



Advisory Opinion 11-003

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 December 20, 2010, the Information Policy Analysis Division (IPAD) received a letter dated December 16, 2010, from Michael Rengel, an attorney representing Independent School District 309, Park Rapids Area Schools. In his letter, Mr. Rengel asked the Commissioner to issue an advisory opinion regarding the classification of certain data the District maintains and whether the District can appropriately disseminate those data to the Hubbard County Attorney. IPAD requested additional information, which Mr. Rengel provided on January 12 and 20, 2011.

In letters dated January 26, 2011, IPAD invited both the data subject, through his/her attorney, and the County Attorney to provide comments, but neither did.

A summary of the facts as Mr. Rengel provided them is as follows. In his opinion request, Mr. Rengel wrote:

... [I]t came to the attention of the police liaison officer that [a former employee might have violated school policy]. This matter was investigated ... and [the former employee] was interviewed by the school principal. We are not aware of the school principal utilizing a Tennesen Warning for the purposes of that preliminary interview. The school principal further interviewed [the former employee's child who is a District student]. ... no Tennesen Warning was provided to [the former employee's child] by the school principal.

The school district hired an investigator ... to conduct an investigation related to the issues ... As part of the investigation ... eleven individuals were interviewed, including [the former employee], fellow teachers, [some] students, as well as past and present school administrators. As part of the investigation, [the former employee] was given a Tennesen Warning with respects [sic] to all three of his interviews with [the investigator]. ...

The school district's request for an advisory opinion is based upon a request by [the] Hubbard County Attorney ...

Mr. Rengel stated that the District maintains the following information:

1. ... [P]rincipal's notes regarding inquiry made of [the former employee]. ... No Tennesen Warning was provided [at this inquiry].

2. ... [P]rincipal's notes regarding inquiry made of [the former employee's child]. Present at this inquiry were [the former employee and his/her child and the principal]. ... No Tennesen Warning was provided [at this inquiry].
3. Investigative information obtained by [the District's investigator] from [the former employee], including interview summaries of [the former employee] after Tennesen Warnings [were] provided ...
4. Interview summaries by [the District's investigator] from individuals (other than [the former employee]) after Tennesen Warnings [were] provided, including [staff, students other than the former employee's child, and law enforcement].

The District collected and created these data while the individual was an employee of the District.

Issue:

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

Pursuant to Minnesota Statutes, Chapter 13, would School District 309, Park Rapids, violate the data practices rights of a former employee if it disseminates certain data about the former employee to the Hubbard County Attorney?

Discussion:

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

Private data are accessible to the data subject and not to the public. (Minnesota Statutes, section 13.02, subdivision 12.) Private data can be disclosed outside the originating entity if there is statutory authority to do so or if the data subject has given written informed consent. (Minnesota Statutes, section 13.05, subdivisions 3 and 4.)

Chapter 13 also sets some additional requirements around the collection and later use of private or confidential data about an individual. When collecting private or confidential data about an individual from that individual, the entity must provide a notice, commonly referred to as a Tennesen warning. (Minnesota Statutes, section 13.04, subdivision 2.) This notice must contain the following: (1) the purpose and intended use of the data; in other words, why the entity is collecting the data and how it will use the data; (2) whether the individual can refuse or is legally required to provide the requested data; (3) what the consequences are of supplying or not supplying the data; and (4) the identity of persons or entities outside the collecting entity authorized by state or federal law to receive the data. The Commissioner previously has opined that if an entity does not give an individual a Tennesen notice when circumstances warrant it or if an entity's notice is inadequate, the entity cannot store, use, or disclose any of the data it collected from the individual. (Minnesota Statutes, section 13.05, subdivision 4 and Advisory Opinion 07-009.)

Data in which former and current employees, and independent contractors are the subjects are classified pursuant to Minnesota Statutes, section 13.43. Certain data about employees are public (section 13.43, subdivision 2), and certain data are private (section 13.43, subdivision 4). Subdivision 15 of section 13.43 provides that private personnel data may be disclosed to a law enforcement agency for the purpose of reporting a crime or alleged crime committed by an employee, or for the purpose of assisting law enforcement in the investigation of a crime committed or allegedly committed by an employee.

