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From the Information Policy Analysis Division

Sunshine in Government: A Civics Class Staple

By Teresa J. Nelson, Guest columnist
Legal Counsel, ACLU-Minnesota

Few people would disagree with the proposition that, in a free country, the government's business should be conducted in the open with ample opportunity for public oversight. The need for and value of government sunshine is a civics class staple.

The average Minnesotan can tell you that the law requires public records to be available for scrutiny. But when you ask them how to access those records, most people have no idea about the mechanics of the Minnesota Government Data Practices Act (MGDPA).

Inconsistent and unpublished policies and procedures by government entities, and inadequately trained staff, can effectively eliminate public access by people who are uninformed about the requirements of the MGDPA.

All too often, knowing the answers to simple questions like "Who do I ask for the information I am looking for?" "How does my request have to be submitted?" and "How much do I have to pay for the information?" will determine whether or not the person is able to exercise their right to access data. Fortunately, the law has provisions in place to ensure that the public is informed about their rights to access data.

The MGDPA requires that government agencies have a "responsible authority" who is the primary decision maker about data-access issues. The responsible authority may also appoint designees to respond to data requests. State law and administrative rules require that

government agencies publish the name, title and address of the responsible authority and the names of any designees. Posting these names in a conspicuous place within the agency makes it easier for the public to direct their requests to the right person and saves time for other agency employees who might otherwise have to redirect inquiries to the proper individual.

The law also requires that the agency adopt and publish access procedures. Written policies and procedures don't just give the public information about how to access data: they also ensure that employees within the agency handle requests properly and consistently.

One school district's lack of written procedures caused one of our clients to be denied access to her child's educational record for over a year because the person who received her repeated requests was under the mistaken belief that she could not allow anyone access to the record. When creating access procedures, the responsible authority should keep in mind that the law requires access to public information "upon request." Thus, to maximize public access, agency policies should allow individuals to make data practices requests by telephone, by e-mail or in person.

The law allows agencies to charge for the actual costs of searching for, retrieving and copying data if the requestor

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Minnesota
Department of
Administration

Advice from the Swamp Fox*

*Francis Marion, "the Swamp Fox," was a colonial officer from South Carolina in the Revolutionary War renowned for hiding in swamps while carrying out guerilla warfare against the British.

Dear Swamp Fox:

I am the responsible authority for the Social Services Department in Frozen Loon County. The Department of Human Services has notified us that we need to send them Social Security numbers (SSN) for the clients who receive services from our department. We've started asking our clients for the SSN and several are balking. One told us that she had talked to your office and was told that if she doesn't get a Tennesen warning and a federal Privacy Act notice, she is not obligated to give us her SSN. What are these notices and do we need to give them to our clients?

Frozen Loon Social Services RA

Dear Responsible Authority:

Your client received accurate information from our office. Before your department can collect a SSN, a client must be given both a "Tennesen warning" and a federal Privacy Act notice.

The "Tennesen warning" is the informal name for the notice required by Minnesota Statutes, section 13.04, subdivision 2. The name comes from Robert Tennesen, the state senator who authored the requirement. The notice must be given before a government entity such as yours collects private or confidential data from an individual. Section 13.355 classifies the SSN as private data and so the notice requirement must be met.

The notice must include: (a) the purpose and intended use of the requested data within the collecting state agency, political subdivision, or statewide system; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from supplying or

refusing to supply private or confidential data; and (d) the identity of other persons or entities (outside the collecting entity) authorized by state or federal law to receive the data.

Because each government entity collects, uses or releases data for different reasons and has specific, different authority for disseminating the data, there is no "model" or standard form for the notice. For your notice, be sure to include the Department of Human Services as one of the entities outside your department (element (d)) that are authorized to receive the SSN, if there is statutory authority for the release.

The federal Privacy Act of 1974 also requires that a client be given a notice before the SSN is collected. The requirement is in Section 7 of the Privacy Act (Public Law 93-579) and is difficult to find because it was not made a part of the federal statutes. (See the IPAD Toolbox column for more information on SSNs, the legal requirements and a link to the federal statutory language.) Section 7 requires that when a federal, state or local government entity requests that a citizen disclose his/her Social Security number, he/she must be told:

- (i) whether the disclosure is mandatory or voluntary;
- (ii) the statutory or other authority used to request it; and
- (iii) what uses will be made of it.

