

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Johanna Beth McDonough,

Appellant,

vs.

Anoka County et al.,

Appellees.

*On Appeal From the United States District Court
for the District of Minnesota
Case No. 13-cv-1889 - DSD*

**APPELLEE CITY OF SAINT PAUL’S MEMORANDUM IN OPPOSITION
TO MOTION OF ELECTRONIC PRIVACY INFORMATION CENTER FOR
LEAVE TO FILE AMICUS CURIAE**

INTRODUCTION

Electronic Privacy Information Center (“EPIC”) has moved this Court pursuant to Fed. R. App. P. 29(b) for leave to file an *amicus curiae* brief in the above-captioned matter. Federal Courts have broad discretion in allowing participation as *amicus curiae*. See, e.g., *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). Since it is considered a privilege to be heard *amicus*, the court may grant or refuse leave according to whether it determines the information

offered is timely and useful. “Historically, *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party to another.” *Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

In exercising discretion to accept an *amicus curiae* brief, the Court “considers such factors as ‘whether the parties oppose the motion, the strength of information and argument presented by the potential *amicus curiae*’s interests, . . . the adequacy of the representation, and . . . perhaps most importantly, the usefulness of information and argument presented by the potential *amicus* to the court.’” *Advanced Systems Technology Inc. v. The United States*, 69 Fed. Cl. 335, 337 (Fed. Cl. 2006); quoting, *Wolfchild v. United States*, 62 Fed. Cl. 521, 536 (Fed. Cl. 2004).

EPIC requested consent from the Appellees to file its *amicus curiae* brief, and that request was denied. Appellee City of Saint Paul (“Saint Paul”) submits this response in opposition of the request by EPIC to file an *amicus curiae* on the following grounds: 1) the parties are adequately represented by legal counsel; 2) the arguments advanced by EPIC are duplicative and wholly irrelevant to this lawsuit; and 3) EPIC is not a disinterested entity and its brief fails to provide any

unique information or perspective that can assist the Court beyond the arguments the parties are able to provide. Accordingly, Saint Paul request the leave to file *amicus curiae* brief be denied.

I. THE PARTIES ARE ADEQUATELY REPRESENTED.

“An amicus brief should normally be allowed when a party is not represented competently or is not represented at all,” otherwise it is superfluous and should be denied. *See Ryan v. Commodity Futures Trading Com’n v. Ill. Bell Tel. Co.*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.)

Although Appellant McDonough has consented to the filing of the *amicus* brief, she is adequately represented by Counsel from the Sapientia Law Group. Appellant’s counsel has addressed all of the relevant issues in their briefing and arguments made to the Court. *Amicus curiae* briefs are to be admitted when in cases where the party’s counsel is inadequate. Because this is not the case here, the addition of the *amicus* brief will not benefit the Court. For that reason, the Motion for Leave to File an *Amicus Brief* should be denied.

II. THE ARGUMENTS PRESENTED BY EPIC ARE DUPLICATIVE AND IN LARGE PART IRRELEVANT TO THE PRESENT CASE BEFORE THE COURT.

The court in *Voices for Choice v. Ill. Bell Tel. Co.*, 339 F.3d, 542, 544 (7th Cir. 2003), stated:

The reasons for the policy [of denying or limiting *amicus* status] are several: judges have heavy caseloads and therefore need to minimize

extraneous reading; *amicus* briefs, often solicited by parties, may be useful to make an end around court-imposed limitations on the length of parties briefs; the time and other resources required for the preparation and study of, and response to, *amicus* briefs drive up the cost of litigation; and the filing of an *amicus* brief is often an attempt to inject interest group politics into the federal appeals process.

Voices for Choice, at 544.

The *amicus* brief submitted by EPIC only reiterates the same arguments presented by Appellant. Like Appellants, EPIC urges the Court to apply the “discovery rule” as opposed to the “injury occurrence rule” to the four year statute of limitations for federal statutory claims under 28 U.S.C. § 1658(a) (2012). EPIC cites no new authority or arguments in support of this position. In fact, EPIC cites the same cases as Appellants and offer only conclusory remarks about what rule they feel best furthers the purpose of the DPPA.

EPIC provides the same historical information for the enactment of the DPPA and its purpose. Moreover, they generally recite portions of the DPPA statute. There is no in-depth analysis or anything different than has already been argued by Appellant. What is more, EPIC argues facts that have not been alleged in this case and submits arguments that are completely irrelevant.

For example, EPIC spends more than half of its brief describing the risk individuals have for identity theft as a result of the “highly restricted personal information” collected by state DMVs. There are no facts alleged in this case to suggest that Appellant’s “highly restricted personal information” such as her social

security number, or medical information were accessed or used. Appellant's Complaint only alleges that she provided personal information to the DPS including her address, color photograph, date of birth, weight, height, and eye color for the purpose of acquiring and utilizing a State of Minnesota driver's license. *Compl.* ¶ 217. Additionally, there are no allegations that her information was used and caused any identity theft concerns. Therefore, should this Court grant EPIC's motion, the arguments pertaining to identity theft, should be disregarded since they would not assist the Court in any way.

III. EPIC OFFERS NO UNIQUE INFORMATION.

An *amicus* brief may be allowed by the court when it provides unique information or perspective that can help the court beyond the help that lawyers for the parties are able to provide. *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997). The Court may also consider the large volume of briefing already in this particular case, and whether or not there is any value in allowing the *amicus* brief which merely repeats Appellants arguments without adding further insight into the law.

Here, Appellant has adequately addressed and argued all of the salient issues in her brief. EPIC is clearly a political interest group that offers nothing extra that is helpful to the law in this case. Rather, its brief pushes an agenda for combatting identity theft, which is not alleged in this case. And EPIC seeks the addition of a

breach notification system, which currently does not exist under the DPPA. EPIC suggested remedial measures are not appropriately brought before the Court. Instead, those policy considerations are best left to Congress, not the judiciary.

Because EPIC's brief is nothing more than an elaboration of what has already been provided to the Court, the Motion for Leave to File should be denied.

CONCLUSION

The role of *amicus curiae* is to assist the court in determining relevant legal issues. For the reasons set forth above, the admittance of EPIC's *amicus curiae* brief would not further this purpose. Accordingly, Appellee, Saint Paul respectfully request this Court deny EPIC's Motion for Leave to File *Amicus* Brief.

Respectfully submitted,

Dated: June 13, 2014

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