Advisory Opinion 11-019

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 October 17, 2011, the Information Policy Analysis Division (IPAD) received a letter dated October 14, 2011, from Maggie R. Wallner, on behalf of Independent School District 272, Eden Prairie. In her letter, Ms. Wallner asked the Commissioner to issue an advisory opinion regarding the classification of certain data the District maintains. IPAD asked for clarification, which Ms. Wallner provided in a letter dated November 3, 2011.

A summary of the facts follows. A District parent requested access to the following data:

1. …all available information concerning the School District's contact in any form with any representatives of YFNS (Yes For Neighborhood Schools) and/or their attorneys. This [sic] requests include all copies of all phone logs and correspondence in any form, including email, between the School District, or any of its representatives (including, but not limited to School Board members) and: [certain specific individuals]…or any other individual or group who associates themselves in any respect whatsoever with YFNS or its views. This request includes contact from YFNS to the School District or its agents and communication from the School Board or its agents to YFNS. [Emphasis omitted.]

2. Copies of correspondence logs kept by the School District and Board members and/or [sic] of all emails, letters, phone calls or any correspondence from parents or any others that relates [sic] in any way, positive or negative, to the recent boundary decisions. [Emphasis omitted.]

Ms. Wallner wrote:

> …. Advisory Opinion No. 11-006 … opined that an email sent to a school board chair from a member of the general public is classified as 'private data on both the individual who sent the email and the elected official to whom the individual sent the email', regardless of the classification (public/private) of the data contained in the email.
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> Based on Advisory Opinion 11-006 we assume that email communication between a single Eden Prairie board member and a single individual is classified as private data regardless of the content of the emails. However … [the] data request presents additional questions.

Issues:

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

1. Is correspondence (email) sent from an individual to more than one board member private data under Minnesota Statutes, section 13.601, subdivision 2, assuming that neither the individual (sender) nor board member(s) has previously made the email public?
    a. If such an email is classified as private data, is the School District required (in response to a data request) to seek a decision by the board member(s) as to whether he/she chooses to make the email public?
    b. If such an email is classified as private data, must it be released in response to a data request if one board member chooses to make it public, or must all board members (recipients) choose to make the email public?

2. Is an email sent to a school board member by more than one individual private data under Minnesota Statutes, section 13.601, subdivision 2, assuming that neither the board member nor the individuals (senders) has previously made the email public?
    a. If such an email is classified as private data, is the School District required (in response to a data request) to seek a decision from the individual(s) senders as to whether he/she chooses to make the email public?
    b. If such an email is classified as private data, must it be released in response to a data request if one individual chooses to make it public, or must all of the individuals who were senders of the email choose to make the email public?

3. If the emails in No. 1 and/or No. 2 are classified as private data, does the fact that a school board member(s) or individual(s) (as either sender or recipient) has shared the email with a person or entity (other than the School District) render the email public data thereafter? In other words, if a board member or individual has forwarded an email or shared the contents of an email with a person or entity (other than the School District), is the email public data and thus it must be released to a member of the public?

4. Is an employee of the School District an “individual” under Minnesota Statutes, section 13.601, subdivision 2, assuming that the employee is acting outside his/her role as an employee?

Discussion:

For purposes of this discussion, based upon the information Ms. Wallner provided, the Commissioner assumes that the District does not maintain the data in question, except to the extent necessary for the responsible authority to fulfill his/her duties to the school board. (The responsible authority for a school board is an employee of the District who is appointed by the board. See Minnesota Rules, part 1205.0200, subpart 14 (C).)

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

Issue 1. *Is correspondence (email) sent from an individual to more than one board member private data under Minnesota Statutes, section 13.601, subdivision 2, assuming that neither the individual (sender) nor board member(s) has previously made the email public?*

a. If such an email is classified as private data, is the School District required (in response to a data request) to seek a decision by the board member(s) as to whether he/she chooses to make the email public?

b. If such an email is classified as private data, must it be released in response to a data request if one board member chooses to make it public, or must all board members (recipients) choose to make the email public?

Minnesota Statutes, section 13.601, subdivision 2, classifies "correspondence between individuals and elected officials" as private data but also provides that the correspondence "may be made public by either the sender or the recipient."

The Commissioner acknowledges that the statutory language refers to "*the* sender or *the* recipient," which could be read to mean that it applies only to those situations involving a single sender and a single recipient. However, pursuant to Minnesota Statutes, section 645.17, in ascertaining the intention of the legislature, the following presumptions may guide: "(1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable; (2) the legislature intends the entire statute to be effective and certain."

It is the Commissioner's opinion that Minnesota Statutes, section 13.601, subdivision 2, applies to situations in which there may be one or more sender and/or one or more recipient of any particular email correspondence. Accordingly, assuming that neither the individual (sender) nor board member(s) has previously made the email correspondence public, then that correspondence is private under section 13.601, subdivision 2.

Regarding Issue 1 (a), it is the Commissioner's opinion that the School District, in response to a request for correspondence, is not required to seek a decision by the board member(s) as to whether he/she chooses to make the email public. Pursuant to Minnesota Statutes, section 13.03, subdivision 9, "the classification of data is determined by the law applicable to the data at the time a request for access to the data is made." Here, at the time of the request, the email was private. Section 13.601 does not impose an affirmative obligation on the District to ask whether the sender or recipient(s) chooses to make it public.

