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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0337**

Steven Uhr,
Appellant,

vs.

University of Minnesota,
Respondent.

**Filed January 16, 2018
Affirmed
Peterson, Judge**

Ramsey County District Court
File No. 62-CV-16-2261

Steven E. Uhr, Law Office of Steven E. Uhr, PLLC, Bloomington, Minnesota (attorney
pro se)

Douglas R. Peterson, General Counsel, Dan Herber, Associate General Counsel,
University of Minnesota, Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

This appeal is from a summary judgment that dismissed appellant's action under the
Minnesota Government Data Practices Act to obtain data from the University of
Minnesota. We affirm.

FACTS

Using funds provided by a grant from the National Institute on Alcohol Abuse and Alcoholism,¹ investigators working for respondent University of Minnesota (university) began studying programs known as the Alcohol Risk Management Program (ARM) and the Enhanced Alcohol Risk Management Program (e-ARM) at least as early as October 2000. The goal of the study was to evaluate the effect of the ARM programs on illegal alcohol sales to obviously intoxicated patrons.

In October 2000, the principal investigator for the study submitted to the University of Minnesota Institutional Review Board (IRB) a “Request For The Approval For The Use Of Human Subjects in Research.” The request described as follows provisions made to maintain the confidentiality of data obtained during the study:

All survey and questionnaire responses and observation forms will be confidential and stored in a locked file. Data entered into the database will not include individual names. Observational data will not be released for individual outlets. Data will only be released at the aggregate level, thereby reducing the potential risk of having individuals identified or singled out for any of their responses or behaviors.

....

Data at the individual level (person or outlet) will only be seen by research staff. Otherwise, data will only be released in aggregate form only.

¹ The National Institute on Alcohol Abuse and Alcoholism is an agency of the National Institutes of Health. 42 U.S.C.A. § 281(b)(12) (2016). The National Institutes of Health is an agency of the Public Health Service. 42 U.S.C.A. § 281(a) (2016). The Public Health Service is part of the Department of Health and Human Services and is administered by the Assistant Secretary for Health under the supervision and direction of the Secretary of Health and Human Services. 42 U.S.C.A. § 202 (2016).

On November 21, 2000, the IRB notified the principal investigator that the project received final approval and that research may begin.

Appellant Steven Uhr has made numerous requests to the university under the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §§ 13.01-.90 (2016), for data about ARM and e-ARM. In response to Uhr's requests for data, the university has given Uhr the opportunity to inspect and/or provided copies of thousands of pages of documents. But the university determined that some of the requested data were not public and withheld the data from Uhr. Not satisfied with the university's explanations as to why the data were not public, Uhr brought this action against the university, seeking the following information:

- a. the identity of the bars and restaurants that participated in ARM,
- b. the identity of the owners and managers who agreed to participate in ARM,
- c. the identity of the bars and restaurants that declined to participate in ARM,
- d. the identity of the bars and restaurants that agreed to eliminate or reduce price promotions as a result of their participation in ARM, and
- e. e-ARM recruiting and training materials.

Uhr alleged that the university had not met its burden of showing that the data are not public data.

In response to a discovery request, the university provided Uhr with a description of the e-ARM program's hypotheses and manner of testing the hypotheses, directed him to two articles that describe the program, and provided him with an overview of the e-ARM

training module. But the university objected to Uhr's request for e-ARM training and related materials. The university explained:

The information you have requested is considered trade secret under Minn. Stat. § 13.37(b) and will not be released. It is considered by the University to be trade secret because it is a program, method or process being developed using research methodologies, using security processes to protect the secrecy of the materials by only allowing access to study participants, and that derives independent economic value, including through potential commercial licensing, by not being generally known. In addition, the research project is ongoing, the results have not been quantified or determined, and there is potential for future academic publications based on the results.

In response to Uhr's MGDPA request and four sets of discovery requests during this litigation, the university produced thousands of pages of documents. The university moved for a protective order limiting further discovery.² The district court ordered:

Given the posture of this case, additional discovery will not be allowed at this time. Additional discovery may be requested in accordance with the Rules in a dispositive motion response. The Court will address the merits of any such request at the [anticipated] upcoming [dispositive] motion hearing. A more specific ruling on [the university's] motion [for a protective order] is stayed until that time.

The university then moved for summary judgment. The district court concluded that the identity information requested by Uhr is not public data under the MGDPA and federal data classifications and that the e-ARM training materials are protected as trade

² During the hearing on the university's motion, the district court noted that Uhr had filed a motion to compel discovery and then asked Uhr if that motion had been withdrawn. Uhr responded that the motion had been withdrawn.

secret information. The district court granted summary judgment for the university and dismissed Uhr's action with prejudice. This appeal followed.³

DECISION

[An appellate court] review[s] a district court's decision to grant summary judgment de novo to determine whether any genuine issue of material fact exists and whether the district court correctly applied the law. Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, establishes that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.