The state and federal requirements are different enough that if you decide to combine the notices, be certain that you meet all the requirements. It might be easier to draft two different notices; the choice is yours. If an in-depth discussion of the requirements of the two notices would help, please see Advisory Opinion 04-048.

Good luck drafting your notices!

The Swamp Fox

Opinion Highlights

The following are highlights of recent advisory opinions by the Commissioner of Administration. All Commissioner's opinions are available on the IPAD web site at www.ipad.state.mn.us.

05-001, 002, and 003: An individual asked whether Rock County, the Rock County Auditor/Treasurer's Office, and the Rock County Sheriff's Office, were in compliance with Minnesota Statutes, Chapter 13, if none of the entities had prepared the

public access procedures required pursuant to section 13.03, subdivision 2(b). The Commissioner opined that each entity was out of compliance with Chapter 13 because it had not prepared the access procedures.

05-005: KSTP-TV asked whether the Minnesota Department of Health complied with Chapter 13 in denying

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From the IPAD Toolbox*

**From the IPAD Toolbox highlights resources for citizens to use in exercising their rights, and for government entities to use in improving compliance with Chapter 13 and other data practices laws.*

Many government programs have enabling legislation that requires a government entity to collect Social Security numbers (SSN) from the individuals who participate. With increased awareness of identity theft and the role SSNs play in many transactions, the public is concerned about the collection and use of SSNs.

Congress began to address this concern in 1974 with the passage of the Privacy Act of 1974 (Public Law 93-579). In Section 7 of that federal law, Congress placed restrictions on the use of the SSN by federal, state and local government. In the ensuing years, Congress has required the use of the SSN for many government programs. The Information Policy

Analysis Division (IPAD) has an informational piece on the federal law that is available on the IPAD website. The basic federal law and some of the exceptions can be found in the publication *Social Security Numbers* at www.ipad.state.mn.us/docs/ssn.doc.

The publication, *What You Should Know When a Government Entity Wants To Collect Your Social Security Number*, offers citizens a short explanation of their rights. It is available at www.ipad.state.mn.us/docs/ssncollect.doc.

Both of these publications are intended to help citizens and government entities understand their rights and obligations when the SSN is collected. Additional information is available in *Advice From the Swamp Fox*, a column on Page 2 of this publication.

The Carpenter

Court Case Update

The **Minnesota Court of Appeals** has found that an arbitration award in favor of an employee grieving discipline is a “final disposition” for purposes of section 13.43, subdivision 2; therefore, the arbitrator’s decision is public. The ruling was made in the case *City of Duluth v. Duluth Police Local*, 690 N.W.2d 357 (Minn. Ct. App. 2004) and involved a Duluth police officer who had been discharged from his position because of alleged criminal conduct. The officer’s union grieved the discharge; an arbitrator found in favor of the officer and ordered that he be reinstated to his position.

The *Duluth News Tribune* asked for a copy of the award and the City asked the Commissioner of Administration for an advisory opinion. In Advisory Opinion 04-002, the Commissioner found that the arbitrator’s award was private as there was no final disposition of discipline. When the City petitioned the district court to vacate the arbitrator’s award, it also moved for a protective order. The *Duluth News Tribune* intervened and moved for an order allowing inspection and copying of the arbitrator’s award. The district court denied the newspaper’s motion and entered partial final judgment.

The first issue identified by the Court of Appeals was whether a disciplinary action had occurred. The district court had found that a disciplinary action had occurred even though there was no sanction in effect. Both the City and the Police Local argued that the district court’s conclusion was in error. As neither had filed a notice of review on this issue, the Court refused to address the issue and let the district court’s conclusion stand.

The remaining issue for the Court was the classifica-

tion of the data in the arbitrator’s award. To reach a conclusion, the Court focused on the definition of “final disposition” in section 13.43, subdivision 2(b). The Court found that judicial review of an arbitration proceeding is not a final disposition and so the data in the arbitrator’s award are public.

