



Advisory Opinion 10-015

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 March 26, 2010, the Information Policy Analysis Division (IPAD) received a letter, dated same, from Matthew Von Pinnon, of the *Fargo Forum*. In his letter, Mr. Von Pinnon asked the Commissioner to issue an advisory opinion regarding the *Forum's* right to have access to the terms of a tentative settlement agreement between Independent School District 152, Moorhead, and its teachers' union. (IPAD requested clarification, which Mr. Von Pinnon provided on April 2, 2010.)

IPAD, on behalf of the Commissioner, wrote to Lynne Kovash, District Superintendent, in response to Mr. Von Pinnon's request. The purposes of this letter, dated April 5, 2010, were to inform her of Mr. Von Pinnon's request and to ask her to provide information or support for the District's position. James E. Knutson, an attorney for the District, responded, in a letter dated April 22, 2010.

The Commissioner also invited Steven G. Hoffmeyer, Commissioner of the Bureau of Mediation Services (BMS), to submit comments. Mr. Hoffmeyer did so, in a letter dated April 22, 2010.

A summary of the facts follows. According to Mr. Von Pinnon, in a mediation session closed by BMS mediators, the Moorhead School District reached a tentative agreement with its teachers' unions on January 1, 2010.

The *Forum* asked for access to the tentative agreement. The District replied, in an email dated January 4, 2010, that "[n]either the mediation sessions nor the content of the mediation sessions are [sic] considered public. We have no obligation to release the information from the mediation sessions, including the details of the tentative agreement."

Mr. Von Pinnon wrote:

Our attorney . . . contacted the lawyer for the Moorhead school district and asked him for the legal basis that the district was relying on to withhold the settlement terms. The lawyer cited Minn. Stat., sec. 179A.14, subd. 3, which is the statute that allows mediators to close meetings; according to our attorney, it does not classify data.

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

Because the parties were unsuccessful in reaching an agreement through negotiations, mediation was requested from BMS. . . . Pursuant to Minn. Stat. §179A.14, Subd. 3, the Mediator closed all mediation sessions as private. Therefore, as determined by the Mediator, all discussion that took place during these mediation sessions by and/or between the [District] and the Union, including documents and proposals exchanged between the parties or developed by each of the parties for mediation, were private. In addition, any discussions between the Mediator and either of the parties and between the parties and documents exchanged were private.

Finally, in a mediation session conducted on January 1, 2010 between the Union, the [District] and the Mediator, a tentative agreement (“TA”) was reached. The Mediator told the [District] and the Union that the TA was private information and would be private until ratified by Union members and the entire School Board voted on the TA. Based on the directive of the Mediator, the [District] was not obliged to disclose any documents, proposals or agreements that took place during mediation sessions.

Mr. Knutson also stated:

The School Board met in a private/closed session at 6:00 pm on January 11, 2010, pursuant to Minn. Stat. §13D.03, Subd. 1(b). At that time, the full School Board was advised of the contents of the TA. . . .

A regular meeting of the School Board was held at 7:00 pm on January 11, 2010, immediately after the closed School Board meeting. At the regular meeting, the TA was made public and the School Board voted to approve it. A representative of the Fargo Forum was present at that meeting and received a copy.

Mr. Knutson submitted a copy of that document, which is dated January 1, 2010, and entitled “Tentative Agreement.” The document also contains this subheading: “PRESENTED TO MOORHEAD AREA PUBLIC SCHOOLS SCHOOL BOARD ON JANUARY 11, 2010.”

In his comments, Commissioner Hoffmeyer discussed the mediation process, in general, and stated: “[t]his tentative agreement, like many such agreements, was a verbal agreement, documents were not exchanged. We do not believe the Minnesota Government Data Practices Act requires the creation of a document when one does not exist.” (Formatting omitted.)

Issue:

Based on Mr. Von Pinnon’s request, the Commissioner agreed to address the following issue:

Did Independent School District 152, Moorhead, comply with Minnesota Statutes, Chapter 13, in denying access to the terms of a tentative settlement agreement with District teachers?

Discussion:

Pursuant to Minnesota Statutes, section 13.03, government data are public unless otherwise classified. Pursuant to Minnesota Statutes, section 13.02, subdivision 7, the term “government data” means “all data collected, created, received, maintained or disseminated by any [government entity] regardless of its physical form, storage media or conditions of use.”

In this situation, it is not clear if the data the *Forum* requested existed in physical form. Mr. Knutson referred to “documents and proposals exchanged between the parties or developed by each of the parties for mediation,” but Commissioner Hoffmeyer stated the tentative agreement “was a verbal agreement, documents were not exchanged.”

It is not clear if Commissioner Hoffmeyer meant that there were no data that were responsive to the *Forum*’s request, i.e., data from which the *Forum* could learn the terms of the settlement agreement, or if he is stating that nothing like a “tentative agreement document” existed. Commissioner Hoffmeyer is correct that Chapter 13 does not require an entity to create data in response to a request.

