

STATE OF MINNESOTA

TAX COURT

COUNTY OF HENNEPIN

REGULAR DIVISION

Southdale Center, LLC (Mall),

Petitioner,

vs.

County of Hennepin,

Respondent.

**ORDER GRANTING IN PART
AND DENYING IN PART
PETITIONER'S MOTION FOR
PROTECTIVE ORDER**

File No: 27-CV-17-6656

Filed: April 30, 2018

This matter came before the Honorable Bradford S. Delapena, Chief Judge of the Minnesota Tax Court, on petitioner Southdale Center, LLC's motion for a protective order.

Thomas R. Wilhelmy and Judy S. Engel, Fredrikson & Byron, P.A., represent petitioner Southdale Center, LLC.

Thomas F. Pursell, Assistant Hennepin County Attorney, represents respondent Hennepin County.

This case concerns the market value of the Southdale Center in Edina, Minnesota. Petitioner Southdale Center, LLC, moves for an order: (1) barring respondent Hennepin County from disseminating certain information Southdale considers trade secret or confidential commercial information; and (2) regulating the County's dissemination of information qualifying as "assessor's data" under Minn. Stat. § 13.51 (2016). Before the scheduled hearing on Southdale's motion, the parties negotiated a protective regime for material Southdale considers trade secret or confidential commercial information, which the court adopted in a protective order filed on February 20, 2018. Consequently, the sole remaining question concerns the County's dissemination of information qualifying as "assessor's data."

We conclude that we lack the authority to regulate the County's dissemination of information—including any qualifying as assessor's data—that the County obtained from Southdale by means other than discovery. With respect to information the County obtains from Southdale *through* discovery, Southdale may, in accordance with the provisions of the protective order filed on February 20, 2018, designate as “protected” any income and expense information for the subject property—including data that might qualify as “assessor's data”—and such information shall thereafter be subject to the terms of the protective order.

Based upon all the files, records, and proceedings herein, the court now makes the following:

ORDER

1. Petitioner Southdale Center, LLC's motion for a protective order regulating respondent Hennepin County's dissemination of information Southdale provided to the Edina Assessor in conformity with Minn. Stat. § 278.05, subd. 6(a) (2016), is denied.

2. Southdale's motion for a protective order barring the County from disseminating income and expense information for the subject property—including data that might qualify as “assessor's data”—that Southdale gives the County through formal discovery is granted.

3. Southdale may—in accordance with the provisions of the protective order filed on February 20, 2018—designate as “protected” any income and expense information for the subject property, and such information shall thereafter be subject to the terms of the protective order.

IT IS SO ORDERED.

BY THE COURT,




Bradford S. Delapena, Chief Judge
MINNESOTA TAX COURT

DATED: April 30, 2018

MEMORANDUM

I. BACKGROUND

On April 28, 2017, petitioner Southdale Center, LLC, filed a property tax petition for the Southdale Center in Edina.¹ Because the subject property is income-producing, Southdale subsequently gave the Edina Assessor documents containing income and expense information for the subject property as required by Minn. Stat. § 278.05, subd. 6(a) (2016) (the August 1 Rule).² Southdale marked each document “Confidential” and included on each a banner reading: “This document contains trade secret information Unauthorized disclosure is strictly prohibited and may result in serious legal consequences.”³ On August 8, 2017, the Edina Assessor requested from Southdale some additional information, including a copy of a lease.⁴ *See id.*, subd. 6(c) (authorizing an assessor to request “actual leases in effect on the assessment date”).

¹ Affidavit of Judy S. Engel (Nov. 22, 2017) ¶¶ 2-3.

² Engel Aff. ¶¶ 4-5.

³ Engel Aff. ¶ 5 & Ex. B.

⁴ Engel Aff. ¶ 4 & Ex. A.

