



Advisory Opinion 10-022

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2010). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On August 24, 2010, the Information Policy Analysis Division (IPAD) received a letter, dated same, from Tom J. Hanson, Commissioner of Minnesota Management and Budget (MMB.) In his letter, Commissioner Hanson asked the Commissioner (of Administration) to issue an advisory opinion regarding the classification of certain data MMB maintains. IPAD asked MMB to provide additional information, i.e., comments from the Office of the Legislative Auditor (OLA). Cecile Ferkul, Deputy Legislative Auditor, responded on August 25 and 26, 2010.

The Commissioner also invited Tammy Pust, attorney for Chas Anderson, former Deputy Commissioner for the Minnesota Department of Education, to submit comments, which she did in a letter dated September 22, 2010.

A summary of the facts follows. According to Commissioner Hanson:

[MMB] has hired an outside investigator to develop facts and issue a report regarding a complaint made against Ms. Chas Anderson The complaint was made after Ms. Anderson had left state employment voluntarily but involved her activities while she was a deputy commissioner.

The Office of the Legislative Auditor has requested a copy of the final report and MMB will provide it upon its completion pursuant to Minn. Stat. § 3.978, Subd. 2.

Once the investigation is completed, this data appears to be classified as public pursuant to the public official clause of Minn. Stat. § 13.43, Subd. 2.

MMB has advised Ms. Anderson's attorney of its opinion that the completed investigative report and supporting materials are public data.

In her comments to the Commissioner, Ms. Pust wrote:

Chas Anderson served as the Deputy Commissioner for the Minnesota Department of Education (MDE) from 2003 through June 4, 2010, on which date she voluntarily resigned her employment. As of that date, no complaint had been filed with MDE, MMB or any other state agency relative to Ms. Anderson's performance of her duties as a state employee.

On or about June 21, 2010, Ms. Anderson was informed that MDE had commenced an investigation of which she was the subject. Ms. Anderson cooperated fully in the investigation.

Issues:

Based on Commissioner Hanson's opinion request, the Commissioner agreed to address the following issues:

1. Pursuant to Minnesota Statutes, Chapter 13, what is the classification of the following data related to an investigation conducted by Minnesota Management and Budget: the investigative report and "supporting or underlying data for the report" about a complaint made against a former deputy commissioner of the Minnesota Department of Education?
2. Does MMB's obligation to provide the Office of the Legislative Auditor with a copy of the report affect the classification of the data described in Issue 1?

Discussion:

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

"Personnel data" are government data about an individual that an entity maintains because the individual "is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity." Personnel data are classified at Minnesota Statutes, section 13.43. Subdivision 2 of section 13.43 classifies certain personnel data as public; pursuant to subdivision 4, all other personnel data are private.

Issue 1: Pursuant to Minnesota Statutes, Chapter 13, what is the classification of the following data related to an investigation conducted by Minnesota Management and Budget: the investigative report and "supporting or underlying data for the report" about a complaint made against a former deputy commissioner of the Minnesota Department of Education?

MMB believes that the data related to the complaint about Ms. Anderson, as a former deputy commissioner, are public under section 13.43, subdivision 2(e), which provides, in relevant part:

Notwithstanding paragraph (a), clause (5), upon completion of an investigation of a complaint or charge against a public official, or if a public official resigns or is terminated from employment while the complaint or charge is pending, all data relating to the complaint or charge are public, unless access to the data would jeopardize an active investigation or reveal confidential sources.

"Public official" includes "the head of a state agency and deputy and assistant state agency heads."

Ms. Pust wrote that section 13.43, subdivision 2(e) is not applicable:

By its express terms, this exception [to the presumption that personnel data are private unless specifically classified as public under section 13.43] only applies when one of two tests are met: either (1) there has been "an investigation of a complaint or charge against

a public official;’ or (2) a public official ‘resigns or is terminated from employment while the complaint or charge is pending.’ Neither of these criteria are met in the present case.

While MMB did conduct an investigation, it did not conduct ‘an investigation ... against a public official.’ Ms. Anderson was the deputy commissioner at MDE, and during her employment would have constituted a ‘public official’ for purposes of this exception. It is important to note, however, that the statute defines ‘the head of a state agency and deputy ... agency heads’ as ‘public officials;’ it does not include former agency or deputy agency heads within the statutory definition. Ms. Anderson was not a public official when the investigation was commenced, and is not now a public official. The fact that she was formerly a public official is irrelevant to the statutory language.

...The legislature certainly knew how to include former public officials within the Act’s reach when they intended to do so. See Minn. Stat. § 13.43, Subd. 1 (reference to ‘was an employee’) and Minn. Stat. § 13.43, Subd. 2 (reference to ‘current and former employees’). The legislature chose not to include former public officials in Subdivision 2(e). Because Ms. Anderson is not a current state employee, she is not a public official for purposes of this section of the MGDPA [Minnesota Statutes, Chapter 13.]

