



Advisory Opinion 11-015

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2011). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On September 13, 2011, the Information Policy Analysis Division (IPAD) received a letter dated same, from Michelle Lawson, Interim Clay County Attorney. In her letter, Ms. Lawson asked the Commissioner to issue an advisory opinion regarding certain government data and the data practices rights afforded the subjects of those data.

A summary of the facts as Ms. Lawson provided them is as follows. She wrote in the opinion request:

The Clay County Attorney's Office is developing a policy related to the release of otherwise confidential information to victims that are represented by an attorney. Active criminal investigative data is classified as confidential under M.S.A. 13.82, subdivision 7 until the data is presented in Court or the case becomes inactive. However, crime victims and their legal representatives have access to the otherwise confidential active criminal investigative data under M.S.A. 13.82, subdivision 13. In terms of our policy, can/should our office require a release of information signed by the victim prior to releasing information to an attorney for the victim, in lieu of the victim themselves under 13.82, subdivision 13.

The implication that this has for prosecutors is that we are specifically required by statute to provide a victim with this information that would not be accessible to the general public. In addition to having the statutory obligation to provide victims with this information, our prosecuting attorneys are also subject to the Lawyers Rules of Professional Responsibility. Specifically, Rule 4.2 of the Lawyers Rules of Professional Responsibility prohibits an attorney from having direct contact with a represented party; instead all communication with that party must be through their legal counsel. In an attempt to reconcile these competing obligations when we encounter victims that are represented by an attorney I am developing an office policy which addresses that scenario. ...

Ms. Lawson wrote that she was copying her opinion request to the Assistant Director of the Office of Lawyers Responsibility.

Issue:

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

Should a prosecutor's office require a release of information signed by the victim prior to releasing data to that victim's legal representative under Minnesota Statutes, section 13.82, subdivision 13?

Discussion:

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

Active criminal investigative data maintained by law enforcement agencies are classified as confidential (data about individuals) and protected nonpublic (data not about individuals). (Minnesota Statutes, section 13.82, subdivision 7.) Generally, confidential/protected nonpublic data are accessible to law enforcement agency staff who need the data to do their work but not to the public and not to the subject(s) of the data. In addition, and of particular relevance here, these data can be released to entities/persons as authorized by law. (Minnesota Statutes, sections 13.04, subdivision 3; 13.05, subdivision 3; and Minnesota Rules Part 1205.0600.)

One such statutory provision authorizing specific persons access to confidential/protected nonpublic data is Minnesota Statutes, section 13.82, subdivision 13, which allows law enforcement agencies, in certain situations, to release active investigative data to a victim or his/her legal representative:

On receipt of a written request, the prosecuting authority shall release investigative data collected by a law enforcement agency to the victim of a criminal act or alleged criminal act or to the victim's legal representative unless the release to the individual subject of the data would be prohibited under section 13.821 or the prosecuting authority reasonably believes:

- (a) that the release of that data will interfere with the investigation; or
- (b) that the request is prompted by a desire on the part of the requester to engage in unlawful activities.

Information collected, created, and maintained related to a criminal investigation likely will have more than one subject, often times including data about a perpetrator and a victim(s). If the confidential/protected nonpublic data are about individuals other than the victim, Minnesota Statutes, section 13.82, subdivision 13, provides the statutory authority for law enforcement to release the data to either the victim or his/her legal representative.

The analysis is the same if the data are about the victim; Minnesota Statutes, section 13.82, subdivision 13, provides the authority for law enforcement to release the data to the victim or his/her legal representative. Law enforcement is not required to obtain informed consent from the victim before releasing the data to his/her legal representative because a data subject cannot give consent to release confidential data.

If the victim is a minor, the parent or guardian also has access to the data unless the minor requests that law enforcement not release the data and law enforcement determines that withholding the data would be in the best interest of the minor. (Minnesota Statutes, section

13.02, subdivision 8, and Minnesota Rules Part 1205.0500.) Again, for the reasons previously stated, neither the minor victim nor his/her parent or guardian would be required to give informed consent for law enforcement to release data about the minor to the minor's legal representative.

Also, if the case involves certain types of crimes, and the victim is incompetent, incapacitated, or deceased, the term "victim" includes the family members, guardian, or custodian. (Minnesota Statutes, section 611A.01- crime victims, definitions) In other words, if Chapter 611A applies, the language in Minnesota Statutes, section 13.82, subdivision 13, gives law enforcement authority to release not public criminal investigative data to certain individuals acting in place of the victim and to those individuals' legal representatives.

Finally, it is important to point out that government entities are required to protect government data. (Minnesota Statutes, section 13.05, subdivision 5.) Therefore, before the County releases any not public investigative data to the victim or his/her legal representative, it should take reasonable measures to ensure they are who they purport to be, and also to have some type of policy for documenting that the attorney represents the victim.

Opinion:

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

A prosecutor's office is not required to obtain a release of information signed by the victim prior to releasing data to that victim's legal representative under Minnesota Statutes, section 13.82, subdivision 13.

Signed:



Spencer Cronk
Commissioner

Dated:

November 1, 2011