STATE OF MINNESOTA
IN SUPREME COURT

Tony Webster,

Appellant,

vs.

Case No.: A16-0736

Hennepin County and Hennepin County Sheriff's Office,

Respondents/Relators.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA AND ELECTRONIC FRONTIER FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Administrative Opinions

Other Authorities

Introduction

Amici Electronic Frontier Foundation (EFF) and the American Civil Liberties Union of Minnesota (ACLU-MN)[1] support the relief sought by Appellant Tony Webster (Mr. Webster).

Transparency is a key pillar supporting our democracy. To make informed decisions, we need to know what the government does with the power and money entrusted to it. Government transparency creates (1) a basis for accountability, (2) a check against mismanagement and corruption, (3) public confidence, and (4) informed participation by the public. The Minnesota Government Data Practices Act (MGDPA) attempts to balance our right to know, the government's need for confidentiality in limited circumstances, and the individual's right to privacy.[2]

Huge sums of capital investment by both private industry and our government allow us to store, search, retrieve, and communicate information at speeds measured in seconds rather than the hours or days it takes to visit a library, or draft, send, and receive a letter. Decisions from our courts are located and retrieved in seconds with powerful search engines on the Internet, in subscription databases like Westlaw, and directly from the governmental source, such as the Minnesota Appellate Courts Case Management

[1] EFF and ACLU-MN certify that no counsel for any other party authored this brief, in whole or in part. No one other than *amici*, their members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 788 (Minn. 2011) ("[T]he MGDPA . . . reconcile[s] 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.").

System.[3] Information-retrieval technology continues to evolve at a rapid pace.[4]

As discussed in detail in Mr. Webster's brief, in responding to Mr. Webster's data-practices requests that seek electronically stored information (ESI), Relators elected not to utilize the standard information-retrieval technologies that they possess.[5] And Relators have limited processes in place to protect the public against Relators' similar elections in the future.[6] At the same time, the limited emails that Relators did produce in response to Mr. Webster's data-practices request suggest Relators are surreptitiously developing and deploying information-retrieval technologies in connection with the collection, storage,

[3] Relators' existing email platform contains similar information-retrieval technology. A.Add. 54-56. "Complying with legal discovery requests for messaging records is one of the most important tasks for organizations involved in lawsuits. Without a dedicated tool, searching messaging records within several mailboxes that may reside in different mailbox databases can be a time-consuming and resource-intensive task. Using Multi-Mailbox Search, you can search a large volume of e-mail messages stored in mailboxes across one or more Exchange 2010 servers, and possibly in different locations." *Understanding Multi-Mailbox Search*, Microsoft, https://technet.microsoft .com/en-us/library/dd335072 (last modified Dec. 8, 2014).

[4] "In-Place eDiscovery is a powerful feature that allows a user with the correct permissions to potentially gain access to all messaging records stored throughout the Exchange 2016 organization. It's important to control and monitor discovery activities, including addition of members to the Discovery Management role group, assignment of the Mailbox Search management role, and assignment of mailbox access permission to discovery mailboxes." *In Place eDiscovery in Exchange 2016*, Microsoft, https://technet.microsoft.com/en-us/library/dd298021 (last modified March 28, 2016).

[5] *See* Appellant's Br. at 18; A.Add. 54.

[6] The County's responsible authority testified that the County did not maintain complete written procedures to search for and retrieve government data, and that the policies the County did maintain had not been updated for at least two years. Tr. 155-157:4, 171:25-172:13; Ex. 203. Consistent with Mr. Webster's Brief, "Tr." refers to the March 25, 2016 trial transcript.

and retrieval of biometric data.[7] The irony is palpable.

The federal government is "in the process of building the world's largest cache of face recognition data, with the goal of identifying every person on the country."[8] Local law-enforcement authorities are being provided access to the FBI's Next Generation Identification program, which seeks to build the world's largest biometric database.[9] And as Relators' limited response to Mr. Webster's MGDPA requests make plain, they too are developing capabilities to collect, store, and retrieve biometric data.[10] These data sets are massive, and the government is developing the ability to search them in real time to identify each of us in public.[11] To what end is not yet clear, and the legal boundaries for the collection, storage, sharing, and use of biometric data have not been set.

