STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1926

In the Matter of:
Walmart Inc.,
Relator,

vs.

Anoka County,
Respondent.

Filed September 14, 2020
Reversed and remanded
Ross, Judge

Office of Administrative Hearings
File No. 8-0305-36242

Mark R. Bradford, Edward F. Fox, Jeffrey R. Mulder, Maria P. Brekke, Bassford Remele, Minneapolis, Minnesota; and

Samantha J. Ellingson, Aaron R. Thom, Thom Ellingson, PLLP, Minneapolis, Minnesota (for relator)

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for amicus curiae USA Property Tax Associates)

Mahesha P. Subbaraman, Subbaraman PLLC, Minneapolis, Minnesota (for amicus curiae Alliance Property Consultants, Inc.)

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

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

ROSS, Judge

Anoka County prepared and presented continuing-legal-education materials discussing strategies employed by county attorneys to defend property-tax appeals brought by big-box retailers. Relator Walmart Inc. sought a copy of the presentation from the county by submitting a request under the Minnesota Government Data Practices Act, but the county refused, claiming the presentation was work product not subject to disclosure. An administrative-law judge agreed with the county. We reverse because, even if the presentation constitutes work product, by broadly presenting the material to third parties without taking appropriate measures to maintain its confidentiality, the county waived any work-product protection and the common-interest doctrine would not prevent disclosure. We remand for the administrative-law judge to amend his order consistent with our holding.

FACTS

This appeal centers on a presentation for continuing-legal-education (CLE) credit offered by the Minnesota County Attorneys Association in February 2019. The presentation, entitled "Litigation of a Big Box Property Tax Appeal," discussed strategies that county attorneys might employ to defend against property-tax appeals by businesses with expansive retail facilities, including Walmart, Target, and Menards.

Assistant Anoka County Attorneys Jason Stover and Christine Carney developed the presentation materials. Stover contacted the county attorneys association, proposing a program during which presenters would discuss how Anoka County had responded to

big-box retailers' property-tax appeals. The association's education director, Stacy Albrecht, responded with interest. The planners scheduled the CLE for online presentation on February 27, 2019. They contemplated limiting attendance to current county attorneys, retired county attorneys, employees of county attorney offices, and county assessors.

The online CLE presentation occurred on schedule, attended by 76 viewers live and six others later by recording. It was available only to those who could access it through the password-protected "members only" section of the county attorneys association's website.

An attorney representing Walmart, which had been involved in tax litigation against Anoka County and other Minnesota counties, cited the Minnesota Government Data Practices Act in May 2019 and made the following request of Anoka County:

> I am requesting copies of the following government data:
>
> (1) the webinar, video, or presentation entitled: 2019 Litigation of a Big Box Property Tax Appeal (On-demand Video);
>
> (2) any webinar, presentation, or CLE presented or created by Jason Stover or Christine Carney; and
>
> (3) any communications discussing a webinar, presentation, or CLE relating to big box property tax appeal(s).

Anoka County refused to disclose any documents, maintaining that they were "attorney data" and therefore not subject to disclosure under the data practices act.

Walmart filed a complaint with the Office of Administrative Hearings in July 2019, alleging that the county's nondisclosure violated the data practices act. The county then disclosed data responding to the third part of Walmart's data request—communications discussing the CLE presentation. The disclosed data consisted mainly of emails detailing

the planning and logistics leading up to the CLE presentation, as well as some feedback from viewers after the CLE. The county refused to disclose the presentation itself.

An administrative-law judge (ALJ) considered the complaint. Walmart moved for summary judgment based on the county's nondisclosure, and the county moved for summary judgment, arguing that the CLE presentation was protected as attorney work product.

The ALJ granted summary judgment for the county, treating the presentation as attorney work product not subject to disclosure. The ALJ also determined that the county did not waive work-product protection by sharing the presentation with other county attorneys because it was shared only with attorneys who had a "common interest" and who would protect the information from disclosure to the county's adversaries. Although Minnesota has not recognized the common-interest exception to work-product waiver, the ALJ relied on caselaw from other jurisdictions in concluding that the exception applied here. The ALJ therefore dismissed Walmart's complaint.

Walmart appeals by certiorari.

D E C I S I O N

Walmart appeals from the ALJ's decision granting summary judgment. We may reverse an agency decision when it is made based on an error in law, unsupported by substantial evidence in the record, or arbitrary or capricious. Minn. Stat. § 14.69 (2018); *Webster v. Hennepin County*, 910 N.W.2d 420, 427–28 (Minn. 2018). On appeal from summary judgment in which there are no genuine issues of material fact, we consider

whether the ALJ erred in its application of the law, a task we undertake de novo. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002).

The Minnesota Government Data Practices Act governs access to data held by government entities. Minn. Stat. § 13.01, subds. 2–3 (2018). The act provides generally that data created and collected by government entities may be accessed by the public unless an exception applies. Minn. Stat. § 13.03, subd. 1 (2018). The act creates an exception for attorney data, providing that "the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility." Minn. Stat. § 13.393 (2018). The county argues that the CLE presentation is not subject to disclosure because it is attorney work product under section 13.393, which incorporates existing law regarding privileges and protections found in other substantive areas of law without expanding or narrowing their scope. *Kobluk v. Univ. of Minn.*, 556 N.W.2d 573, 576 (Minn. App. 1996), *rev'd on other grounds*, 574 N.W.2d 436 (Minn. 1998). The scope of a privilege or protection under the data practices act presents a question of law that we review de novo. *See id.*

Walmart challenges the ALJ's determinations both that the CLE presentation was work product and that the county did not waive work-product protection by sharing the presentation with third parties. We can assume for the purposes of this opinion that the CLE presentation constituted work product because, when the county shared the presentation with third parties, it clearly waived any consequent protection.

