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## Advisory Opinion 09-008

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 February 9, 2009, the Information Policy Analysis Division (IPAD) received a letter dated February 6, 2009, from Michael Waldspurger and Kimberley Sobieck, attorneys representing School District 47, Sauk Rapids-Rice. In their letter, Mr. Waldspurger and Ms. Sobieck asked the Commissioner to issue an advisory opinion regarding the classification of certain data the District maintains. IPAD requested additional clarification which Mr. Waldspurger provided on February 23, 2009.

A summary of the facts as Mr. Waldspurger and Ms. Sobieck provided them is as follows. They wrote in their opinion request that the parents of District students filed complaints with the federal Office for Civil Rights (OCR):

While OCR's investigation was pending, the [parents] voluntarily detailed information to [a local newspaper] about the complaints...The newspaper subsequently published [an article] about the complaints...In addition, the [parents] discussed their complaints in [correspondence with the District's School Board and the newspaper]. The [parents'] letter identifies students and employees by name....

Mr. Waldspurger and Ms. Sobieck discussed that the OCR issued two decisions. Regarding one, they wrote, "Although OCR's decision does not identify individuals by name, the decision contains a wealth of personal identifiers, such as job titles and codes that are easy to decipher....if an unredacted copy of the decision were released, many community members could readily identify students, [others], and District employees who are referenced in the decision."

Regarding the second decision, Mr. Waldspurger and Ms. Sobieck stated, "[This decision] contains very little personally identifying identification."

Mr. Waldspurger and Ms. Sobieck noted that the District has received a request for a copy of each decision. They wrote, "As of this date, however, the District has not released redacted copies of the decisions, because the District is concerned that even with heavy redaction the decisions would reveal private educational data on the [parents and their student children]."

**Issue:**

Based on the opinion request from Mr. Waldspurger and Ms. Sobieck, the Commissioner agreed to address the following issue:

Given the publicity relating to the Office of Civil Rights (OCR) complaints, can School District 47, Sauk Rapids, release a copy of the two OCR decisions after redacting all personally identifying information that appears in those documents?

**Discussion:**

Pursuant to Minnesota Statutes, Chapter 13, government data are public unless otherwise classified. (Section 13.03, subdivision 1.)

Data about students and their parents are governed by both Minnesota and federal law. Minnesota Statutes, section 13.32, classifies data relating to students and parents, and incorporates by reference much of the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, and its implementing regulations, 34 C.F.R. Part 99. Subject to limited exceptions, data about students and their parents are private, and may not be released without consent.

In their opinion request, Mr. Waldspurger and Ms. Sobieck wrote:

...the District questions whether either [of the decisions] can be redacted to a degree that would prevent the release of private educational data on the [parents and their student children]. Under Minnesota Statutes section 13.32, the following data appear to be classified as private educational data when they are in the possession of a public school district: data identifying a parent or student who files a complaint; data revealing the nature of a parent or student's complaint; and data revealing the resolution of a parent or student's complaint. If the...OCR decisions are released in any form, members of the community will know the identity of the complainants because of the earlier publicity. Moreover, unless the decisions are redacted to a degree that essentially renders them meaningless, members of the community will be able to ascertain the nature of the complaints and the manner in which OCR resolved them.

The Commissioner agrees that the fact the parents made complaints and the outcomes of the complaints are private data about the parents. In addition, there are data in the decision documents that are about the parents, the students (the children of the parents), other students, and District employees. Some of those data are private and cannot be released to the public. (For information about the data classification of employees of government entities, see Minnesota Statutes, section 13.43.)

The United States Department of Education recently adopted changes to the federal regulations implementing FERPA. The changes were effective January 8, 2009. The Family Compliance Policy Office of the Department has posted a section-by-section analysis of the changes at [www.ed.gov/policy/gen/guid/fpco/pdf/ht12-17-08-att.pdf](http://www.ed.gov/policy/gen/guid/fpco/pdf/ht12-17-08-att.pdf). The following is an excerpt from that analysis:

**§ 99.31(b) De-identification of information.** Education records may be released without consent under FERPA if all personally identifiable information [PII] has been removed....

...the regulations add that PII includes “other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.”...Under the final regulations, PII also includes “information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.”

The definition of PII provides objective standards for districts...the disclosing party must look to local news, events, and media coverage in the “school community” in determining whether “other information” (i.e., information other than direct and indirect identifiers listed in the definition of PII), would make a particular record personally identifiable even after all direct identifiers have been removed. In regard to so-called targeted requests, the final regulations clarify that a party may not release information from education records if the requester asks for the record of a particular student, or if the party has reason to believe that the requester knows the identity of the student to whom the requested records relate....

...The regulations recognize that the risk of avoiding the disclosure of PII cannot be completely eliminated and is always a matter of analyzing and balancing risk so that the risk of disclosure is very low. The reasonable certainty standard in the new definition of PII requires such a balancing test.

The question before the Commissioner is whether the data in the two OCR decisions are classified such that the District is prohibited from releasing the decisions. In situations such as this, the government entity clearly is in the best position to make the determination because it has all of the relevant information and is knowledgeable about the circumstances.

The Commissioner, though, offers the following guidance. First, the District cannot release any of the data in the decisions that are classified as private by sections 13.32 and 13.43.

Second, the District needs to consider the discussion in Advisory Opinion 04-014 about data that are inextricably intertwined:

*In Northwest Publications, Inc. v. City of Bloomington*, 499 N.W.2d 509 (Minn.App. 1993), the Minnesota Court of Appeals held that entire documents may be withheld under Chapter 13 only when public and nonpublic information is so inextricably intertwined that segregation of the material would impose a significant financial burden and leave the remaining part of the document with little informational value....

Therefore, if it is not possible for the District to appropriately redact the document, it may withhold the entire document. However, it is important to note that the Commissioner, as well as the court in *Northwest Publications, Inc.*, maintains that denial of access of data should occur only in situations where it is impossible to separate or redact the data appropriately. Given the clear presumption of openness in

Chapter 13, the District should make every effort to avoid a situation where it must withhold an entire document from the public.

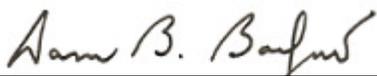
Third, the District needs to give careful consideration to the amended FERPA definition of personally identifiable information. The question the District must answer is whether, given the situation, the redacted decisions alone or in combination with other information is linked or can be linked to a specific student such that a “reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, [would be able] to identify the student with reasonable certainty.” (34 C.F.R. § 99.3.)

Finally, the Commissioner notes that the opinion documents as maintained by the OCR are government records subject to the Federal Freedom of Information Act. Therefore, a person seeking the documents could make an information request to the OCR under the federal Act.

**Opinion:**

Based on the facts and information provided, my opinion on the issue Mr. Waldspurger and Ms. Sobieck raised is as follows:

Any data in the two Office of Civil Rights decisions (OCR) that are private pursuant to Minnesota Statutes, sections 13.32 and 13.43 cannot be released. The District must determine whether 34 C.F.R. § 99.31(b)(1) prohibits the release of additional data.

Signed:   
Dana B. Badgerow  
Commissioner

Dated: April 2, 2009