Advisory Opinion 12-013

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2012). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On June 29, 2012, the Information Policy Analysis Division (IPAD) received a letter from Laura Yuen, of Minnesota Public Radio. In her letter, Ms. Yuen asked the Commissioner to issue an advisory opinion about her right to gain access to certain data the Minnesota Department of Public Safety (DPS) maintains.

IPAD, on behalf of the Commissioner, wrote to Ramona L Dohman, DPS Commissioner, in response to Ms. Yuen's request. The purposes of this letter, dated July 2, 2012, were to inform her of Ms. Yuen's request and to ask her to provide information or support for DPS's position. On July 13, 2012, IPAD received a response, dated same, from E. Joseph Newton, General Counsel and Data Practices Compliance Official for DPS. (IPAD also solicited comments from the data subject, who did not respond.)

A summary of the facts as Ms. Yuen provided them follows. She wrote that on May 17, 2012, she asked DPS for access to certain data (see below) pertaining to "the state's Drug Recognition Evaluator (DRE) program, which is administered through the Minnesota State Patrol. The outcome of a criminal investigation into the program is pending, and that is the chief reason most of my requests were denied."

In addition, Ms. Yuen asked for access to "any and all charges and complaints" filed against two state patrol employees. On June 8, 2012, DPS "provided a summary pertaining to the existence and status of charges and complaints. The first employee was the subject of an active investigation. The second employee had received nine complaints; investigations into all nine were complete."

Ms. Yuen stated to the Commissioner that on June 11, 2012, she wrote again to DPS:

> I clarified that I was not requesting summary information, but rather the data that stated the sustained charges, as well as the letters of reprimand. In the email, I wrote that I was seeking to inspect "any and all data that documents the final disposition of any disciplinary action, the specific reasons for the action, and the data documenting the basis of the action."
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> On June 13, 2012, [Mr.] Newton responded and provided me with three disciplinary memos issued against the second employee. Mr. Newton, however, did not provide the

Statements of Charges that outline the employee's actions which resulted in the disciplinary action. After I asked for a written explanation as to why he was withholding the Statements of Charges, he responded, on June 14, 2012:

> That data is part of the Internal Affairs Division's Personnel investigation. That would be private data on the employee. As stated below I have provided the discipline memos which constitute 'the specific reasons for the [discipline] and data documenting the basis for the action.' Minn. Stat. 13.43 subd. 2 a (5). The memos spell out the discipline and the basis for the discipline.

My understanding is that Statements of Charges and other data are public under Minnesota Statute 13.43, subdivision 2(a)(5), particularly because the charging statements provide the basis for the disciplinary action. The letters specifically refer to the employee's actions as "outlined in the Statement of Charges."

Issues:

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

1. Did the Minnesota Department of Public Safety (DPS) comply with Minnesota Statutes, Chapter 13, when it denied access to the following data?

    - Names of Minnesota State Patrol employees who facilitate the Drug Recognition Evaluator (DRE) program;
    - Names of law enforcement officers who have received DRE certification since 2002;
    - Names of law enforcement officers enrolled in this year's class.

2. Did DPS comply with Minnesota Statutes, Chapter 13, in its response to a request for the following data related to disciplinary action it took against an employee?

    - Statements of Charges, and any other data that document the final disposition of disciplinary action, the specific reasons for the action, and the data documenting the basis of the action.

Discussion:

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

Issue 1. *Did the Minnesota Department of Public Safety (DPS) comply with Minnesota Statutes, Chapter 13, when it denied access to the following data?*

- *Names of Minnesota State Patrol employees who facilitate the Drug Recognition Evaluator (DRE) program;*
- *Names of law enforcement officers who have received DRE certification since 2002;*

- *Names of law enforcement officers enrolled in this year's class.*

In his comments to the Commissioner, Mr. Newton stated that DPS denied Ms. Yuen access to the data described above because:

> …. DPS, through the Bureau of Criminal Apprehension (BCA), had an active criminal investigation looking into the entirety of the DRE program, subjecting all past and present members and participants. The investigation has been referred to the prosecuting authority for determination of charges. Because the entire DRE program was subject to the investigation and everyone was subject to scrutiny, the data was withheld, as is required by statute.

Minnesota Statutes, section 13.82, subdivision 7, provides that active criminal investigative data are classified as confidential or protected nonpublic. According to Mr. Newton, all of the data Ms. Yuen requested related to the DRE are active criminal investigative data. Accordingly, those data are not public.

Mr. Newton also stated that even when the investigation is inactive, DPS would or could still deny access to data about the law enforcement officers involved (with the exception of any state troopers), because "these law enforcement officers are or would be undercover" and "… DPS will not put at risk those officers who have, are currently, or may be in the future, working in an undercover capacity."

Pursuant to section 13.82, subdivision 7, inactive investigative data are public unless the release of the data would jeopardize another ongoing investigation or would reveal the identity of individuals protected under subdivision 17, which, in relevant part, states, "(a) when access to the data would reveal the identity of an undercover law enforcement officer, as provided in section 13.43, subdivision 5."