Documents are protected as work product only when the protection is properly claimed and is not waived or lost. *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 693 (Minn. App. 2000). Work-product protection generally is waived if the attorney discloses the protected material to third parties "in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it." Restatement (Third) of the Law Governing Lawyers § 91(4) (2000). The common-interest doctrine is an exception to work-product waiver that has been adopted in some jurisdictions, but not expressly in Minnesota, and that applies when the protected material is disclosed to individuals who share a "common interest." *Id.* cmt. b. The ALJ applied the doctrine here and concluded that the county did not waive its work-product protection. For the following reasons, we reach a different conclusion, holding that the common-interest doctrine would not apply. In doing so, we do not decide whether Minnesota would adopt the common-interest doctrine in the proper case, which this is not.

Other courts have defined the common-interest exception in various ways, but never in a fashion so broad as to apply in the circumstances here. The Eighth Circuit explained that the exception applies when "two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (quotation omitted). The Seventh Circuit reasoned that the exception applies only when "the parties undertake a joint effort with respect to a common legal interest" and is limited "to those communications made to further an ongoing enterprise." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007). The

D.C. Circuit noted that work-product protection is waived when information is disclosed "to an adversary or a conduit to an adversary" and explained that the existence of a common interest could help determine "whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential." *United States v. Deloitte LLP*, 610 F.3d 129, 140–41 (D.C. Cir. 2010). And the Supreme Court of New Jersey has concluded that the common-interest exception "applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties." *O'Boyle v. Borough of Longport*, 94 A.3d 299, 317 (N.J. 2014)

The county presents a plausible common interest in its strategy-sharing materials because county attorneys are tasked with defending tax appeals. *See* Minn. Stat. § 278.05, subd. 2 (2018). But under the facts derived from the summary-judgment evidence as construed in the light most favorable to Walmart, no version of the common-interest doctrine extends far enough to cover these circumstances for at least two reasons: first, the county allowed the presentation to be accessed by individuals who did not share the common interest of defending tax appeals, and second, adequate safeguards did not exist to ensure that the presentation would not be disclosed to adverse parties.

Email exchanges among the planners indicate that they did not intend to limit viewership to those who shared a common interest with county attorneys. In an early email discussing the logistics of the presentation, for example, Stover asked Albrecht if the webinar would be limited to employees of county attorney offices, and Albrecht responded

that a few retired county attorneys would also attend. Stover did not object. But a former county attorney might represent private clients adverse to the counties' shared interest opposing big-box tax appeals. And in another email, Stover asked Albrecht "whether county assessors and their staffs can attend this webinar" because much of the information would "be applicable to them as well." County assessors do not share the duties or serve an advocacy role defending counties in litigation, but are instead tasked with providing a neutral assessment of real-estate market value. *See* Minn. Stat. § 273.08 (2018). Albrecht also indicated that "other county staff" could attend if a county attorney invited them, but the record does not establish that the other staff would share the interests of county attorneys. And according to Walmart's statement of undisputed facts, most of the individuals who attended had not been involved in tax litigation. It does not appear from the record that the planners expected the CLE to be restricted to individuals sharing a common interest, and the record does not establish that all attendees fit such a restriction.

The planners also did not sufficiently ensure that the CLE presentation would not be disclosed to adverse parties. The county did make some effort, making the presentation available only to members of the county attorneys association with access through a password-protected section of the association's website. But the record does not suggest that the county asked viewers to keep the information confidential. *See Deloitte*, 610 F.3d at 141 (recognizing that, in the absence of a common litigation interest, a reasonable expectation of confidentiality may be based on a confidentiality agreement or other arrangement between the disclosing party and the recipient). The CLE presentation was later "uploaded for distribution on [the association's] website," and attendees could

download the materials. This would enable viewers to share the materials with other, potentially adverse, persons. The record does not demonstrate that the planners took steps to keep the information confidential during the presentation or afterward.

We add that the disclosure here is far broader than the narrow disclosure in cases that have applied the common-interest exception, typically involving only one or a small handful of others. *See Deloitte*, 610 F.3d at 133, 142 (applying the exception to hold that work-product protection was not waived when a party disclosed protected information to one independent auditor); *BDO Seidman*, 492 F.3d at 817 (applying the exception when in-house counsel for one party shared a memorandum with counsel for one other party discussing legal issues); *O'Boyle*, 94 A.3d at 304, 317–18 (applying the exception to documents prepared by a private attorney and sent to a single municipal attorney discussing strategy to defend against the same opposing party in separate lawsuits). This case involving a well-attended CLE stands in obvious contrast to these limited-dissemination cases. The county cites no common-interest-exception case involving anywhere near the number or variety of outsiders with whom the presenters in this case shared their information. And the county does not circumvent that omission by characterizing the CLE presentation as a "training program" for county attorneys; the planners did not communicate about the CLE as a training program, and they did not advertise it in that fashion. We therefore need not consider whether an actual training program offered to a limited group and offered with confidentiality protection would warrant the exception.

Again, we do not address whether the common-interest doctrine has been or should be adopted in Minnesota. We hold only that the county waived its claim to work-product

protection and that the common-interest exception would not apply here. The county offers no other basis to support the ALJ's dismissal of Walmart's complaint. We therefore reverse the ALJ's dismissal and remand for further proceedings consistent with this opinion.

Reversed and remanded.