As noted above, section 13.43 defines personnel data as data a government entity maintains because an individual “is or was” an employee, applicant for employment, volunteer or independent contractor. Ms. Pust wrote that had the Legislature intended specifically to include former public officials in subdivision 2(e), it would have done so. The Commissioner acknowledges that section 13.43 could be clarified. However, she respectfully disagrees with Ms. Pust’s position that the data in question are not classified under section 13.43, subdivision 2(e).

All provisions of a statute must be given effect. (See Minnesota Statutes, sections 645.16 and 645.17.) Section 13.43, subdivision 2(e), provides an exception to the general rule, under subdivision 2(a)(5), which classifies personnel data related to complaints and charges about employees who are not public officials. By definition, the general rule applies to current and former employees, volunteers and independent contractors. The Commissioner believes therefore that section 13.43, subdivision 2(e), should be construed to include data about allegations made about public officials’ actions while employed in public service, even if the complaint or charge was made after a public official left public employment.

The subdivision 2(e) exception classifies as public more data about individuals in their roles as public officials than would be public under the general rule. If section 13.43, subdivision 2(e) did not apply to situations like this one, then the only data that would be public would be the existence of the complaint or charge, and the status (i.e., under investigation, sustained, dismissed, etc.) Details about the nature of the complaint against the former public official would never be public. (See section 13.43, subdivisions 2(a) 4 & 5 and 2(b).)

In her comments to the Commissioner, Ms. Pust wrote:

[Ms. Anderson] voluntarily terminated her employment on June 4, 2010, well before any complaint was made and well before any investigation was commenced. While the Legislature clearly intended to prevent high-ranking state employees from avoiding release of complaint findings merely by quitting their employment, that policy interest is not at all at issue in the present circumstances. Ms. Anderson clearly did not quit her

employment to avoid disclosure of a complaint that she did not know about – and which did not even exist – at the time she terminated her employment.

Regardless of whether Ms. Anderson could have anticipated this complaint, it is the Commissioner’s understanding that, in general, the Legislature also did not intend that high-ranking state employees could avoid the public release of details of investigations into allegations simply by resigning before an anticipated complaint or charge is filed. To conclude otherwise would eviscerate the principle that actions public officials take *during the course of their public employment* are subject to public scrutiny, including when a complaint or charge is made about those actions after an official voluntarily resigns. (IPAD staff reviewed the recording of the May 8, 1995, Minnesota House floor debate of HF1473/SF1279, during which the 1995 amendment was introduced, discussed, and approved.)

Accordingly, the data in the investigative report, along with supporting or underlying data, are presumptively public, pursuant to section 13.43, subdivision 2(e). However, it is likely that some of the data are not public, e.g., private data about confidential sources, other public employees, etcetera, which MMB would need to redact. (See Advisory Opinion 96-002.)

Issue 2: *Does MMB’s obligation to provide the Office of the Legislative Auditor (OLA) with a copy of the report affect the classification of the data described in Issue 1?*

Ms. Pust wrote:

The MGDPA is clear that when one government agency disseminates data to another government agency, ‘the data disseminated shall have the same classification in the hands of the entity receiving it as it had in the hands of the entity providing.’ Minn. Stat. § 13.03, Subd. 4 (c). Therefore, because the subject data is private in the hands of MMB, it remains private if disseminated to the OLA.

The OLA has no legal authority to release private personnel data. Minnesota law provides that the OLA is subject to the MGDPA ‘and shall protect from unlawful disclosure data classified as not public.’ Minn. Stat. § 3.979, Subd. 1. Data collected by the OLA for purposes of conducting an audit are not public during the course of the audit, and ‘upon release of a final report by the legislative auditor, data relating to an audit are public *except data otherwise classified as not public.*’ Minn. Stat. § 3.979, Subd. 3 (a) (emphasis added.) Because the subject data is classified as private data for the reasons set forth above, and because the data’s classification does not change by virtue of the fact that it is disseminated to the OLA, the data remains private and not releasable in the hands of the OLA.

In her comments, Ms. Ferkul stated: “the OLA does not anticipate that the public release of the investigative report related to Chas Anderson would jeopardize any investigation that the OLA may undertake.”

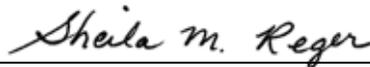
Thus, MMB’s obligation to provide OLA a copy of the report does not affect the classification of the data in question.

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issue Commissioner Hanson raised is as follows:

1. Pursuant to Minnesota Statutes, Chapter 13, the following data related to an investigation conducted by Minnesota Management and Budget: the investigative report and "supporting or underlying data for the report" about a complaint made against a former deputy commissioner of the Minnesota Department of Education are presumptively public. MMB may need to redact not public data from the final investigative report.
2. MMB's obligation to provide the Office of the Legislative Auditor with a copy of the report does not affect the classification of the data described in Issue 1.

Signed:



Sheila M. Reger
Commissioner

Dated:

October 15, 2010