Minnesota Statutes, section 13.43, subdivision 5, provides:

> All personnel data maintained by a government entity relating to an individual employed as or an applicant for employment as an undercover law enforcement officer are private data on individuals. When the individual is no longer assigned to an undercover position, the data described in subdivisions 2 and 3 become public unless the law enforcement agency determines that revealing the data would threaten the personal safety of the officer or jeopardize an active investigation.

Accordingly, when the criminal investigation into the DRE is inactive, DPS must protect data about law enforcement officers who are currently employed as undercover officers. It may protect the identities of former undercover officers only if it determines that revealing the data would threaten the personal safety of the officer or jeopardize an active investigation.

Issue 2*. Did DPS comply with Minnesota Statutes, Chapter 13, in its response to a request for the following data related to disciplinary action it took against an employee?*

- *Statements of Charges, and any other data that document the final disposition of disciplinary action, the specific reasons for the action, and the data documenting the basis of the action.*

Minnesota Statutes, section 13.43, classifies data on individuals who are current or former employees of a government entity. Subdivision 2 lists the types of personnel data that are public; subdivision 4 classifies most other types of personnel data as private. Pursuant to subdivision 2(a), (4) and (5), the following data are public: "the existence and status of any complaints or charges against the employee…." and "the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action…." Subdivision 2(b) provides when disciplinary action is final for purposes of section 13.43.

In response to her request for access to data that document the specific reasons for and basis of the disciplinary action DPS took against the second trooper, DPS provided Ms. Yuen with three disciplinary memos.

One memorandum, dated March 31, 2010, contains the following statement: "[t]his is to inform you of my decision to take disciplinary action against you in the form of a 10 day unpaid suspension for your *violations of the General Orders outlined in the Statement of Charges* dated March 5, 2010." (Emphasis added.) It contains no other data about those violations.

A letter of reprimand, dated January 4, 2012, states: "[t]his memo shall serve as a written reprimand for your actions on August 4, 2011, *as outlined in the Statement of Charges* dated December 29, 2011. Your actions constituted violations of General Order R 02-10-029, IV.B.4 and 8, IV.E.1 and 2, and General Order 09-20-006, V.A." (Emphasis added.)

The third document DPS provided to Ms. Yuen states:

> You are hereby reprimanded for your actions at an incident on October 9th 2008…. This disciplinary action is being taken because of sustained charges: -Violation of GO #R 02-10-029 – Conduct sworn members:
>
> - IV.B Public Trust
> - IV.E Exercise reasonable courtesy with public

That document also contains a narrative of the trooper's actions that resulted in discipline.

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

> To be clear, the "Statement of Charges" is not what its name may imply. The name is a misnomer from the historical past that is not used as a charging document in any proceeding before any tribunal. The Statement of Charges is prepared only to summarize the investigation for the benefit of the employee;..[sic] it is a summary of the investigative file. This is done so the employee can properly grieve the discipline or otherwise respond.
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> The Statement of Charges and other investigative data neither states "the specific reasons for the discipline," nor do they contain data documenting "the basis for the action." In fact, the requester received the public personnel data that included the reasons for and the

> basis of the discipline. The three documents that were provided specifically stated the discipline and the reason therefore, and indeed, are the documents that are used by (and signed by) the disciplining authority to memorialize the disciplinary action. In this case, the documents included the fact that the employee was disciplined for violations of General Orders and the specific portions of those orders.

Mr. Newton concluded by stating, "…the Statement of Charges and related data … are private personnel data pursuant to Minn. Stat. 13.43 subd 2 (a) [sic]." The Commissioner respectfully disagrees. Minnesota Statutes, Chapter 13, classifies data, not documents. Accordingly, regardless whether "Statement of Charges" is a misnomer, and irrespective of the reason(s) DPS created the Statements, or how they are used, any data contained in them that constitute the specific reasons for or document the basis of final disciplinary action are public.

Furthermore the March 31, 2010, document states only that DPS was taking disciplinary action due to the employee's "violations of the General Orders outlined in the Statement of Charges," and contrary to Mr. Newton's assertion, contains no data about the specific reasons for or basis of that disciplinary action. (In correspondence to Ms. Yuen, Mr. Newton noted that the "memo related to violations of" several provisions of General Orders, which he specified.)

Accordingly, given that the memoranda refer to the employee's actions as "outlined in the Statements of Charges," and Mr. Newton's description of the data contained therein, at least some, if not all, of those data are public. Thus, DPS should provide Ms. Yuen with the public data in those Statements.

Opinion:

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

1. The Minnesota Department of Public Safety (DPS) complied with Minnesota Statutes, Chapter 13, when it denied access to active criminal investigative data related to the Drug Recognition Evaluator (DRE) program.

2. DPS did not comply with Minnesota Statutes, Chapter 13, because it denied access to reasons for and data documenting the basis of final disciplinary action it took against an employee contained in the Statements of Charges.

Spencer Cronk
Commissioner

August 20, 2012