This case is not about whether or how the government may collect biometric data and develop and domestically deploy information-retrieval technology as a potential sword against the general public. That is just one debate we must have, but critical to it

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[7] Kyle Chayka, *Biometric Surveillance Means Someone is Always Watching*, Newsweek (Apr. 17, 2014), http://www.newsweek.com/2014/04/25/biometric-surveillance-means-someone-always-watching-248161.html.

[8] *Id.*

[9] *Id.*

[10] *Id.* Relators' limited production showed that the Hennepin County Sheriff's Office (HCSO) is considering using real-time facial recognition technologies for the 2018 Super Bowl; incorporating jail booking photos from other counties into facial recognition databases; and exploring other options for behavioral analysis, iris scanning, and crowd-iris analysis. *See* Webster Decl. in Opp'n to Resp'ts Mot. for a Stay of Court's April 22, 2016 Order ("Webster Decl.") ¶¶ 13, 15, and Ex. 3.

[11] Chayka, *supra* note 7.

and all public debates is that it be informed by public electronically stored information (ESI)—ESI Mr. Webster requested long ago, ESI that may be retrieved promptly using available retrieval technology, and ESI that still has not been provided almost two years after it was first requested.

Identification of Amici Curiae

The ACLU-MN is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil rights and liberties. It is the statewide affiliate of the American Civil Liberties Union and has more than 31,000 members in the State of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and laws, including the right to access government information. The ACLU-MN believes that government secrecy is at odds with basic democratic principles. Sunshine laws like the MGDPA are critical to ensure government transparency, which in turn ensures accountability of government officials. ACLU-MN regularly uses the MGDPA to hold government actors accountable.

EFF is a donor-supported, nonprofit civil liberties organization working to protect and promote fundamental liberties in the digital world. Founded in 1991, EFF has more than 35,000 dues-paying members. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support free expression, privacy, and transparency in the information society. EFF files amicus briefs at all levels of the judicial system on issues related to technology's impact on civil liberties, and frequently serves as counsel or amicus in key cases addressing the scope and application of state and

federal freedom-of-information laws. As part of EFF's Street-Level Surveillance project, its activists and lawyers file and litigate public-records requests related to government use of technology, at the local, state, and federal level.

Argument

I. Disclosure of Public ESI is *Required* for an Informed Public Debate.

Knowing "what the[] government is up to"[12] is often the first step in ensuring that the government respects our civil liberties. The meteoric growth in the volume of ESI is undeniable.[13] Literature reflects that in 2015, the typical employee sent and received 125 emails per day.[14] The increased use of instant and text messaging as well as the ability to attach audio and video files further increases the amount of electronic data that organizations create and store. Government entities will most certainly experience similar growth as they, too, seek to leverage technology.[15]

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[12] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (citations omitted).

[13] *See, e.g.*, George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 Rich. J.L. & Tech. 10, 1 n.2 (2007) ("Organizations now have thousands if not tens of thousands of times as much information within their boundaries as they did 20 years ago.") (citations omitted).

[14] *See* The Radicati Group, Inc., *E-mail Statistics Report, 2011-2015* at 3 (Sara Radicati ed., May 2011), *available at* http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf.

[15] *See, e.g.*, Procedures & Guidance; Implementation of the Government Paperwork Elimination Act, 65 Fed. Reg. 25508-02 (May 2, 2000). As of late-2016, Hennepin County's system had approximately 210 million emails and stores 6 million more each month. Kelly Smith, *Hennepin County to Follow Sheriff's Office in Automatically Deleting E-mails Sooner*, Minn. Star Tribune, Nov. 29, 2016, *available at* http://www.startribune.com/hennepin-county-sheriff-s-office-automatically-deleting-e-mails-sooner/403686806/. Relators recently changed their email policies, with the HCSO

A. Other Governmental Entities Regularly Respond to Data-Practice Requests Seeking ESI Using Term Searches.

Much of Relators' argument before the court of appeals pertained to Mr. Webster's request that Relators use specific search terms to locate and retrieve ESI. According to Relators, this request was not "traditional" and rendered the request improper under the MGDPA.[16] In EFF's experience, however, this statement is not accurate.