Data of which students are the subjects 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 informed consent.

Mr. Rengel asked the Commissioner to assist in determining what of the data in question the District can disclose to the County Attorney. The answer depends upon the classification of the data. The Commissioner has not seen the data and in situations such as these, can offer only general guidance as government entity staff, with their knowledge of the relevant facts, circumstances, and involved data subjects, are in the best position to make decisions about classification.

Before proceeding, the Commissioner notes that any data the District determines are public can be disclosed to the County Attorney. (Minnesota Statutes, section 13.02, subdivisions 14 and 15.) Also, any of the data in question of which an employee or student is the subject can be disclosed to the County Attorney if the employee or student (or student's parent(s)) gives informed consent to the release or there is a court order.

1. Mr. Rengel asked about disclosing to the County Attorney data in the principal's notes from the "inquiry made of [the former employee]." Mr. Rengel noted that present at the meeting were the employee, union representatives, an officer (the Commissioner assumes this is the school police liaison officer but is not certain), and the principal. Mr. Rengel stated that no Tennesen notice was provided. Because multiple parties were at the inquiry, it is possible the notes contain data about multiple data subjects though the Commissioner assumes most of data are about the former employee.

Data of which employees are the subject are classified pursuant to Minnesota Statutes, section 13.43. Subdivision 15 of section 13.43 provides that certain private data can be disseminated to a law enforcement agency in certain situations. Mr. Rengel stated the principal did not give the former employee a Tennesen notice. Therefore, any data the principal asked the former employee to provide about him/herself cannot be disclosed to the County Attorney unless the former employee gives informed consent or there is a court order. (Advisory Opinion 07-009.)

Any private data in the notes about the former employee that the employee did not provide that are of the type described in section 13.43, subdivision 15, can be disclosed to the County Attorney.

Any private data about the principal of the type described in Minnesota Statutes, section 13.43, subdivision 15, can be disclosed to the County Attorney.

The classification of any data in the notes of which the union representatives and the officer are the subjects depends upon whether they are employees of the District. If so, the data are Minnesota Statutes, section 13.43 (personnel) data and can be disclosed in a manner similar to that discussed above in regard to the principal and the former employee. If they are not employees, any data about them are public pursuant to the general presumption in Minnesota Statutes, section 13.03, subdivision 1.

2. Mr. Rengel also asked about disclosing to the County Attorney data in the principal's notes regarding "the inquiry made of [the former employee's child]." The child is a student in the District. Given the situation, it is likely the notes contain data about multiple data subjects, i.e., the child, the former employee (the child's parent), and possibly the principal. The Commissioner above has discussed the classification of any data of which the former employee and the principal are the subjects.

Data of which students are the subjects are classified pursuant to Minnesota Statutes, section 13.32; most are private. Section 13.32 does provide authority for school districts to release certain private data about students in certain situations. However, the Commissioner, not knowing the content of the data, is not in a position to determine whether there is a provision in section 13.32 permitting release to the County Attorney. If there is, and the principal asked the child to provide private or confidential data about him/herself, the principal was required to give the child a Tennessee notice. If the child was too young to understand the implications of the notice, the principal should have given the notice to the child's parent(s). (Minnesota Statutes, section 13.02, subdivision 8.) Mr. Rengel stated that no Tennessee notice was provided. Therefore, the District cannot disclose to the County Attorney any data the principal asked the child to provide about him/herself.

If there are private data about the student in the notes that did not come from the student, and Minnesota Statutes, section 13.32, or FERPA provides statutory authority for releasing those data to the County Attorney, the District can do so.

