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## Advisory Opinion 11-016

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 25, 2011, the Information Policy Analysis Division (IPAD) received a letter dated August 23, 2011, from John Bodette of the St. Cloud Times. In his letter, Mr. Bodette asked the Commissioner to issue an advisory opinion regarding the newspaper's right to gain access to certain data from the City of Sauk Rapids. IPAD requested additional information, which Mr. Bodette provided on September 7 and 19, 2011.

IPAD, on behalf of the Commissioner, wrote to Ross Olson, City Administrator, in response to Mr. Bodette's request. The purposes of this letter, dated September 21, 2011, were to inform him of Mr. Bodette's request and to ask him to provide information or support for the City's position. On October 5, 2011, IPAD received a response, dated same, from Adam Ripple, an attorney representing the City.

A summary of the facts as Mr. Bodette provided them is as follows. He wrote in the opinion request:

The City of Sauk Rapids, in partnership with the Minnesota Department of Employment and Economic Development, is in the process of arranging a \$500,000 forgivable loan (grant) to The Coleman Companies Inc. for an expansion that will add about 100 jobs at Coleman's Sauk Rapids factory. The loan funds will come from public sources.

On Aug. 12, 2011, [a newspaper reporter] learned that the Sauk Rapids City Council had scheduled a special meeting for Aug. 15 to act on a proposed "financial information agreement" requested by The Coleman Companies Inc. The agreement ... states that city and state staff will review Coleman financial documents as part of the city's due diligence in deciding whether to make the loan, but that they will then return all of the financial documents to the company before advising the City Council on whether the documentation supports a decision to proceed with the loan. The city claims that the agreement is "consistent with [Minnesota Statutes, Chapter 13]" and contends that it will not have to make any of the records received from Coleman public because the city will no longer have them in its physical possession when the loan is approved by the city council.

Mr. Bodette provided to the Commissioner a copy of the agreement and a copy of a *Sauk Rapids City Council Request for Action* document, dated August 22, 2011, that contains background information about the agreement. In part, the document states:

Coleman is a privately held corporation and its financial information is not public information. ... [Minnesota Statutes, Chapter 13] classifies the financial information as private nonpublic data during the review process. However, after the grant is awarded much of Coleman's financial information would then be reclassified as public data. To avoid the disclosure of the information, the City will return the information to Coleman after it has been reviewed.

... The Agreement is consistent with [Minnesota Statutes, Chapter 13], but most importantly for Coleman, the City agrees not to make or retain copies and to return all the information to Coleman before it becomes public information.

Mr. Bodette wrote that on August 15, 2011, the City Council voted to approve the financial agreement with the company "effectively approving the return of the company's financial information without public disclosure."

On August 15, 2011, the reporter made a data request to the City for "copies of all financial information for The Coleman Company Inc. that becomes public after the grant is awarded ... ."

Mr. Bodette wrote that on September 12, 2011, the City Council approved financial assistance for The Coleman Companies Inc., and that the reporter renewed her request for data.

Mr. Bodette stated:

City officials stated ... that they did not possess Coleman financial documents; rather, they based their due diligence on a recommendation from a consultant who is said to have reviewed the documents at Coleman offices.

The consultant was retained by the city for the purpose of reviewing the financial documents and therefore would appear to be acting as the city's agent in this context.

The [newspaper] maintains that the city's use of a consultant does not alter the application of the Minnesota Official Records Act, Minn. Stat. 15.17.

### **Issue:**

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

Did the City of Sauk Rapids comply with Minnesota Statutes, Chapter 13, when it denied access to data provided to the City and/or the City's contractor by a private company that the City then used to determine whether to provide financial assistance to the company?

### **Discussion:**

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

In responding to a data request, a government entity must provide the data, advise that the data are classified such that the requestor is denied access, or inform the requestor that the data do not exist.

In addition, Minnesota Statutes, section 15.17, requires government entities to create records that document their official activities. Pursuant to Minnesota Statutes, section 138.17, official records must be kept for time periods as prescribed in the entity's record retention schedule.

Further, if a government entity contracts with a private person to perform any of its functions, data related to performance of the contract are subject to the requirements of Minnesota Statutes, Chapter 13, and the private person must comply with those requirements as if it were a government entity. (Minnesota Statutes, section 13.05, subdivision 11.)