EFF frequently makes information requests to federal agencies under FOIA and to state agencies under sunshine laws. In many of these requests, EFF asks the agencies to use specific terms to conduct their search. Similarly, MuckRock, the organization with which EFF has partnered in its mobile-biometric campaign, frequently utilizes keyword searching in its requests.[17] Identification of search terms is typically welcomed by other governmental entities, because search terms provide concrete parameters that enable agencies to quickly identify responsive records.[18] Moreover, in the FOIA context, courts require federal agencies to defend their efforts in responding to requests by disclosing the

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now deleting emails after thirty days, and the County deleting emails after six months. *Id.*

[16] *See* Appellant's Br. (Court of Appeals) at 33.

[17] MuckRock maintains a database of all information requests made on its behalf. *See Requests*, MuckRock, https://www.muckrock.com/foi/ (last visited July 10, 2017). A search of all requests utilizing the word "keyword" results in 701 requests.

[18] Mr. Webster also testified that in his experience, government entities prefer or even insist on being provided search terms. A.Add 60. He agrees that "performing a term search on multiple keywords is likely the best way to find responsive data, and is highly beneficial toward the public's understanding of the data." Webster Decl. ¶ 33.

specific terms they used to look for and retrieve responsive ESI.[19] Accordingly, the use of search terms to ensure timely and complete responses to data-practices requests seeking ESI is common, and it is Relators, not Mr. Webster, who are the outliers by arguing that such a request is improper.

B. ESI Concerning Governmental Use of Biometric Data has Informed the Public Debate.

Transparency is essential to an informed discussion of appropriate use of new technologies for law-enforcement and national-security purposes. Because there is no central list showing which police agencies have access to biometric devices or a uniform set of policies for how they must be used, the only way to learn about these biometric tools is to ask each individual agency directly.

In August 2015, EFF asked for its members' help in filing public-records requests with the law-enforcement agencies in their communities to learn more about mobile biometric technologies and how the police are using them. EFF drew on its experience and expertise in filing public-records requests by generating a sample request and providing access to a tracking system, and EFF encouraged people to share and publicize records they received in response.

Mr. Webster's request to Relators was spurred by EFF's call to action. Mr. Webster's request sought information about law enforcement's use of biometric

[19] *See, e.g.*, *DeBrew v. Atwood*, 702 F.3d 118, 112 (D.C. Cir. 2015) ("[T]he BoP's third supplemental declaration is not sufficiently detailed to support a summary judgment because it does not disclose the search terms used by the BoP and the type of search performed.").

technologies like fingerprint scanners, iris scanners, and facial recognition. Law-enforcement officers in many jurisdictions around the country now carry mobile devices capable of capturing and scanning all kinds of biometric information—from fingerprints to face-recognition to DNA—from members of the public. This information is often, in turn, uploaded to databases that can be accessed later by a wide range of other government agencies, often for purposes beyond simple identification.

Relying on state public-records laws, several hundred people filed requests in direct response to EFF's call to action, including Mr. Webster. This has resulted in substantive responses from dozens of agencies so far. Using the documents released in response to these requests, EFF has been able to report on nine agencies using biometric technology in California.[20] The documents revealed that most of the agencies are using digital fingerprinting devices, and many are also using iris-, palm-, and facial-recognition technology, or plan to use them in the future. MuckRock, one of EFF's partner organizations, and the nonprofit governmental accountability research organization LittleSis, used these same records to map the ties between the biometric contractors mentioned in the documents, on the one hand, and firms in the defense and security industries that are embedded in the national-security apparatus, on the other hand.[21] EFF

[20] Dave Maass, *California Cops Are Using These Biometric Gadgets in the Field*, EFF (Nov. 4, 2015), https://www.eff.org/deeplinks/2015/11/how-california-cops-use-mobile-biometric-tech-field.

[21] Aaron Cantu, *Explore the Defense Industry's Ties to Police Biosurveillance in California*, MuckRock (Dec. 10, 2015) https://www.muckrock.com/news/archives/2015/dec/10/how-defense-and-security-industry-tied-police-bios/.

is continuing to review records released by other agencies.