3. Mr. Rengel inquired also about releasing investigative information obtained by the District's investigator from the former employee, including "investigative summaries of the [former employee] after Tennessee Warnings [were] provided." Although it is possible the investigator is the subject of some of the data, the Commissioner assumes most of the data are about the former employee. As discussed above in 1, data of which employees and independent contractors (likely the investigator is an independent contractor) are the subject are classified pursuant to Minnesota Statutes, section 13.43. Certain private personnel data can be disclosed to law enforcement agencies.

Mr. Rengel provided a copy of a document entitled, "Notice of Rights Employee." The notice appears to include most of the components required in a Tennessee notice as well as some additional items. For purposes of this opinion, the Commissioner is focusing on whether the notice contains the fourth element: the identity of persons or entities outside the collecting entity authorized by state or federal law to receive the data. The final provision on the District's notice states:

The information which you provide during this interview may be released to Park Rapids Area Schools, agents of Park Rapids Area Schools, insurer of Park Rapids Area Schools and their representatives, or any other individuals directly or indirectly involved in this matter, including complainants and other witnesses.

In the Commissioner's opinion, it is not reasonable to conclude that the former employee could have understood that the phrase, "or any other individuals directly or indirectly involved in this matter" meant that the District could disclose the data to law enforcement. Therefore, the District's Tennesen notice is not adequate and any of the investigative information that the former employee provided about him/herself cannot be disseminated to the County Attorney unless the former employee gives informed consent or there is a court order. As discussed above in 1, data about the former employee that s/he did not provide can be disclosed to the County Attorney as allowed pursuant to Minnesota Statutes, section 13.43, subdivision 15.

4. Finally, Mr. Rengel asked about releasing data in interview summaries by the District's investigator gathered from individuals other than the former employee "after Tennesen [notices were] provided, including fellow teachers, students (other than [the former employee's child]), past and present school administrators and law enforcement."

- For discussion about personnel data, see 1 and 3 above
- For discussion about student data, see 2 above
- For data about non-employee data, see 1 above

Although Mr. Rengel stated that Tennesen notices were provided, he did not indicate whether they were the same as the notice the former employee received. If so, as the Commissioner stated above in 3, his opinion is that the District's notice is not adequate. Therefore, the District can disclose, to the County Attorney pursuant to Minnesota Statutes, section 13.43, subdivision 15, only public and private data the interviewees provided about other individuals. The District also can disclose the data if the individuals have given informed consent or there is a court order.

Regarding data in interview summaries from law enforcement, assuming these individuals are not employees of the District, any data about them the District maintains are public pursuant to the general presumption. (Minnesota Statutes, section 13.03, subdivision 1.)

Opinion:

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

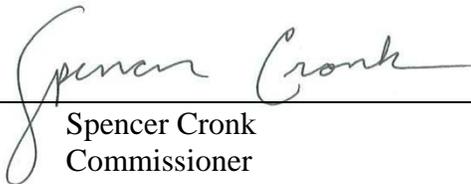
Pursuant to Minnesota Statutes, section 13.43, subdivision 15, School District 309, Park Rapids, has authority to disclose certain private data of which the former employee is the subject to the Hubbard County Attorney. However, because neither the District principal nor the District's investigator provided adequate Tennesen notices as required pursuant to Minnesota Statutes, section 13.04, subdivision 2, any data collected from the former employee of which s/he is the subject cannot be disclosed to the County Attorney unless the former employee has given informed consent or there is a court order.

The District also can disclose certain private data about other District employees to the Hubbard County Attorney pursuant to section 13.43, subdivision 15. However, if the District's investigator did not provide an adequate Tennessee notice, any data collected from those employees about them cannot be disclosed to the County Attorney unless the District obtains informed consent or there is a court order.

The Commissioner does not have enough information to determine whether there is a provision in Minnesota Statutes, section 13.32, or FERPA, allowing the District to disclose data about the former employee's child to the County Attorney. However, because the District did not provide a Tennessee notice, the District can disclose only those data the child did not provide about him/herself, unless the child or child's parent(s) gives informed consent or there is a court order.

Finally, the District can disclose any public data about any of the individuals to the County Attorney.

Signed:



Spencer Cronk
Commissioner

Dated:

March 10, 2011