Regarding Issue 1 (b), if such an email is classified as private data, it must be released in response to a data request if only one board member chooses to make it public. Section 13.601 does not require that all board members must agree to make the email public, it affords the right to make correspondence public to each sender/recipient individually.

Issue 2. *Is an email sent to a school board member by more than one individual private data under Minnesota Statutes, section 13.601, subdivision 2, assuming that neither the board member nor the individuals (senders) has previously made the email public?*

a. If such an email is classified as private data, is the School District required (in response to a data request) to seek a decision from the individual(s) senders as to whether he/she chooses to make the email public?

b. If such an email is classified as private data, must it be released in response to a data request if one individual chooses to make it public, or must all of the individuals who were senders of the email choose to make the email public?

The analysis of this issue is the same as for Issue 1. If neither the board member nor the sender(s) has made the correspondence public, it is private. The District is not obligated to ask any sender if s/he chooses to make it public. Any individual sender may choose to make the email public.

Issue 3. *If the emails in No. 1 and/or No. 2 are classified as private data, does the fact that a school board member(s) or individual(s) (as either sender or recipient) has shared the email with a person or entity (other than the School District) render the email public data thereafter? In other words, if a board member or individual has forwarded an email or shared the contents of an email with a person or entity (other than the School District), is the email public data and thus it must be released to a member of the public?*

According to Minnesota Statutes, section 13.601, subdivision 2, if either a sender or a recipient of correspondence shares it with a person or entity other than the District, the correspondence is public, and, upon request, it must be provided to the requester.

Issue 4. *Is an employee of the School District an "individual" under Minnesota Statutes, section 13.601, subdivision 2, assuming that the employee is acting outside his/her role as an employee?*

The Commissioner previously has opined that a government entity can protect correspondence between its elected officials and certain employees if the employees were writing as private citizens. However, if the employees were writing in their roles as employees, the entity cannot use Minnesota Statutes, section 13.601 to withhold the data. (See Advisory Opinion 07-004.)

Therefore, if a District employee acting in his/her capacity as a private citizen, not as a District employee, wrote to a board member, the employee would be considered an "individual" for purposes of Minnesota Statutes, section 13.601, subdivision 2.

The Commissioner has a final comment. The description of the data request at issue here refers to correspondence between representatives, including their attorneys, of an organization (YFNS) and District board members, as well as correspondence between other individuals or group who associate themselves "in any respect whatsoever with YFNS or its views." In Advisory Opinion 10-023, the Commissioner opined:

> The email in question is correspondence between Mayor Kuehn and Mr. Oldendorf. Although Mr. Oldendorf is an individual, the Commissioner does not believe the Legislature intended for the protection afforded under section 13.601, subdivision 2, to apply to an individual writing as a representative of an organization. First, and foremost, the classification of private applies to data on individuals (as opposed to data about organizations or businesses). See *International Brotherhood of Electrical Workers, Local No. 292 v. City of St. Cloud*, 765 N.W.2d 64 (Minn. 2009). It is unlikely that someone corresponding on behalf of an organization is writing about an issue as a private citizen and not about an issue related to the organization.
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> ….Based on the analysis above, if the correspondence between Mayor Kuehn and Mr. Oldendorf relates to an issue involving Mr. Oldendorf, as an individual, the data in the email can be protected by section 13.601, subdivision 2. If the correspondence relates to an issue involving an organization Mr. Oldendorf represents, such as the Gateway Trail

Association, the data in the email cannot be protected under section 13.601, subdivision 2.

Accordingly, correspondence between a board member and an individual who is authorized to represent YFNS is not subject to protection under section 13.601, and is presumptively public.

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issues Ms. Wallner raised is as follows:

1. Correspondence (email) sent from an individual to more than one board member is private data under Minnesota Statutes, section 13.601, subdivision 2, if neither the individual (sender) nor board member(s) has previously made the email public.
   a. If such an email is classified as private data, the School District is not required (in response to a data request) to seek a decision by the board member(s) as to whether he/she chooses to make the email public.
   b. If such an email is classified as private data, it must be released in response to a data request if one board member chooses to make it public.

2. An email sent to a school board member by more than one individual is private data under Minnesota Statutes, section 13.601, subdivision 2, assuming that neither the board member nor the individuals (senders) have previously made the email public.
   a. If such an email is classified as private data, the School District is not required (in response to a data request) to seek a decision from the individual(s) senders as to whether he/she chooses to make the email public.
   b. If such an email is classified as private data, it must be released in response to a data request if one individual chooses to make it public.

3. If the emails in No. 1 and/or No. 2 are classified as private data, the fact that a school board member(s) or individual(s) (as either sender or recipient) has shared the email with a person or entity (other than the School District) renders the email public data thereafter. In other words, if a board member or individual has forwarded an email or shared the contents of an email with a person or entity (other than the School District), the email is public data and thus it must be released to a member of the public.

4. An employee of the School District is an "individual" under Minnesota Statutes, section 13.601, subdivision 2, assuming that the employee is acting outside his/her role as an employee.

Signed: Spencer Cronk

Spencer Cronk
Commissioner

Dated: December 22, 2011