After receiving the Edina Assessor's August request, Southdale contacted respondent Hennepin County.⁵ The parties agreed that some of the additional information the assessor had requested qualified as "assessor's data" under Minn. Stat. § 13.51 (2016) of the Minnesota Government Data Practices Act (MGDPA).⁶ They could not fully agree, however, concerning the limits Minnesota law places upon the County's use of assessor's data.⁷ Southdale's principal concern was that the County might use Southdale's information about the subject property in entirely separate tax court cases concerning properties *other than the subject property*.⁸ Indeed, Southdale identified a case in which the County had used in an appraisal report for one property, assessor's data that had been submitted to the County in relation to a separate property.⁹ Southdale explained to the County

that it was [Southdale's] position that any such use [of Southdale's assessor's data] in other cases which would involve the disclosure of that data to other unrelated taxpayers through the exchange of appraisal reports or the conversion of the data into public data through its introduction into evidence at a tax court trial would be prohibited and that [Southdale] would not consent to any such use of the data.¹⁰

Although the parties' disagreement concerning the permissible use of Southdale's data by the County remained unresolved, Southdale sent the Edina Assessor via both e-mail and United States mail the lease the assessor had requested, also e-mailing a copy to the County.¹¹

⁵ Engel Aff. ¶ 6.

⁶ Engel Aff. ¶¶ 7-8.

⁷ Engel Aff. ¶¶ 5-8 & Ex. E.

⁸ Engel Aff. ¶ 8.

⁹ Engel Aff., at 4 n.1 (citing *Macy's Retail Holdings, Inc., (Downtown Minneapolis Parking Ramp) v. Cty. of Hennepin*, No. 27-CV-13-6683 et al., [2017 WL 3271602] (Minn. T.C. July 28, 2017)).

¹⁰ Engel Aff. ¶ 8.

¹¹ Engel Aff. ¶ 9.

Southdale marked the lease “Confidential” and included the banner set forth above.¹² Although the Edina Assessor returned unopened the paper submission and deleted the e-mail, the County “did not return [its] electronic copy.”¹³ On November 13, 2017, the County served Southdale with formal written discovery seeking, among other things, production of the same information the Edina Assessor’s office had requested in August.¹⁴

On November 22, 2017, Southdale filed its motion for a protective order: (1) barring the County from disseminating certain information Southdale considers trade secret or confidential commercial information; and (2) regulating the County’s dissemination of information qualifying as “assessor’s data” under Minn. Stat. § 13.51.¹⁵ Before the scheduled hearing on Southdale’s motion, the parties negotiated a protective regime for material Southdale considers trade secret or confidential commercial information, which the court adopted in a protective order filed on February 20, 2018. Accordingly, we will not further discuss that aspect of Southdale’s motion.

With respect to assessor’s data, Southdale argues: (1) that Minn. Stat. § 13.51 classifies “assessor’s data” as “private or nonpublic”; (2) that although Minn. Stat. § 273.061, subd. 8a (2016), allows assessors to share “assessor’s data” with other assessors and with the Commissioner of Revenue, it does *not* authorize assessors to publically disseminate such data; and (3) that no other provision of Minnesota law authorizes assessors to disseminate assessor’s data to third parties in unrelated tax proceedings.¹⁶

¹² Engel Aff. ¶ 9.

¹³ Engel Aff. ¶ 10.

¹⁴ Engel Aff. ¶ 11 & Ex. I.

¹⁵ Notice Mot. & Mot. Protective Order (filed Nov. 22, 2017); Pet’r’s Mem. Supp. Mot. Protective Order 1-2, 9 (filed Nov. 22, 2017).

¹⁶ Pet’r’s Mem. Supp. Mot. Protective Order 2-9.