Critical to this matter, much of this important and revealing information has been contained in ESI. Mr. Webster has already discussed the information revealed by emails released in response to his request, suggesting that the Hennepin County Sheriff's Office is considering use of facial-recognition technology in connection with still images in individual investigations and considering use of real-time facial recognition against live surveillance-camera streams, possibly including those of privately owned security cameras, within the next two years.[22]

Emails released to other requesters have been equally revealing. For example, emails released by Miami-Dade County, Florida showed how MorphoTrak, a large biometrics vendor serving forty-two states' DMVs and many federal agencies, underpriced the devices in its invoices but increased the price later. Emails between the Phoenix, Arizona Police Department and its vendor reveal information about the sole-source procurement process. And emails produced by the Polk County, Florida Sheriff's Office describe the timeline for installing biometric devices in squad cars and outline the training process for using the devices. Disclosure of this ESI fosters debate on an array of issues of public interest.

Increased use of public funds to purchase technology that surreptitiously collects, stores, and uses biometric and other data from citizens is an emerging public debate at all levels of government across the country. For example, on September 21, 2016, officials

[22] Webster Decl. ¶¶ 13-15, 18-19, and Exs. 3-5.

in eleven municipalities around the country announced plans to "push for local legislation that would require city council approval and public hearings before local police could acquire or use surveillance technologies."[23] Similarly the 2015 Minnesota Legislature considered a bill to require responsible authorities to prepare and update an inventory of surveillance technologies maintained by the government entity.[24] This legislation complements the driving force behind EFF's Street-Level Surveillance project: ensuring the people and their elected representatives have access to public information and the opportunity to say no.[25] The public interest in having access to the particular data at issue in this matter is wide-reaching—from concerns over how law enforcement's use of biometric data might increase racial profiling, to concerns about data breaches once this type of information is collected. "If a Social Security Number is stolen in a breach, one can apply for a new number . . . ; individuals cannot change their facial features, fingerprints, or other biometric traits [and] [t]heir security and safety could be compromised for the rest of their lives."[26]

Like EFF and other organizations dedicated to ensuring that the government acts within the bounds of its constitutional and legal authority, the ACLU-MN relies heavily

[23] Paul Merrion, *ACLU Leads National Effort for Local Control of Police Spy Gear*, CQ Roll Call, Sept. 23, 2016, 2016 WL 5334796.

[24] S.F. 86, 89th Legis. (Minn. 2015).

[25] *See* Eric M. Johnson, *Technology News*: *U.S. Cities Push for Local Laws to Oversee Police Surveillance*, REUTERS (Sept. 21, 2016), http://www.reuters.com/article/us-usa-police-surveillance-idUSKCN11R304.

[26] Paul Merrion, *FBI's Facial Recognition Database Draws Broad Opposition*, CQ Roll Call, July 11, 2016, 2016 WL 3661565.

on the MGDPA to ensure that the government is acting properly and to bring instances of unconstitutional conduct to light.[27] Its advocacy and litigation to correct unconstitutional conduct often depends on its ability to identify that conduct through MGDPA requests for relevant documents.

Without timely access to government ESI—and a requirement that agencies maintain data in an arrangement and condition as to make them easily accessible for convenient use (*i.e.*, searchable)—Minnesota residents would be seriously limited in their ability to learn "what their government is up to."

II. Relators Should be *Required* to Disclose Public ESI Using Best Management Practices and ESI-Retrieval Technologies.

It is the government's responsibility under the MGDPA to "make public data . . . easily accessible . . . for public inspection."[28] To fulfill this obligation, government entities must "act proactively to prepare their computer systems so that they are easily

[27] The ACLU-MN has requested and used public data in a variety of important constitutional contexts such as gathering information regarding police-involved shootings, analyzing racial disparity in arrest data, and unearthing expansive technological advancements in how the government is using automatic license-plate readers. *See, e.g.*, *Automatic License Plate Readers: Are You Being Followed*, ACLU, https://www.aclu.org/map/automatic-license-plate-readers-are-you-being-followed?redirect=maps/automated-license-plate-readers-are-you-being-followed (last visited July 12, 2017); Jana Kooren, *ACLU of Minnesota Sues to Release Squad Video of Castile Shooting*, ACLU of Minn. (July 12, 2017), https://www.aclu-mn.org/news/2016/09/01/aclu-minnesota-sues-release-squad-video-castile-shooting; *Picking Up the Pieces: A Minneapolis Case Study*, ACLU, https://www.aclu.org/feature/picking-pieces?redirect=minneapolis (last visited July 12, 2017).

