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### Advisory Opinion 12-017

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 September 20, 2012, the Information Policy Analysis Division (IPAD) received a letter from Madeleine Baran, of Minnesota Public Radio. In her letter, Ms. Baran asked the Commissioner to issue an advisory opinion about her right to gain access to certain data the Dakota County Attorney's Office maintains.

IPAD, on behalf of the Commissioner, wrote to James Backstrom, Dakota County Attorney, in response to Ms. Baran's request. The purposes of this letter, dated September 27, 2012, were to inform him of Ms. Baran's request and to ask him to provide information or support for the Office's position. Mr. Backstrom responded on October 9, 2012.

A summary of the facts as Ms. Baran provided them follows. She wrote:

On Sept. 5, 2012, I emailed a Data Practices request to Mr. Backstrom to request access to: "[a]ll written communication received or created by employees of the Dakota County Attorney's Office regarding the St. Paul Police Department crime lab from January 1, 2012 to September 5, 2012. This data includes but is not limited to emails, meeting notes, reports, and memos."

Mr. Backstrom replied via email the same day. He wrote:

Data generated and maintained by the Dakota County Attorney's Office, including Emails and other correspondence sent or received related to criminal prosecution files, are not subject to the Minnesota Government Data Practices Act [MGDPA] pursuant to Minnesota Statutes section 13.393. .... All aspects of this issue will be handled in the courtroom through the continuing litigation pertaining to this matter and in the litigation relating to prosecutions of individual pending drug cases. ....

[In response, I wrote], "[i]t is my understanding that Minnesota Statute does not state that all data generated and maintained by a county attorney's office is private. Rather, it provides a list of specific types of data that are private, and everything not specified as private is public. In

this case, there may be some data that is private and some data that is public that pertains to the crime lab.”

Mr. Backstrom [responded]:

You have accurately stated the general rule of the Data Practices [Act], i.e., that government data not specifically made private is considered to be public. However, by virtue of Section 13.393 of the same Act, the general rule does not apply to data in the office of a government attorney. Section 13.393 clearly states on its face and that I am not obligated by the Data Practices Act to share emails maintained in my Office with members of the public or the press.

I believe Mr. Backstrom’s interpretation of statute is overly broad. I do not believe the statute is meant to make private all data held by a county attorney’s office. If that was the case, for example, the public would not have access to data about the county attorney’s office’s budget or an official list of job responsibilities for the position of county attorney.

In regards to my specific data request, I believe that administrative data related to the crime lab that does not involve an active case is public.

Further, I have filed Data Practices requests in the past with the Ramsey County Attorney’s Office and they have provided access to data without objection, to the extent allowed by statute. On a related note, I have also filed Data Practices requests with the St. Paul Police Department regarding the crime lab and have received an extensive amount of data.

Ms. Baran also provided the Commissioner with copies of her correspondence with Dakota County Sheriff David Bellows, in which Ms. Baran requested access to “[a]ll written communication received or created by employees of the Dakota County Sheriff’s Office regarding the ... crime lab .... [including but not] limited to emails, meeting notes, reports, and memos. This also includes but is not limited to employees of the Dakota County Drug Task Force.”

In response, Mr. Bellows wrote to Ms. Baran:

We searched our files and found two email messages from our attorney that pertain to the St. Paul police department crime lab. However I have been advised by the County Attorney’s office that these email messages are classified as nonpublic pursuant to Minn. Stat. 13.393, because they constitute attorney work product prepared in conjunction with its response to discovery requests made in a legal action.

**Issue:**

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

Did the Dakota County Attorney’s Office comply with Minnesota Statutes, Chapter 13, when it denied access to the following data?

- All written communication received or created by employees of the Dakota County Attorney’s Office regarding the St. Paul Police Department crime lab from January 1, 2012, to September 5, 2012.

**Discussion:**

Pursuant to Minnesota Statutes, Chapter 13, government data are public unless otherwise classified. (Minnesota Statutes, section 13.03, subdivision 1.) Minnesota Statutes, section 13.393, provides:

Notwithstanding the provisions of this chapter and section 15.17, the use, collection, storage, and dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility; provided that this section shall not be construed to affect the applicability of any statute, other than this chapter and section 15.17, which specifically requires or prohibits disclosure of specific information by the attorney, nor shall this section be construed to relieve any responsible authority, other than the attorney, from duties and responsibilities pursuant to this chapter and section 15.17.