In its responsive filing, the County affirms that “[t]he parties attempted to resolve the protective issues” concerning assessor’s data, but alleges that “the negotiation broke down over [Southdale’s] insistence on imposing unwarranted limitations on the assessor’s use of assessor’s data.”¹⁷ According to the County, “the Court should not issue any order governing Assessor’s Data because the MGDPA and statutes governing assessors already strike the balance of taxpayer protections and assessors’ uses of such data.”¹⁸

II. GOVERNING LAW

The August 1 Rule requires a petitioner contesting “the valuation of income-producing property” to provide the county assessor with the following information:

- (1) a year-end financial statement for the year prior to the assessment date;
- (2) a year-end financial statement for the year of the assessment date;
- (3) a rent roll on or near the assessment date listing the tenant name, lease start and end dates, base rent, square footage leased and vacant space;
- (4) identification of all lease agreements not disclosed on a rent roll in the response to clause (3), listing the tenant name, lease start and end dates, base rent, and square footage leased;
- (5) net rentable square footage of the building or buildings; and
- (6) anticipated income and expenses in the form of a proposed budget for the year subsequent to the year of the assessment date.

Minn. Stat. § 278.05, subd. 6(a)(1)-(6). This information must be submitted “no later than August 1 of the taxes payable year.” *Id.*, subd. 6(a). “Failure to provide the information required ... shall result in the dismissal of the petition” unless specified circumstances are present. *Id.*, subd. 6(b).

¹⁷ Resp’t’s Mem. Opp’n Protective Order 2 (filed Nov. 30, 2017).

¹⁸ Resp’t’s Mem. Opp’n Protective Order 2.

The MGDPA defines “assessor’s data” and classifies assessment data for income-producing property as private or nonpublic. See Minn. Stat. § 13.51, subd. 2. The classification applies to the following data:

- (a) detailed income and expense figures;
- (b) average vacancy factors;
- (c) verified net rentable areas or net usable areas, whichever is appropriate;
- (d) anticipated income and expenses;
- (e) projected vacancy factors; and
- (f) lease information.

Id., subd. 2(a)-(f).

The Minnesota Rules of Civil Procedure “govern the procedures in the Tax Court, where practicable.” Minn. Stat. § 271.06, subd. 7 (2016). “A district court has ‘broad discretion’ under Minn. R. Civ. P. 26.03 ‘to fashion protective orders and to order discovery only on specified terms and conditions.’ ” *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17-18 (Minn. 2009) (quoting *Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987)). Rule 26.03 provides, in pertinent part, as follows:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

...

(g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way....

Minn. R. Civ. P. 26.03(g). “Generally, the burden of demonstrating good cause [under Rule 26.03] rests with the party seeking a protective order.” *Star Tribune v. Minn. Twins P’ship*, 659 N.W.2d 287, 293 (Minn. App. 2003) (citation omitted).

We recently observed that “a court must limit the scope of any Rule 26 protective order to information obtained through the discovery process.” *Schoeneckers, Inc. v. Comm’r of Revenue*, No. 8881-R, 2017 WL 8683324, at *3 (Minn. T.C. July 25, 2017). According to the United States Supreme Court, a properly tailored protective order “prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court’s processes.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); accord *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 686 (Minn. App. 2000) (“To prevent public disclosure of matters *produced in discovery*, the party or person from whom discovery is sought may move for a protective order under Minn. R. Civ. P. 26.03.” (emphasis added)).

III. ANALYSIS

Here, to comply with the August 1 Rule, Southdale gave the Edina Assessor certain income and expense information for the subject property.¹⁹ Some of that information undoubtedly qualifies as “assessor’s data” under section 13.51, which engenders the issue underlying this motion. As Southdale puts it, “[t]he parties’ primary dispute appears to be whether the [County] can use [Southdale’s] non-public Assessor’s Data in *other property tax appeal cases*.”²⁰ To resolve this dispute, Southdale requests a protective order regulating the County’s dissemination of information that Southdale provided to the Edina Assessor in conformity with the August 1 Rule so as to prohibit its use in any other case.²¹

¹⁹ Engel Aff. ¶¶ 4-5.

²⁰ Pet’r’s Mem. Supp. Mot. Protective Order 3 (emphasis added).

²¹ Pet’r’s Mem. Supp. Mot. Protective Order 4.