Citizens State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 61-62 (Minn. 2014) (citations omitted); see Minn. R. Civ. P. 56.03. "No genuine issue of material fact exists when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008) (quotations omitted). An appellate court's de novo review of a district court's grant of summary judgment includes de novo review of the district court's interpretation of the MGDPA. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 443 (Minn. App. 2017), review denied (Minn. Apr. 6, 2017).

The MGDPA "regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities." Minn. Stat. § 13.01,

³ In the facts and argument sections of his brief, Uhr asserts that ARM was developed by bar and restaurant owners and managers to facilitate an illegal price-fixing conspiracy. Although the complaint refers to the alleged illegal price-fixing conspiracy, the only relief requested is the production of data under the MGDPA. At the hearing on the university's motion for sanctions, Uhr stated: "I'm not bringing an action against the University for price-fixing. I'm seeking records under the Data Practices Act"

subd. 3. The MGDPA's purpose "is 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." *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011) (quotation omitted). The MGDPA defines government data as "all data collected, created, received, maintained or disseminated by any government entity." Minn. Stat. § 13.02, subd. 7. "'Government entity' means a state agency, statewide system, or political subdivision." Minn. Stat. § 13.02, subd. 7a.

[G]overnment data falls into one of two main categories based on the type of information included in the data: (1) data on individuals, or "government data in which any individual is or can be identified as the subject of that data," Minn. Stat. § 13.02, subd. 5, and (2) data not on individuals, which is all other government data, Minn. Stat. § 13.02, subd. 4. The MGDPA classifies data from each of these two categories into different levels of access. The levels of access for data on individuals are "public," "private," and "confidential," and the levels of access for data not on individuals are "public," "nonpublic," and "protected nonpublic."

KSTP-TV, 806 N.W.2d at 789 (footnotes omitted). The MGDPA provides for a variety of civil remedies for violations of the act, including an action to compel compliance. Minn. Stat. § 13.08, subd. 4.

I.

Uhr argues that the university's affidavits and interrogatory responses did not comply with civil-procedure rules and, therefore, it was not proper for the district court to rely on them. Affidavits supporting a summary-judgment motion "shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall

show affirmatively that the affiant is competent to testify to the matters stated therein.” Minn. R. Civ. P. 56.05. Interrogatory answers must be signed “under penalty of perjury [and] must have the signature affixed immediately below a declaration using substantially the following language. ‘I declare under penalty of perjury that everything I have stated in this document is true and correct.’” Minn. R. Civ. P. 33.01.

The university submitted two affidavits executed by its attorney, Dan Herber. Uhr contends that the affidavits were improper because Herber lacked personal knowledge of exhibits attached to the affidavits. Uhr asserts that the university should have provided an affidavit by the principal investigator for the university’s studies and that he should have been allowed to depose the principal investigator. The university’s interrogatory responses were signed by Brian R. Steeves, who stated that he was authorized to sign them as Executive Director and Corporate Secretary to the University of Minnesota Board of Regents and

that many of the matters stated in the foregoing Interrogatory Answers are not within the personal knowledge of the deponent, but that the deponent believes that the facts stated in the foregoing Interrogatory Answers have been assembled with reference to information provided by authorized employees of the University with knowledge.

“Answers to interrogatories shall be stated fully in writing and shall be signed under oath or penalty of perjury by the party served or, if the party is the state, a corporation, a partnership, or an association, by any officer or managing agent, who shall furnish such information as is available.” Minn. R. Civ. P. 33.01 (d).

Uhr also argues that articles attached to Herber's affidavit supporting the summary-judgment motion are unauthenticated hearsay and do not come within an exception to the hearsay rule and that he should have been allowed to depose Steeves. The university states that the ARM materials attached to the affidavit had already been incorporated into the university's interrogatory answers as business records under Minn. R. Civ. P. 33.03.

Uhr did not raise these challenges to the affidavits and discovery responses before the district court. "A reviewing court must generally consider only those issues that the record shows were presented [to] and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Because the record does not show that these issues were presented to the district court, we will not consider them for the first time on appeal.

Uhr also argues that the district court should have allowed additional discovery before ruling on the university's summary-judgment motion. Uhr identifies 14 categories of information regarding the university's application of confidentiality laws or protocols for which he sought discovery. An assertion that the district court awarded summary judgment prematurely because the nonmoving party should have been permitted to conduct additional discovery is reviewed by "apply[ing] an abuse-of-discretion standard to th[e] issue." *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010).