[28] Op. Comm. Admin. 00-019 (June 16, 2000).

able to respond to requests for data . . . ."[29] Accordingly, Relators must stay up to date on information-retrieval technologies and best management practices so that they can adapt their processes for maintaining and producing ESI to reflect current realities. Fortunately, readily available information-retrieval technologies and best management practices have developed in tandem with increases in ESI.

Traditionally, organizations have used manual review by humans to retrieve information. Even assuming organizations have the time and resources to conduct manual reviews of massive sets of ESI, the efficacy of manual review versus utilizing automated methods of review is questionable.[30] Literature suggests that humans "are far less accurate and complete than they believe themselves to be when searching [for] and retrieving information from a heterogeneous set of documents . . . , using ad hoc, simple keywords as the sole means to identify potentially relevant documents."[31] In light of the rapid increase in ESI, "the continued use of manual search and review methods may be

[29] Op. Comm. Admin. 00-067 (Dec. 5, 2000).

[30] *See* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 Rich. J. L. & Tech. 11 (2011); Herbert L. Roitblat, et al., *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. Am. Soc'y for Infor. Sci & Tech. 70 (2010); *see generally* Nicoholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery 59–69 (RAND Corporation 2012) (summarizing results from these and other studies).

[31] The Sedona Conference Working Group on Electronic Document Retention & Production, *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 Sedona Conf. J. 217, 230 (2014) [hereinafter *2014 Sedona Best Practices*].

infeasible or even indefensible" as a means of searching for responsive ESI.[32] It follows that best management practices and ESI-retrieval technologies must be regularly updated to adapt to the changing digital landscape.

A. Relators Should Be *Required* to use ESI Best Management Practices

The MGDPA does not require government entities to utilize specific practices to retrieve and produce information when responding to requests for public data. Nonetheless, Relators must be able to defend the practices they do employ, ensuring that "requests for government data are received and complied with in an appropriate and prompt manner."[33] Although there is less commentary on what constitutes defensible ESI practices when responding to requests for public data, this issue has been discussed at length in the context of civil discovery. According to one court, "much of the logic behind the increasingly well-developed case law on e-discovery searches is instructive in the FOIA search context because it educates litigants and courts about the types of searches that are or are not likely to uncover all responsive documents."[34]

For a decade, lawyers and judges have looked to the *Sedona Best Practices*, issued by the Sedona Conference Working Group on Electronic Document Retention and Production, as the benchmark for best practices governing the retrieval of ESI.[35] In

[32] *Id.*

[33] Minn. Stat. § 13.03, subd. 2(a).

[34] *Nat'l Day Laborer Organizing Network*, 877 F. Supp. 2d at 108 n.110.

[35] *See* The Sedona Conference Working Group on Electronic Document Retention & Production, *Best Practices Recommendations & Principles for Addressing Electronic Document Production* 1 (The Sedona Conference 2d ed. 2007), *available at*

September 2016, the Working Group issued a "Commentary on Defense of Process," highlighting the need to "defend the efficacy" of "discovery efforts, especially when, as is increasingly common, large volumes of [ESI] are involved."[36] Courts have also required parties in recent years to defend the processes they use to search for and produce ESI.[37] As stated by one court, "the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented."[38] Responses to requests seeking public ESI require no less.[39]

The court of appeals' decision acknowledges that practices initially developed in connection with civil litigation may provide appropriate standards by which to judge compliance with MGDPA, while noting curbs on the burden of discovery of ESI in civil

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https://thesedonaconference.org/download-pub/81 [hereinafter *2007 Sedona Best Practices*].

[36] *See* The Sedona Conference Working Group on Electronic Document Retention & Production, *Commentary on the Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process* 1 (The Sedona Conference 2016), *available at* https://thesedonaconference.org/download-pub/4815.

[37] *See, e.g., L-3 Commc'ns Corp. v. Sparton Corp.*, 313 F.R.D. 661, 667 (M.D. Fla. 2015) (stating lawyers must "understand the functioning and capabilities of any software used to implement keyword searching" and "must be able to explain the methods and tools they use to the court, opposing parties, and their clients"); *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 134 (S.D.N.Y. 2009) (issuing a "wake-up call" to the bar about the "need for careful thought, quality control, testing, and cooperation with opposing counsel" in designing search techniques).