Southdale's concern appears justified. Southdale acknowledges that, should this case proceed to trial, information about the subject property that qualifies as "assessor's data" might become public.²² Should this case settle, however, any "assessor's data" Southdale gave the assessor will *not* have become public by virtue of having been used as evidence in a public trial. Southdale's concern focuses on the County's possible use of such data in some future tax court case involving a property *other than the subject property*.²³ To demonstrate the plausibility of its concern, Southdale points us to a tax court case in which the County apparently used assessor's data submitted about one property as evidence of the market value of another property.²⁴ Although we are sympathetic with Southdale's concern, we must decline its invitation to issue a protective order addressing that concern.

Rule 26.03 does not give us the authority to regulate the dissemination of information a property tax petitioner gives a county assessor to comply with the August 1 Rule. Although that statutory regime requires the disclosure of specified income and expense information that would almost surely be discoverable under Rule 26.02 (which governs the scope of discovery in tax court cases), the statutory disclosure regime is nevertheless distinct from the discovery process over which this court presides. We therefore decline to bar the County from disseminating information Southdale gave the Edina Assessor to comply with the August 1 Rule.

Southdale argues with considerable urgency that the County would violate the MGDPA were it to use, in a separate and unrelated property tax case, nonpublic assessor's data that

²² Pet'r's Mem. Supp. Mot. Protective Order 7.

²³ Pet'r's Mem. Supp. Mot. Protective Order 3-4, 7-8.

²⁴ Pet'r's Mem. Supp. Mot. Protective Order 3 (citing *Macy's Retail Holdings, Inc., (Downtown Minneapolis Parking Ramp) v. Cty. of Hennepin*, No. 27-CV-13-6683 et al., [2017 WL 3271602] (Minn. T.C. July 28, 2017)).

Southdale gave the Edina Assessor.²⁵ If Southdale is correct, the Act itself furnishes Southdale with a suite of civil remedies, including injunctive relief and damages. *See* Minn. Stat. § 13.08, subds. 1-2 (2016). Our lack of lawful authority to issue the protective order Southdale seeks requires us to remit Southdale to those statutory remedies.

Matters stand differently with respect to income and expense information—including data that might qualify as “assessor’s data,”—which Southdale gives the County through formal discovery. Rule 26.03 plainly grants us the authority, upon a showing of good cause, to prohibit dissemination of “trade secret or other confidential research, development, or commercial information” obtained through discovery. Minn. R. Civ. P. 26.03(g).

We find the testimony of Mr. Juan C. Paz sufficient to establish that Southdale: (1) considers income and expense information for its properties to be trade secret or confidential commercial information; (2) pursues adequate measures to protect that information from public disclosure; and (3) might be harmed if that information were disseminated to its competitors.²⁶ *See Mall of Am. Co. v. Cty. of Hennepin*, No. 16076 et al., 1995 WL 461069, at *3 (Minn. T.C. Aug. 2, 1995) (issuing a protective order where the “[a]ffidavits filed by Petitioner indicate that the type of data Respondent seeks to discover was made available to Petitioner’s employees on a need-to-know basis only and was never disclosed outside of the organization”). Accordingly, we conclude that Southdale has established good cause to protect income and expense information for the subject property for purposes of Rule 26.03. Thus, Southdale may—in accordance with the provisions of the protective order filed on February 20, 2018—designate as “protected” any income and expense information for the subject property (including data that might qualify as

²⁵ Pet’r’s Mem. Supp. Mot. Protective Order 3-4 (“Any such dissemination would be a violation of the clear and unambiguous requirements of the MGDPA”).

²⁶ *See generally* Affidavit of Juan C. Paz (Nov. 20, 2017).

“assessor’s data”), and such information shall thereafter be subject to the terms of the protective order. Put another way, the information is protected in its capacity as trade secret or confidential commercial information, rather than because it might qualify as “assessor’s data.”

B.S.D.