At the summary-judgment hearing, Uhr argued that the university had improperly disclosed the names of some entities participating in the ARM program without getting the permission of each entity's employees. The district court questioned whether any improper disclosure would waive the applicable laws of protection, and Uhr did not cite any authority

that indicates that a failure to protect the data as required by law changes the protections that apply to the data. Because Uhr has not cited any authority that indicates that the university's practices with respect to data and data subjects may alter the protections that apply to the data or the data subjects, the district court did not abuse its discretion when it concluded that additional discovery was unnecessary to determine whether confidentiality and trade-secret protections apply to the data that the university declined to disclose.

II.

Identity information

Uhr seeks the identity of participants in the ARM programs. The university argues that these identities are private data under the MGDPA. The classification of data under the MGDPA may be established by federal law. “‘Private data on individuals’ are data made by statute or *federal law applicable to the data*: (a) not public; and (b) accessible to the individual subject of those data.” Minn. Stat. § 13.02, subd. 12 (emphasis added). “‘Confidential data on individuals’ are data made not public by statute or *federal law applicable to the data* and are inaccessible to the individual subject of those data.” Minn. Stat. § 13.02, subd. 3 (emphasis added). “‘Nonpublic data’ are data not on individuals made by statute or *federal law applicable to the data*: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data.” Minn. Stat. § 13.02, subd. 9 (emphasis added). “‘Protected nonpublic data’ are data not on individuals made by statute or *federal law applicable to the data*[:] (a) not public; and (b) not accessible to the subject of the data.” Minn. Stat. § 13.02, subd. 13 (emphasis added). “‘Not public data’ are any government data classified by statute, *federal law*, or temporary classification as

confidential, private, nonpublic, or protected nonpublic.” Minn. Stat. § 13.02, subd. 8a (emphasis added).

Title 42 of the United States Code addresses public health and welfare. 42 U.S.C.A. §§ 1-18501 (2016). Under this statute, the United States Secretary of Health and Human Services (HHS) has been authorized to “make grants-in-aid to universities, hospitals, laboratories, and other public or private institutions.” 42 U.S.C.A. §§ 201(c), 241(a)(3). Also,

[t]he Secretary may authorize persons engaged in biomedical, behavioral, clinical, or other research (including research on mental health, including research on the use and effect of alcohol and other psychoactive drugs) to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings to identify such individuals.

42 U.S.C.A. § 241(d).

The secretary of HHS has been directed to adopt rules that require each entity that applies for a grant for “any project or program which involves the conduct of biomedical or behavioral research involving human subjects” to submit with its application

assurances satisfactory to the Secretary that it has established (in accordance with regulations which the Secretary shall prescribe) a board (to be known as an “Institutional Review Board”) to review biomedical and behavioral research involving human subjects conducted at or supported by such entity in order to protect the rights of the human subjects of such research.

42 U.S.C.A. § 289(a).

Pursuant to the authority granted under 42 U.S.C.A. § 289(a), the secretary of HHS adopted 45 C.F.R. Part 46, Subpart A (2016), which established HHS policy for the protection of human research subjects. Under this policy, “[e]ach institution engaged in research which is covered by this policy and which is conducted or supported by a federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements set forth in this policy.” 45 C.F.R. § 46.103(a).

The requirements set forth in the policy include that, to approve research covered by the policy, the IRB shall determine that “[i]nformed consent will be sought from each prospective subject or the subject’s legally authorized representative, in accordance with, and to the extent required by [45 C.F.R.] § 46.116.” 45 C.F.R. § 46.111(a)(4). In turn, 45 C.F.R. § 46.116 requires an investigator seeking informed consent to provide to a research subject “[a] statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained.” 45 C.F.R. § 46.116(a)(5). Finally, “[f]ederal funds administered by a department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.” 45 C.F.R. § 46.122.

These federal regulations required the university to assure HHS that research subjects would be told the extent to which the confidentiality of records that identify them will be maintained. The university IRB approved a request for approval of the use of human subjects in research that stated that data will only be released at the aggregate level and that data at the individual level for persons and outlets will only be seen by research

staff. Thus, under the federal regulatory scheme for grants received from HHS, data that identify individual research subjects may only be seen by research staff.

Uhr argues that, because 42 U.S.C.A. § 241(d) protects the confidentiality of persons who are involved in a research project relating to their consumption of alcohol, it does not apply to the identities of the bar and restaurant owners who participated in the study conducted by the university. Uhr contends that the people consuming alcohol are the general public, and it is their behavior that is being measured. But the statute states that the Secretary of HHS “may authorize persons engaged in . . . research on the use and effect of alcohol . . . to protect the privacy of individuals who are the subject of such research.” 42 U.S.C.A. § 241(d). Obtaining alcohol is a necessary step in using alcohol, and the practices of those who own establishments that serve alcohol are a factor related to the use of alcohol. Under the plain language of the statute, it applies to research on those who serve alcohol.

