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### Advisory Opinion 09-021

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2009). It is based on the facts and information available to the Commissioner as described below.

#### **Facts and Procedural History:**

On July 24, 2009, the Information Policy Analysis Division (IPAD) received a letter dated July 23, 2009, from Jesse Berglund, an attorney representing Sean Niemic. In his letter, Mr. Berglund asked the Commissioner to issue an advisory opinion regarding Mr. Niemic's right to gain access to certain data from the University of Minnesota.

IPAD, on behalf of the Commissioner, wrote to Tracy Smith, Associate General Counsel of the University, in response to Mr. Berglund's request. The purposes of this letter, dated August 5, 2009, were to inform her of Mr. Berglund's request and to ask her to provide information or support for the University's position. On August 26, 2009, IPAD received a response, dated same, from Ms. Smith.

A summary of the facts as Mr. Berglund provided them is as follows. In his opinion request, Mr. Berglund noted that Mr. Niemic is a student at the University and a member of the Minnesota Student Association (MSA) – the undergraduate student governance body at the Twin Cities campus of the University. Mr. Berglund also stated that Mr. Niemic is a reporter/employee of the *Minnesota Republic Newspaper*.

In both his role as MSA member and newspaper reporter/employee, Mr. Niemic requested the applications for all 58 student applicants for the University's Student Services Fee Committee. The University denied both of Mr. Niemic's requests stating that the data in the applications are private data under Minnesota Statutes, section 13.32, educational data.

Mr. Berglund provided a copy of a Student Services Fees Committee application. Applicants are asked to provide their name, year in school, address, phone number, and email address. In addition, applicants are asked to answer the following questions:

- Are you currently, or have you been in the past, a member of any student organization or administrative units that receive student services fees? If so, please list them, as well as any leadership positions held in these organizations.
- Please list other activities in which you are currently involved. State the amount of time per week devoted to each activity and positions held.
- What do you hope to gain from being a member of the fees committee?

- What experiences working with financial matters and activities do you have that would benefit the committee's performance?
- What experiences do you have that would assist the committee?
- Please explain the concept of "viewpoint neutrality" and the role it plays in the fees process.

In his opinion request, Mr. Berglund discussed the Fee Committee:

The Fee Committee is...established by the Board of Regents for the University of Minnesota...on each campus of the University, with the purpose of annually reviewing and recommending the student service fee....Generally, the Fee Committee has reviewed and recommended funding for a variety of functions, including operations of the student unions, campus health services, the University Recreation Center, and many student groups.

The Fee Committee for the Twin Cities Campus is composed of 15 at-large student members who are selected by a [Student Members Selection Committee]. The Student Members Selection Committee is composed of two students appointed by the [MSA]...and two students from the Graduate and Professional Student Assembly [GAPSA], which is the graduate and professional student governing body for the Twin Cities campus. The Student Members Selection Committee reviews applications...and also conducts interviews...The Student Members Selection Committee then, in practice, recommends a slate of students for the Fee Committee to MSA and GAPSA who both confirm the slate of students....

Among student governing bodies, the Fee Committee is among the most influential at the University, due to its power to review and recommend funding for student groups at the University. Currently, 45 groups, including three administrative units receive money through student service fees on the Twin Cities campus, with total funding for the 2008-2009 academic year in excess of \$24 million. This is computed as a fee of about \$350 per semester per fee-paying student, which is mandatory for any student enrolled for more than six credits each semester, or three credits in the summer.

The University also recognizes the importance of the Fee Committee by paying each committee member a stipend for serving on the Fee Committee in the amount of \$500 for general members, \$600 for subcommittee chairs, and \$750 for the committee chair....

In his opinion request, Mr. Berglund argued that certain data about the Fee Committee applicants should be public pursuant to Minnesota Statutes, section 13.601, subdivision 3 (applicants for appointment) or because they are public directory information (Minnesota Statutes, section 13.32, subdivision 5).

**Issue:**

Based on Mr. Berglund's opinion request, the Commissioner agreed to address the following issue:

Did the University of Minnesota comply with Minnesota Statutes, Chapter 13, in denying access to data contained in the applications of students who apply for the University's Student Services Fee Committee?

**Discussion:**

Data about students are governed by both Minnesota and federal law. Minnesota Statutes, section 13.32, classifies data relating to students 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 are private and may not be released without consent. (Minnesota Statutes, section 13.32, subdivision 3.)

One of the exceptions noted above is that any data a public educational institution chooses to designate as directory information pursuant to the provisions of FERPA are public. (Section 13.32, subdivision 5.) Under the federal regulations, “directory information” means “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” (34 C.F.R. § 99.3.)

In her comments to the Commissioner, Ms. Smith wrote that pursuant to state and federal law, the applicant data are private educational data. She then listed the types of data the University has designated as directory information and argued that the data Mr. Niemic seeks are not public directory information:

Directory information shall mean the student’s name, address, electronic (e-mail) address, telephone number, dates of enrollment, enrollment status (full-time, part-time, not enrolled, withdrew, and date withdrawn), major, adviser, college, class, academic awards and honors received, and, upon graduation, the degree awarded.

...This definition [of directory information] does not include application for membership on the student fees committee. The information [Mr. Niemic seeks] therefore is not directory information.

Mr. Niemic argues that he is only looking for the “directory information” concerning the applicants. Mr. Niemic, however, is asking for the identities of applicants who unsuccessfully applied for appointment to the committee – and it is the fact of their application that is private....name, address, phone number, and email – which are [sic] appear on the application – may be directory information, but when they are asked for in a context that would reveal private information (e.g., Who received financial aid? Who unsuccessfully applied for admission to the University? Who applied for membership on the student fees committee?), the information is private educational data.

The Commissioner agrees with Ms. Smith. Pursuant to the University’s current designation of data to be directory information (public), the data at issue in this opinion are not directory information.

In his opinion request, Mr. Berglund argued that some of the application data are public pursuant to Minnesota Statutes, section 13.601, subdivision 3, applicants for appointment. This subdivision classifies certain applicant data as public and makes additional data public once the individual is appointed to a public body.

However, educational data ultimately are controlled by FERPA; the Minnesota Legislature’s ability to act in the area of access to and dissemination of school data is limited by the provisions

of FERPA and the accompanying regulations. Because FERPA does not contain an exception allowing for release of data when students apply to and are appointed to a public body of their educational institution, and because the University has chosen not to designate these types of data as directory information, the data in question are private and cannot be released without consent.

The Commissioner notes the following: The data about Fee Committee applicants who unsuccessfully applied are considered not public; likewise, data for those successful applicants are also considered not public and should only be released with written consent.

**Opinion:**

Based on the facts and information provided, the Commissioner's opinion on the issue that Mr. Berglund raised is as follows:

The University of Minnesota complied with Minnesota Statutes, Chapter 13, in denying access to data contained in the applications of students who apply for the University's Student Services Fee Committee.

Signed:

*Sheila M. Reger*

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Sheila M. Reger  
Commissioner

Dated:

September 14, 2009

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