[38] *Victor Stanley v. Creative Pipe*, 250 F.R.D. 251, 262 (D. Md. 2008).

[39] *See* Op. Comm. Admin. 00-067 (Dec. 5, 2000); *see also DeBrew*, 702 F.3d at 112.

litigation are not relevant under the MGDPA.[40] Such curbs appear inapposite in light of the literature suggesting that ESI-retrieval technologies such as term-searches and technology-assisted review may be more accurate, faster, and less expensive than manual review, regardless of whether the review is conducted in response to civil litigation discovery requests or in response to a data-practices request.[41] Case law further supports this point.[42]

EFF and ACLU-MN do not opine on which practices are sufficient to comply with the MGDPA in any one case. Best management practices continuously evolve in relation to technology.[43] Instead, EFF and ACLU-MN contend Relators' (1) objection to basic term-search requests,[44] (2) refusal to use readily-available ESI retrieval technologies,[45] (3) failure to adopt best management practices,[46] (4) attempts to engraft a burden analysis

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[40] A.Add. 14

[41] *2014 Sedona Best Practices*, *supra* note 31, at 240 (citing, *inter alia*, Grossman & Cormack, *supra* note 30, Roitblat, *supra* note 30).

[42] *See Da Silva Moore v. Publicus Groupe*, 287 F.R.D. 182, 190 (S.D.N.Y. 2012) (discussing studies concluding that technology-assisted review is more cost-effective, efficient, and accurate than manual review).

[43] *Compare 2007 Sedona Best Practices*, *supra* note 35 *with 2014 Sedona Best Practices*, *supra* note 31, at 234 (noting the limits of keyword searching and that lawyers "are beginning to feel more comfortable using alternative search tools to identify potentially relevant ESI").

[44] A.Add 8-10.

[45] Tr. at 18-28, 31 (showing the County's forensics analyst failed to exhibit a working knowledge of available technologies or the County's existing search functionalities).

[46] *Id.* at 155-157 (showing the County lacked and did not update written procedures on searching for and retrieving government data).

into the MGDPA,[47] and (5) continued delay and lack of transparency in responding to Mr. Webster's request,[48] both individually and collectively, suggest that Relators have not considered and adopted processes to ensure that data-practices requests seeking ESI are responded to in an appropriate and prompt manner and that ESI is stored in a manner that makes it easily accessible for convenient use.

B. Relators Should Be *Required* Implement ESI-Retrieval Technologies

The retrieval technology utilized by Relators in responding to Mr. Webster's data request also failed to meet widely-recognized best practices governing the retrieval of ESI. In 2007, the Sedona Working Group recognized that, due to the "enormous volume of information involved" in e-discovery, "it is often advisable, if not necessary, to use technology tools to help search for, retrieve, and produce relevant information."[49] At the time, the Working Group encouraged the "selective use of keyword" and "concept" searches to facilitate the review of large amounts of electronic data.[50] Today, the Working Group recommends using, in addition to keyword searches, "various forms of computer- or technology-assisted review, machine learning, relevance ranking, and text mining tools which employ mathematical probabilities, as well as other techniques

[47] A.Add. 8, 12-15.

[48] A.Add. 18-19 (observing that for three months the County did not "specifically respond to Webster's specific inquiries"); *id.* at 29-30 ("[T]he failure to conduct more than a day's work searching for and retrieving requested data from email correspondence and attachments . . . does not justify the nearly 19[-]week span of time between the request for data and the initial inspection of only a small part of the requested data.").

[49] 2007 *Sedona Best Practices, supra* note 35, at 57.

[50] *Id.*

incorporating supervised and unsupervised document and content classifiers."[51]

Not only is the use of technology-assisted review recognized as a best practice, it has been required by courts for two reasons: (1) empirical studies establish that technology-assisted review "equals or exceeds human manual review in search and production reliability[,]" and (2) such review "reduces the expense of document production, especially in cases involving many gigabytes and/or terabytes of electronically stored information."[52] As noted by one court, "computerized searches are at least as accurate, if not more so, than manual review."[53] The court also noted that technology-assisted review results in "significant cost savings" because it "require[s], on average, human review of only 1.9% of the documents, a fifty-fold savings over exhaustive manual review."[54] Courts have also specifically endorsed technology-assisted review when responding to requests for government data, noting "beyond the use of keyword search, parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive

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[51] *2014 Sedona Best Practices*, *supra* note 31, at 224; *see also* Jason R. Brown, *Law in the Age of Exabytes: Some Further Thoughts on "Information Inflation" and Current Issues in E-Discovery Search*, 17 Rich. J.L. & Tech. 9, 31 (2011).

