



Advisory Opinion 14-001

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2013). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On February 4, 2014, the Information Policy Analysis Division (IPAD) received a letter dated same, from Senator Scott Newman. In his letter, Sen. Newman asked the Commissioner to issue an advisory opinion about his right to gain access to certain data the Campaign Finance and Public Disclosure Board (the Board) maintains.

On behalf of the Commissioner, IPAD wrote to Gary Goldsmith, Executive Director and data practices responsible authority of the Board, in response to Sen. Newman's request. The purposes of this letter, dated February 13, 2014, were to inform him of Sen. Newman's request and to ask him to provide information or support for the Board's position. On February 28, 2014, IPAD received a response, dated same, from Mr. Goldsmith.

In his opinion request, Sen. Newman wrote:

I recently requested that The Campaign Finance and Public Disclosure Board release public information from their investigation of the Senate DFL Caucus independent expenditure violations. The Board declined to release the information requested stating the investigation is "confidential" under Minnesota Statutes Section 10A.02, subdivision 11(d) and Minnesota Rules Part 4525, subpart 5.

In his response to the Commissioner, Mr. Goldsmith provided the following facts:

The investigation involved thirteen candidates and two units of the DFL party and was long and complex, requiring the discovery of many documents and the taking of many depositions...

...

At its meeting of December 17, 2013, the Board discussed the proposed stipulation of facts, the proposed settlement agreement, and a draft of possible findings, order, and memorandum that staff had prepared for Board consideration. Legal counsel for the [DFL candidates and units] addressed the Board as did Board staff...

... These three documents were published to the Board's website on the afternoon of December 17, 2013. With the release of the findings, the official record of the investigation was also made public.

The official record of any Board investigation includes:

1. The complaint or complaints
2. Notices advising respondents of the complaints
3. Notices advising respondents of any expansion of the investigation
4. Requests to respondents for documents or for answers to questions
5. Any responses received from respondents
6. Transcripts of any depositions taken during the investigation
7. Staff notes regarding any evidentiary conversation that took place as part of the investigation
8. Other evidence that the Board considered in making its decision.

What is excluded from the official record of the investigation are:

1. Staff memoranda to the Board regarding the investigation
2. Internal staff notes or memoranda that were not provided to the Board.
3. Recordings of executive session meetings at which the investigation was discussed
4. Minutes of executive session meetings at which the investigation was discussed.

In preparation for the January 7, 2014, meeting I placed an item on the Board's regular session agenda listed as "Follow-up on investigation of expenditures by the DFL Senate Caucus." After conversations with the Board's legal counsel, the Board Chair, and senior staff, I concluded that the item should have been placed on the executive session [a meeting closed to the public] agenda. As a result, the regular session agenda was re-issued without the improperly placed item.

As part of his advisory opinion request, Sen. Newman included a letter he wrote on January 15, 2014, to Board Chair Deanna Wiener, requesting the following data:

1. All statements, documents, emails, phone calls, or other matter associated with the decision to move the agenda item to executive session.
2. All statements, documents, emails, phone calls, or other matter of record from the executive session.

In replying to Sen. Newman's request, Mr. Goldsmith wrote, "the materials you have requested are considered confidential under Minnesota Statutes Section 10A.02 and under the doctrine of attorney-client privilege."

Issue:

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

Pursuant to Minnesota Statutes, Chapter 13, did the Minnesota Campaign Finance and Public Disclosure Board respond appropriately to a request for data about the January 7, 2014 executive session related to a conciliation agreement between the Board and the Minnesota Senate DFL Caucus?

Discussion:

Before discussing the issue presented in this advisory opinion, the Commissioner wishes to address the scope and jurisdictional concerns raised by Mr. Goldsmith in his response. On behalf of the Board, Mr. Goldsmith wrote:

The Board considers Senator Newman’s complaint to be primarily based on Minnesota Open Meeting Law, not on the Data Practices Act... This issue, arising under the Open Meeting law, is not subject to the advisory opinion process defined in Chapter 13 and thus, would not be in the Commissioner’s jurisdiction.

Firstly, while the facts in this advisory opinion relate to the Open Meeting Law, Minnesota Statutes Chapter 13D, and the Data Practices Act, Chapter 13, this opinion will address only the Board’s response to Sen. Newman’s data request pursuant to Chapter 13, as stated in the issue above. Secondly, the Commissioner does have authority to issue advisory opinions involving Chapter 13D, pursuant to Minnesota Statutes, section 13.072, subdivision 1(b).

An additional point of clarification, Mr. Goldsmith notes that the agreement was not a “conciliation agreement” as Sen. Newman characterized in his opinion request to the Commissioner. However, that fact, Mr. Goldsmith writes, “does not affect the issues involved in this advisory opinion request.” The Commissioner notes it here, simply because the issue refers to a conciliation agreement.

Minnesota Statutes, section 13.03, subdivision 1, provides:

All government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.

