

The term "employee" is not defined in the statute. But the commissioner of administration has issued a series of advisory opinions on how to classify elected officials for the purposes of section 13.43. While advisory opinions from the commissioner of administration are not binding on this court, they are entitled to deference. Minn. Stat. § 13.072, subd. 2. This court gives more careful consideration to advisory opinions when they are on point and long standing. *Billigmeier v. Cnty. of Hennepin*, 428 N.W.2d 79, 82 (Minn. 1988) (examining advisory opinions from the attorney general). The commissioner of administration has opined that "the classification of data about elected officials depends upon whether the entity considers the elected official to be an employee. If so, the data are classified pursuant to section 13.43. If not, the data are presumed public pursuant to section 13.03, subdivision 1." Minn. Dep't of Admin., Advisory Op. 04-064 (Oct. 15, 2004). This has been the consistent approach of the commissioner of administration since at least 1995. *See* Minn. Dep't of Admin., Advisory Op. 95-041 (Oct. 12, 1995); *see also* Minn. Dep't of Admin., Advisory Op. 03-011 (May 7, 2003); Minn. Dep't of Admin., Advisory Op. 02-013 (Mar. 27, 2002); Minn. Dep't of Admin., Advisory Op. 01-039 (Apr. 16, 2001).

The parties invite this court to rule definitively on whether elected officials generally are employees under section 13.43. We decline to do so. Instead, we conclude

that, on this record, these particular elected officials are not employees. We see no reason to diverge from the commissioner of administration's opinions, as they are directly on point and long standing. Therefore, because the city of Greenfield does not consider its elected officials to be employees under the MGDPA, they are not employees for the purposes of Minn. Stat. § 13.43.

Allowing governmental units to decide whether their elected officials are employees also comports with the fundamental purpose of the MGDPA. The statute seeks "to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The [MGDPA] also attempts to balance these competing rights within a context of effective government operation." *Montgomery Ward & Co. v. Cnty. of Hennepin*, 450 N.W.2d 299, 307 (Minn. 1990) (quoting Gemberling & Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From "A" to "Z"*, 8 Wm. Mitchell L. Rev. 573, 575 (1982)).

The district court noted that there are also strong public-policy reasons to support making the information public in this circumstance. We agree. To prevent the public from gaining information relevant to the business and performance of elected officials by protecting it as "personnel data" would undermine the important public-policy goal of the MGDPA—openness in government. *See Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 32 (Minn. 1989). Because elected officials serve at the discretion of the public, citizens need all of the information regarding the official business of elected officials in order to make informed choices at the polls. Furthermore, the open-meeting

law requires that all meetings of a public governing body be open to the public. Minn. Stat. § 13D.01, subd. 1(b) (2010). Elected officials should not be able to evade public observation and scrutiny of their work by conducting all pertinent discussions on sensitive matters in private and then simply voting on a *fait accompli* at the public meeting.

Appellants contend that *Republican Party of Minn. v. Patrick H. O'Connor*, 712 N.W.2d 175, 176-77 (Minn. 2004), stands for the proposition that the triggering event for determining whether an individual is an employee under the MGDPA is if a government entity pays salary or benefits to the person. We disagree. That case concerned election judges. In concluding that election judges are employees under the MGDPA, the supreme court reasoned that "[e]lection judges are compensated for their services." *Republican Party*, 712 N.W.2d at 176. While the supreme court did not elaborate on the services that election judges provide, it is clear that election judges provide their services to the governing body of the municipality that they serve. Election judges are not elected; they are appointed by the governing body of the municipality. Minn. Stat. § 204B.21, subd. 2 (2010). Because the governing body has direct control over the selection of election judges, the comparison between election judges and elected officials fails.

Affirmed.