[52] Paul Burns & Mindy Morton, *Technology-Assisted Review: The Judicial Pioneers*, 15 Sedona Conf. J. 35, 51 (2014) (collecting cases).

[53] *Da Silva Moore v. Publicus Groupe*, 287 F.R.D. 182, 190 (S.D.N.Y. 2012) (citing Herbert Roitblat et al., *Document Categorization in Legal Electronic Discovery: Computer Classification v. Manual Review*, 61 J. Am. Soc'y for Info. Sci. & Tech. 70, 79 (2010)).

[54] *Id.* (quoting Grossman & Cormack, *supra* note 32, at 52).

documents."[55]

In responding to Mr. Webster's data request, Relators struggled to implement simple keyword searching. And there is no evidence in the record that they even considered technology-assisted review. However, as a frequent litigator in state and federal court, they are required to be familiar with evolving methods of technology-assisted review that might be necessary to respond to discovery requests in a timely and complete manner. According to a review of federal and state court dockets, the County and its various departments have been involved as a party in at least 642 civil litigated matters since 2003.[56] As members of the bar, the lawyers in the County Attorney's Office are expected to "increase their awareness of search and retrieval sciences generally, and of the sciences' appropriate application to discovery."[57]

There is no indication in the record that Relators attempted to keep abreast of these ever-changing—yet readily available—technologies and best management practices, and Relators' claim that keyword searches are unduly burdensome confirms they are not aware of such practices and technologies. Indeed, despite the MGDPA's mandate that Relators stay up-to-date on these technologies, the County's Chief Technology Officer

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[55] *Nat'l Day Laborer Organizing Network*, 877 F. Supp. 2d at 109.

[56] The undersigned searched for "Hennepin County" as plaintiff or defendant on the Courthouse News Service database, resulting in 642 matters since 2003, not counting criminal matters in which the County regularly appears.

[57] *2014 Sedona Best Practices*, *supra* note 31, at 229; *see also* Minn. R. Prof'l Conduct R. 1.1 cmt. 8 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .").

indicated that the County did not even consider the MGDPA's requirements when setting up its email servers in 2013.[58] Similarly, the County's Computer Forensics Unit IT Supervisor failed to exhibit a working knowledge of available technologies or even the full extent of its existing search functionalities, [59] and the County's responsible authority admitted to not maintaining or updating written information-retrieval policies. [60]

Thus, by failing to adapt their information-retrieval technologies to keep pace with best practices, Relators appear unable to respond to data-practices requests seeking ESI in an appropriate and prompt manner.

Conclusion

Without transparency, informed participation in our democracy would be impossible, and the public would not have the means to ensure that our government is properly using the authority with which it is entrusted. Compliance with the MGDPA is necessary to ensure that the public can stay properly apprised of what its "government is up to." Rather than utilize readily-available technologies for retrieving ESI, Relators ultimately responded to Mr. Webster's request by utilizing an inappropriately cumbersome search process that is neither consistent with best practices nor sufficient under the MGDPA. Accordingly, to ensure the continued viability of the MGDPA as a means of holding our government accountable and maintaining an informed public, EFF and ACLU-MN respectfully request that the Court affirm the ALJ's decision in its

[58] *See* Tr. 143:22-144:18 ("We just wanted the standard installation, basically.").

[59] *Id.* at 18-28, 31.

[60] Tr. 155-157:4, 171:25-172:13; Ex. 203.

entirety. EFF and ACLU-MN further request that the Court reverse the court of appeals' holding that Relators did not violate the MGDPA by (1) establishing procedures to ensure appropriate and prompt compliance with data requests, and (2) keeping records containing government data in an arrangement to make them easily accessible for convenient use.

Respectfully submitted,

Dated: July 14, 2017

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No. A16-0736

STATE OF MINNESOTA
IN SUPREME COURT

Tony Webster,

Appellant,

vs.

Hennepin County and the Hennepin County Sheriff's Office,

Respondents/Relators.

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Respectfully submitted,

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