However, in its response to the *Forum* and in its comments to the Commissioner, the District did not state that there were no data. Furthermore, as noted above, the District did possess a document entitled “Tentative Agreement” that was dated January 1, 2010, and presented to the School Board on January 11, 2010. The Commissioner cannot resolve the disparity between Mr. Hoffmeyer’s and Mr. Knutson’s comments.

Therefore, this discussion will consider the *Forum*’s right to gain access to the terms of the tentative agreement if those terms were data recorded in some physical form at the time the *Forum* made its request.

The District stated that, pursuant to Minnesota Statutes, section 179A.14, subdivision 3, the mediation sessions and all related “documents and proposals exchanged between the parties or developed by each of the parties for mediation” were closed and “private” per the mediator’s instruction.

Pursuant to section 179A.14, subdivision 3, “[a]ll negotiations, mediation sessions, and hearings between public employers and public employees or their respective representatives are public meetings except when otherwise provided by the commissioner.”

Mr. Von Pinnon asserted that this provision does not classify data; the Commissioner agrees. In Advisory Opinion 06-015, the Commissioner addressed this issue:

As prescribed in section 13.03, subdivision 1, government data are public unless otherwise classified by statute, temporary classification, or federal law. Accordingly, Minnesota Rules do not classify data, nor does a mediator's Order. Therefore, it was not appropriate for the Council to deny access to the data in the rejected contract offer based on either Minnesota Rules, section 5510.2905, or the mediator's Order.

With regard to the School Board’s closed meeting at which the Board was advised of the TA’s contents, Mr. Knutson wrote:

The [closed meeting] was held to discuss and review labor negotiations proposals. . . . What the Fargo Forum is asking is that the [District] disclose this proposed TA . . . notwithstanding the fact that it was going to be disclosed to the School Board for the first time at a closed meeting. What is the purpose of holding a closed meeting to discuss a document that has already been disclosed? If this were the case, the sanctity of Minn. Stat. §13D.03, Subd. 1(6) [sic] would be destroyed and would be rendered meaningless.

Minnesota Statutes, Section 13D.03, subdivision 1(b), provides:

The governing body of a public employer may by a majority vote in a public meeting decide to hold a closed meeting to consider strategy for labor negotiations, including negotiation strategies or developments or discussion and review of labor negotiation proposals, conducted pursuant to sections 179A.01 to 179A.25.

The Commissioner respectfully disagrees with Mr. Knutson's position. Section 13D.03 allows a governing body to decide to close an otherwise open meeting for the purposes stated above; it does not classify data.

Finally, although none of the parties here raised this issue, the Commissioner notes that Advisory Opinion 06-015 discussed the possibility that this kind of data may be classified under Minnesota Statutes, section 13.7908 (recodified from section 13.79, subdivision 2(b) in 2007), which states:

Data received or maintained by the staff or commissioner of the Bureau of Mediation Services during the course of providing mediation services to the parties to a labor dispute under chapter 179 are classified as protected nonpublic data or confidential data on individuals, except to the extent the commissioner of the Bureau of Mediation Services determines access to data is necessary to fulfill the requirements of section 179A.16 or to identify the general nature of or parties to a labor dispute.

Given the discrepancy between Mr. Knutson's and Commissioner Hoffmeyer's comments, it isn't clear if there were data the *Forum* sought that could have been classified under this provision at the time it made its request; the Commissioner raises the issue as it relates to the discussion in 06-015:

However, the Commissioner believes an argument can be made that the Council appropriately withheld the data in the rejected contract pursuant to section 13.79. In his comments to the Commissioner, Mr. Grossman wrote:

At the time the Star Tribune requested the rejected contract proposal on January 17 or 18, 2006, the requested data fell squarely within the definition of mediation data as set forth in Minn. Stat. § 13.79, subd. 2(b). The Metropolitan Council and the Transit Union submitted this labor dispute to the Bureau of Mediation Services and were working with their appointed mediator....

Section 13.79, subdivision 2(b), appears to classify only those data maintained by the Bureau of Mediation Services. Such a reading, however, creates an absurd result, which, pursuant to Minnesota Statutes, section 645.17, is not to be presumed. If data relating to a mediation conducted by BMS are protected at BMS but not protected in the agency that created the data, the purpose in classifying the data at BMS is frustrated.

The Commissioner, however, strongly encourages interested parties to take this issue to the Legislature to ensure that the valid policy reasons for protecting data during mediation are considered and appropriate data classifications adopted.

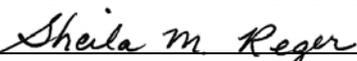
In addition, in cases in which data are classified under section 13.7908, to the extent that BMS disseminates those data to an entity, it appears that the data are classified at that entity the same way they are classified at BMS. (See Minnesota Statutes, section 13.03, subdivision 4 (c).)

Opinion:

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

If data documenting the terms of a tentative settlement agreement with District teachers existed at the time of the request, Independent School District 152, Moorhead, did not comply with Minnesota Statutes, Chapter 13, in denying access pursuant to Minnesota Statutes, section 179A.14, subdivision 3.

Signed:



Sheila M. Reger
Commissioner

Dated:

May 17, 2010