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

The St. Cloud Times seeks documents that are in the sole possession of The Coleman Company, Inc. The documents were viewed by Ehlers, Inc., at Coleman's office. The documents were not submitted to or received by the City of Sauk Rapids. Neither the City nor Ehlers have these documents, and no employee of the City has even seen these documents, let alone possessed them at any time. ...

The City has no legal obligation to receive or even review the documents in question, but the City of Sauk Rapids decided to verify representations made by The Coleman Company, Inc. and utilized the services of Ehlers, Inc. to assist the City in reviewing Coleman's financial records. However, Coleman was concerned about the release of confidential information and refused to physically provide to Ehlers or to the City its confidential documents. To move past this hurdle and ensure that the City did not miss a stellar business opportunity, the City decided to have Ehlers, Inc. perform the review of the financial records at Coleman's business offices. Under this approach, the representations made by Coleman could be reviewed by Ehlers with a report submitted to the City Council. The City performed its verification, without compromising the confidentiality of Coleman's records, under a process that was fully transparent.

On August 26th, Ehlers went to the Coleman facility in Sauk Rapids and reviewed their books. ... Ehlers did not retain copies of any data or take detailed notes. Ehlers reviewed, but did not acquire possession of, financial documents and reported its findings back to the City. ...

The St. Cloud Times has all of the data that is possessed by the City. The Ehlers report has been disclosed to the Times, and the Times has thus had access to all data that the City has, or has ever had in connection with this matter. ...

The City's response to the newspaper is that neither the City, nor its contractor, collected and is maintaining any of the requested data. The problem with that response, however, is that for the City to meet its obligations under Minnesota Statutes, section 15.17, it must "make and preserve all records necessary to a full and accurate knowledge of [its] official activities." Certainly, verifying a corporation's financial viability before providing it with \$500,000 in financial assistance is an official activity. Therefore, because of the interplay between Minnesota Statutes, Chapter 13, and Minnesota Statutes, sections 15.17 and 138.17, the City should maintain data it used to determine financial viability for the time period specified in the City's retention

schedule, and should have provided data classified as public to the newspaper. The City did not; therefore, it is not in compliance with Chapter 13 or section 15.17. As the Commissioner wrote in Advisory Opinions 08-026 and 10-017:

... Section 15.17, subdivision 4, states that access to records containing government data is governed by sections 13.03 and 138.17. Thus, section 15.17, read in concert with section 13.03, imposes an obligation upon government entities to make and preserve a record of their actions so that the data in those records will be accessible pursuant to Chapter 13.

See also Advisory Opinions 94-035, 98-017, 10-018, and 11-001.

Finally, it is Minnesota Statutes, section 13.591, that classifies data a business submits when requesting financial assistance or a benefit financed by public funds. Subdivision 1 of section 13.591 classifies certain data as private or nonpublic:

financial information about the business, including credit reports; financial statements; net worth calculations; business plans; income and expense projections; balance sheets; customer lists; income tax returns; and design, market, and feasibility studies not paid for with public funds.

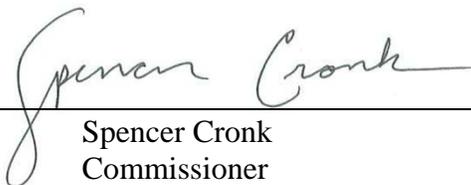
Subdivision 2 of section 13.591 provides that if the business receives financial assistance or a benefit financed by public funds, the data described in subdivision 1 become public except for the following: “business plans; income and expense projections not related to the financial assistance provided; customer lists; income tax returns; and design, market, and feasibility studies not paid for with public funds.”

Any other data submitted by the business would be public pursuant to the general presumption in Minnesota Statutes, section 13.03, subdivision 1.

**Opinion:**

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

The City of Sauk Rapids did not comply with Minnesota Statutes, Chapter 13, and Minnesota Statutes, section 15.17, when it denied access to data about a private company the City used in determining whether to provide financial assistance to the company.

Signed:   
Spencer Cronk  
Commissioner

Dated: November 7, 2011