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## Advisory Opinion 08-032

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2008). It is based on the facts and information available to the Commissioner as described below.

### Facts and Procedural History:

On September 26, 2008, the Information Policy Analysis Division (IPAD) received a letter, dated same, from Mike Jennings, of the *Hibbing Daily Tribune*. In his letter, Mr. Jennings asked the Commissioner to issue an advisory opinion regarding his right to have access to certain data the City of Hibbing maintains. IPAD requested clarification, which Mr. Jennings provided on October 13, 2008.

IPAD, on behalf of the Commissioner, wrote to Brian J. Redshaw, City Administrator, in response to Mr. Jennings's request. The purposes of this letter, dated October 16, 2008, were to inform him of Mr. Jennings's request and to ask him to provide information or support for the City's position. Richard K. Sellman, City Attorney, responded, in a letter dated November 13, 2008.

A summary of the facts follows. In a letter dated September 11, 2008, Mr. Jennings wrote to Mr. Redshaw and requested a copy of "the file for case number 08-168012, in which Anoka County Sheriff's Detective Mike Lapham investigated police testimony at the misdemeanor trial of Anthony Sarago in St. Louis County District Court in Hibbing in June 2008. If information is excluded from the document, please inform me of the provisions of the Data Practices Act that authorize the exclusion."

On September 18, 2008, Mr. Sellman wrote to Mr. Jennings: "[t]he information you request is being used for an internal investigation for possible disciplinary action(s). The data you request is therefore private data under Minnesota Statute 13.43."

On September 22, 2008, Mr. Jennings replied:

It has repeatedly been made clear to us that the investigation of Hibbing police officers' testimony in a June 17, 2008, trial dealt narrowly with the question of possible criminal conduct. After arranging in July for an independent investigation of that testimony, Hibbing Police Chief Barbara Mitchell told us it was customary to ask another police agency to investigate when complaints against officers 'might be criminal in nature.' Based on our further inquiries into the conduct of the investigation, we believe that [the investigating agency] limited [its] inquiry to the question of possible perjury in the June 17 trial. [The] report, then we assume, maintains that same close focus, and should thus

be regarded exclusively as criminal investigative data, regardless of whether the report is later used in other contexts, such as an internal affairs investigation.

Minnesota Statute 13.82, Subd. 7, provides that criminal investigative data shall remain confidential or protected nonpublic while the investigation is active. It also provides that an investigation becomes inactive upon the occurrence of any of three events. One of those events - a decision by the prosecutorial authority not to pursue the case - occurred on August 29, 2008, when . . . [that authority found] that the investigative report provided 'insufficient evidence to charge anyone in connection with this matter.'

In his comments to the Commissioner, Mr. Sellman wrote:

It is clear under Minnesota Statute, 13.82 that, with a couple of exceptions that do not apply here, once a criminal investigation is completed and the charging decision made, the investigative report is public data under the statute.

It is also clear under Minnesota Statute 13.43 . . . that information used to investigate/evaluate an internal matter is personnel data and is private data until and unless the person is disciplined.

**Issue:**

Based on Mr. Jennings's request, the Commissioner will address the following issue:

Did the City of Hibbing comply with Minnesota Statutes, Chapter 13, in denying a request for a copy of "the complete report on an investigation of possible perjury on the part of Hibbing police officers who testified at a misdemeanor trial in Hibbing in June 2008?"

**Discussion:**

Pursuant to Minnesota Statutes, section 13.03, government data are public unless otherwise classified.

Data that law enforcement agencies collect, create, and maintain are classified pursuant to section 13.82. Certain law enforcement data are always public, certain law enforcement data are never public, and certain law enforcement data may become public depending on the occurrence of certain events.

There is no dispute that the data in question were created as part of a criminal investigation. Under section 13.82, subdivision 7, data collected or created by a law enforcement agency in order to prepare a case against a person are confidential or protected nonpublic while the investigation is active.

One of three occurrences changes the status of a criminal investigation from active to inactive; one of those is the decision by the agency or appropriate prosecutorial authority not to pursue the case. Once the investigation is inactive, the data are public, unless the release of the data would

jeopardize another ongoing investigation or would reveal the identity of individuals protected under subdivision 17. (According to Mr. Sellman, neither of those exceptions applies to the data in the report.)

Mr. Sellman stated that the data in question are properly classified as personnel data under section 13.43, because they are now being used in a disciplinary investigation. That section classifies certain personnel data as public, and all other personnel data as private. If the entity takes final disciplinary action, the specific reasons for and data that document the basis of the final disciplinary action are public. If the entity does not take final disciplinary action, related data remain private. (See section 13.43, subdivision 2.)

Mr. Sellman stated that the two provisions under which the data in question might be classified, namely section 13.82 and section 13.43, appear to be in conflict, and that section 13.43 is more specific and should therefore control.

Minnesota Statutes, Chapter 645, provides guidance on statutory interpretation. Section 645.17 discusses presumptions in ascertaining legislative intent. Section 645.26 discusses irreconcilable provisions. Subdivision 1 of section 645.26 states, in part, “[w]hen a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both.” Section 645.26, subdivision 1, further provides that if two provisions are irreconcilable, “the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.” The Legislature adopted section 13.82, subdivision 7, after adopting section 13.43, subdivision 4.

The Commissioner sees the logic in Mr. Sellman’s position; however, that position is also problematic. Section 13.82 temporarily classifies active investigative data as not public; once any of three events occurs, data that had been protected become public when the investigation is no longer active. However, private personnel data don’t become public unless the entity takes final disciplinary action against an employee. If an entity could protect otherwise public inactive criminal investigative data as private personnel data, the Legislature’s intent, i.e., that protected criminal investigative data become public, could be thwarted (in a situation in which the entity does not take final disciplinary action.)

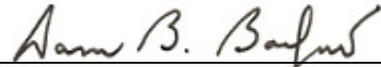
Mr. Jennings asked for data that were created because the City police department undertook (through an agreement with Anoka County) an investigation of possible crimes. That investigation was a criminal matter, not a personnel investigation. Mr. Jennings did not ask for access to personnel data. He asked for inactive criminal investigative data, which are public under section 13.82, assuming neither of the exceptions noted above applies.

### **Opinion:**

Based on the facts and information provided, my opinion on the issue that Mr. Jennings raised is as follows:

The City of Hibbing did not comply with Minnesota Statutes, Chapter 13, in denying a request for a copy of “the complete report on an investigation of possible perjury on the part of Hibbing police officers who testified at a misdemeanor trial in Hibbing in June 2008.”

Signed:



Dana B. Badgerow  
Commissioner

Dated:

November 25, 2008