Section 13.393 does not classify data. Rather, it provides that certain data created, collected, maintained, and/or disseminated by a government entity's attorney are excluded from the provisions of Chapter 13. Generally, data exempted by section 13.393 relate to information protected by the attorney-client privilege and/or are data that reveal an attorney's work-product.

In Advisory Opinion 05-009, the Commissioner discussed *City Pages v. State of Minnesota*, 655 N.W.2d 839 (Minn. Ct. App. 2003). In finding that neither the attorney-client privilege nor the work-product doctrine protected attorney billing records in their entirety, the Court wrote that the attorney-client privilege protects those parts of the billing records that "communicated legal advice that would not have been disclosed but for the existence of the privilege" and, in order to be protected by the work product doctrine, "material must contain opinions, conclusions, legal theories, or mental impressions of counsel, and it must have been prepared in anticipation of litigation."

Section 13.393 must be applied in a way that harmonizes its provisions with the requirements of Chapter 13, as well as other provisions of statute and rule. Given the limiting language in the last phrase of section 13.393, i.e., "...nor shall this section be construed to relieve any responsible authority, other than the attorney, from duties and responsibilities pursuant to this chapter and section 15.17," clearly the Legislature did not intend that any and all data used, collected, stored, or disseminated by a public attorney, or government data held by a government entity that relate to the conduct of its legal affairs, are exempt from disclosure under Chapter 13.

In his comments to the Commissioner, Mr. Backstrom stated that the data to which he denied access are data that are "used, collected, stored and disseminated exclusively in connection with the County Attorney's professional activities as prosecuting attorney in Dakota County for the State of Minnesota." According to Mr. Backstrom, the crime lab data relate both to on-going as well as previous criminal prosecutions handled by the County Attorney. He wrote:

Accordingly, the crime lab data is not subject to disclosure by the provisions of the MGDPA. The clear intent of Section 13.393 is to exclude such data from the requirements of the MGDPA while acknowledging that other statutes, rules and professional standards do regulate disclosure of the crime lab data. ....

Section 13.393, however, does not exempt all data in the County Attorney's Office from the reach of the MGDPA. Data in the County Attorney's Office that are used, collected, stored and disseminated by the County Attorney acting in his capacity as the head of a County department and not in a professional capacity (either as a prosecutor or as counsel to the county board) is governed by the MGDPA. This would include, by way of example, information about the County Attorney's Office organizational structure, County Attorney programs not constituting legal work, budget and financial information, personnel data, general office policies and procedures, press releases, statistical information (when available), and contracts. The County Attorney's obligation to release or withhold any of this data is governed by the MGDPA.

Ms. Baran asked for access to "all written communication received or created by employees of the Dakota County Attorney's Office regarding the St. Paul Police Department crime lab ...." She suggested that the Office might maintain data on the crime lab that are more administrative in nature and therefore, accessible.

The Commissioner has not reviewed the data in question and cannot determine whether the Office maintains any data regarding the crime lab that are not exempt from disclosure by section 13.393. For example, if the Office maintains data related to any agreements it has entered into with the lab, those data likely are not protected by section 13.393.

Mr. Backstrom did not address that the Dakota County Sheriff denied Ms. Baran access to two emails because the Dakota County Attorney's Office instructed him to do so. The Commissioner encourages Mr. Backstrom to review the possibility that the Dakota County Sheriff's Office maintains data on the crime lab, other than the two emails, that should be accessible to Ms. Baran, i.e., data not governed by section 13.393 and not otherwise classified as not public. For example, pursuant to Minnesota Statutes, section 13.82, subdivision 7, inactive criminal investigative data are public (with exceptions), and any investigative data presented as evidence in court are public.

**Opinion:**

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

The Dakota County Attorney's Office complied with Minnesota Statutes, Chapter 13, when it denied access to the requested data, if all of the data it maintains regarding the crime lab are "used, collected, stored and disseminated exclusively in connection with the County Attorney's professional activities" for Dakota County, and thus are exempt from disclosure pursuant to section 13.393.

  
Spencer Cronk  
Commissioner

November 5, 2012