The **Court of Appeals** has ruled that Rule 35 of the Minnesota Rules of Civil Procedure provides the legal authority necessary to permit the release of plaintiff’s medical records in a personal injury case to the defendant’s medical expert. The plaintiff, Amanda Newman, was in a car accident and sued the other driver for negligence. The law firm of Brendel & Zinn represented the defendant and hired a medical expert to review Ms. Newman’s condition. Ms. Newman signed a release authorizing Brendel & Zinn, and “its representatives or employees,” to receive copies of certain medical records relating to the accident. In *Newman v. Brendel & Zinn, Ltd.*, 691 N.W.2d 480 (Minn. Ct. App. 2005), the Court was asked to determine if the defense expert was a “representative or employee.” The plaintiff argued that the expert was not covered and that Minnesota Statutes, section 144.335, subdivision 3a (a) (the Medical Records Act) had been violated by the disclosure to the defense expert.

The Court found that Rule 35 of the Minnesota Rules of Civil Procedure specifically authorizes the review of a plaintiff’s medical records when a medical condition is at issue in a lawsuit. As Rule 35 permits the review, the Court found that section 144.335, subdivision 3a (a) had not been violated.

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a request for access to the following data: addresses of homes participating in the water testing program as well as the corresponding test results (including lead and copper). The Commissioner opined that because the data are public pursuant to section 13.03, subdivision 1, the Department did not comply with Chapter 13.

Note: At this time and through May 19, 2005, the Commissioner is considering the Department of Health's request for a temporary classification of the data at issue in this opinion. Thus, pursuant to section 13.04, subdivision 6, until the Commissioner either approves or disapproves the application, the type of data requested by KSTP-TV are not public. See www.ipad.state.mn.us/tempclass.html for more information.

05-008: An individual asked whether Independent School District 15, St. Francis, complied with Chapter 13 in responding to a request for data documenting who the District appointed as responsible authority.

The Commissioner opined that the District did not comply with Chapter 13 because, at the time of the request, it had not appointed an individual as responsible authority. The Commissioner also observed that, between the date of the request and the issuance of the opinion, the District did appoint an individual as responsible authority.

05-011: An individual asked the Commissioner whether Resource Training and Solutions (RTS), a service cooperative, complied with Chapter 13 in responding to a request for access to the following data: all financial documents pertaining to the health insurance pool and the annual audit of RTS. RTS denied access to some data pursuant to section 13.203, which provides that certain data that service cooperatives receive from carriers and claims administrators are nonpublic data not on individuals. The Commissioner opined that RTS did not comply with Chapter 13 because it appeared that some of the data RTS withheld were public, pursuant to section 13.03, subdivision 1.



**Information Policy
Analysis Division**

Questions or comments?

Contact the Information Policy Analysis Division at 201 Administration Building, 50 Sherburne Avenue, St. Paul, MN, 55155; phone 800.657.3721 or 651.296.6733; fax 651.205.4219; email info.ipad@state.mn.us.

Staff: Laurie Beyer-Kropuenske, *Director*, Katie Engler, Janet Hey, Brooke Manley, Linda Miller and Catherine Scott.

This document can be made available in alternative formats, such as large print, Braille or audiotope by calling 651.296.6733.

For TTY communication, contact the Minnesota Relay Service at 800.627.3529 and ask them to place a call to 651.296.6733.

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seeks copies of the data instead of in-person inspection. In spite of the "actual costs" requirement, fee schedules are almost as numerous as the number of government agencies in the state.

Some agencies routinely charge \$5 for the first page of a document and then a set fee for every page thereafter. Other agencies charge a flat per-document fee. Still other agencies have varying charges depending on the magnitude of the request.

Often times, these charges do not reflect the "actual costs" of fulfilling a request.

Just as troubling is the practice of using highly paid professional staff to retrieve and copy information, making the actual costs much higher than necessary.

The law requires maintaining data "in such an arrangement and condition as to make them easily accessible for convenient use." Therefore, the costs should be minimal except in the unusual circumstances that require a highly trained individual to fulfill the request.

By taking a few easy steps to follow all of the requirements of the MGDPA, government agencies can provide the public with the information that they need to maximize their ability to access the information that they have a right to see.