Uhr also argues that the district court improperly viewed the evidence in the light most favorable to the university. Uhr contends that, when the evidence is properly viewed in the light most favorable to the nonmoving party, it shows “that ARM was the creation of the alcohol industry for the purpose of increasing profits.” But even if we assume that ARM was the creation of the alcohol industry and that it is part of an illegal, price-fixing conspiracy, that does not change the university’s responsibility to comply with federal law with respect to data that the university has collected.

When viewed in the light most favorable to Uhr, the evidence shows that the university followed the steps required under federal law to obtain authority to protect the

privacy of individuals who are the subject of research on the use of alcohol. Taken as a whole, the record could not lead a rational trier of fact to conclude that university researchers did something other than what they sought approval to do from the IRB. The record does not show that, for every individual subject that provided data, the university followed the requirements for obtaining informed consent. But we are not aware of any provision in state or federal law that makes data about a subject public if the subject does not provide informed consent for the collection of the data.

Uhr argues that “the government should not be allowed to hide behind the [MGDPA] to prevent illegal activity from seeing the light of day. If government accountability has any meaning at all, the University must be required to identify its coconspirators in an ongoing criminal price-fixing conspiracy.” Uhr’s action, however, seeks data under the MGDPA, and the record provides no basis for us to conclude that the data are not classified by federal law as confidential, private, nonpublic, or protected nonpublic data under the MGDPA.⁴

Trade secrets

Uhr also sought data regarding e-ARM recruiting and training materials, which the university asserted are protected as trade secret information. Trade secret information is

⁴ Because the university IRB approved a request for approval that stated that data will only be released at the aggregate level and that data at the individual level for persons and outlets will only be seen by research staff, it appears that the data are classified as confidential or protected nonpublic data, rather than private or nonpublic data. We need not address this issue, however, because, under any of these classifications, the data are not available to Uhr.

classified as nonpublic data with regard to data not on individuals and as private data with regard to data on individuals. Minn. Stat. § 13.37, subd. 2(a).

“Trade secret information” means government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

Id., subd. 1(b).

Uhr argues that the e-ARM recruiting and training materials do not satisfy the first prong of this definition because the e-ARM materials were developed in-house rather than supplied to the university by a person from outside the university. The university argues that Uhr’s interpretation of the statute is contrary to the statute’s plain language.

Both parties cite agency advisory opinions to support their positions. Minn. Dep’t Admin. Advisory Op. 95-018 (Apr. 18, 1995) (supporting Uhr’s interpretation, but conclusion superseded by Minn. Stat. § 13.591, subd. 5 (2016)); Minn. Dep’t Admin. Advisory Op. 06-005 (Feb. 21, 2006) (supporting university’s interpretation). “But an advisory opinion is entitled to no deference when the statute is unambiguous.” *Minn. Joint Underwriting Ass’n v. Star Tribune Media Co., LLC*, 862 N.W.2d 62, 67 (Minn. 2015). The plain language of the statute does not require that data be supplied by a person from outside the university; it only requires that data be “supplied by the affected individual or organization.” Minn. Stat. § 13.37, subd. 1(b)(1). The e-ARM data were created and,

therefore, supplied by investigators working for the university, and the university is the organization that would be affected by releasing the data.

Uhr argues that there is no admissible evidence in the record that addresses prong two and that the district court erred in relying on a review of materials that describe the e-ARM program when it determined that prong three was satisfied. Uhr contends that the university needed to provide an affidavit from someone with personal knowledge about the e-ARM materials and that the articles attached to the university's discovery responses are inadmissible hearsay.

But, under the rules of civil procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P.

56.03. A university interrogatory response states:

eARM utilizes sophisticated website and delivery design and techniques for research-focused online public health interventions and content management that have been developed and supplied by the eARM researchers, which derives independent economic value from the eARM online tools and associated materials not being generally known or readily ascertainable. . . . [T]he eARM researchers are also still in the process of submitting academic papers for publication regarding eARM which separately derives independent economic value from the eARM website and associated materials not being generally known or readily ascertainable. The researchers have consistently orally directed anyone working with eARM not to disclose the contents of the eARM website and have maintained the trade secret status of eARM. The researchers are still reviewing their commercialization options with respect to the eARM website and associated materials based on discussions with the

University's unit for Software and Information technology in the Office for Technology Commercialization.

This response satisfies the second and third prongs of the definition of "trade secret information."

Uhr argues that "[t]he University has presented no admissible evidence that there is a viable market for the e-ARM materials or that it has taken serious sustained efforts to sell or license the materials." But the statute does not require viable marketability; it requires "independent economic value, actual or potential." Uhr cites nothing in the record that indicates that the materials do not have potential economic value.

Affirmed.