Minnesota Statutes, section 13.607, subdivision 2, states, “disclosure by the Campaign Finance and Public Disclosure Board of information about a complaint or investigation is governed by section 10A.02, subdivision 11.”

Minnesota Statutes, section 10A.02, subdivision 11(d), provides:

A hearing or action of the board concerning a complaint or investigation other than a finding concerning probable cause or a conciliation agreement is confidential. Until the board makes a public finding concerning probable cause or enters a conciliation agreement:

- (1) a member, employee, or agent of the board must not disclose to an individual information obtained by that member, employee, or agent concerning a complaint or investigation except as required to carry out the investigation or take action in the matter as authorized by this chapter; and
- (2) an individual who discloses information contrary to this subdivision is subject to a civil penalty imposed by the board of up to \$1,000.

Chapter 13 defines “confidential” as data on individuals that “are made not public by statute or federal law and are inaccessible to the subject of the data.” An “individual” is defined as a natural person. (See Minnesota Statutes, section 13.02, subdivisions 3 and 8.)

Minnesota Rules, part 4525.0200, subpart 5, provides:

Any portion of a meeting during which the board is hearing testimony or taking action concerning any complaint, investigation, preparation of a conciliation agreement, or a conciliation meeting must be closed to the public. The minutes and tape recordings of a meeting closed to the public must be kept confidential.

In denying Sen. Newman’s data request, Mr. Goldsmith cited section 10A.02, subdivision 11, and Minnesota Rule, part 4525.0200, subpart 5, and wrote:

Historically these provisions have been interpreted to mean that the investigative process is confidential except for the publicly released findings, conclusions, and orders and the official record. Minutes or records of the Board deliberations, discussions, direction to staff or votes regarding investigations are never made public.

However, the Commissioner has previously opined that the plain language of section 13.03, subdivision 1, precludes classification by state rule. (See Advisory Opinions 98-054 and 06-015.) Therefore, the Board may rely only upon the plain language of the statute to determine the classification of the data at issue here. In addition, data not specifically classified as not public are presumptively public.

The challenge confronting the Board is that the plain language of section 10A.02 is incongruous with the current data practices classification scheme, as provided in Chapter 13, as well as the Board’s investigative process.

Section 10A.02, subdivision 11(d), states that hearings or actions are “confidential.” As noted above, “confidential” classifies data on individuals that are not accessible to those individuals. To the extent that the Board collects, creates, or maintains data not on individuals (i.e., political parties or units), those data are not classified by the plain language of that section. (Mr. Goldsmith also stated that counsel for the DFL candidates and units participated in the December 17, 2013, closed meeting, suggesting that the data subjects may have had access to some of the data classified by the statute as confidential.)

Sen. Newman argues that the investigative data are classified only temporarily as confidential by section 10A.02, subdivision 11(d), and that the data become public as demonstrated by subdivision 11a, which allows the Board to classify data as private under certain circumstances. This argument discounts the confidential classification in subdivision 11(d). However, it does illustrate another inconsistency; section 10A.02 does not explain when (or if) confidential data classified in subdivision 11(d) change classifications. Currently, the Board makes a distinction between the “official record,” which becomes public, and items that it excludes from the official record and maintains as “confidential.” Section 10A.02, however, does not contain a provision that supports that distinction. The section does provide that the threat of penalty in subdivision 11(d)(2), for disclosing information ceases once the Board issues a probable cause finding or enters into a conciliation agreement, which suggests that some data does indeed change

classifications. It is unclear, however, which data a member, employee, or agent of the Board may disclose with impunity, after a finding or an agreement.

Another example of the disparity between section 10A.02 and Chapter 13, is the plain language of section 10A.02, subdivision 12(c), which also purports to classify data. It provides that the Board may issue advisory opinions, but the request and the resulting opinion are “nonpublic.” “Nonpublic data” are defined as data *not on individuals* that are *not public* but are accessible to the data subject (e.g., a corporation), if any. (See section 13.03, subdivision 9.) Section 10A.02, subdivision 12(c) also states that the Board may publish advisory opinions (i.e., make them public) and may withhold certain identifying information about the data requester (i.e., an individual). Neither of those provisions is consistent with a “nonpublic” classification.

Finally, in addition to the statutory and rules-based arguments, Mr. Goldsmith also based his denial of Sen. Newman’s data request on the doctrine of “attorney-client privilege.” In his letter to Sen. Newman and his response to the Commissioner, Mr. Goldsmith argued that the January 7, 2014, meeting was permitted to be closed by the attorney-client privilege and as a result, Sen. Newman could not have access to the data he requested. (See Minnesota Statutes, section 13D.05, subdivision 3(b).) The Commissioner wishes to remind government entities and public bodies that Chapter 13D does not classify data; a validly closed meeting does not classify data as not public. However, Minnesota Statutes, section 13.393 governs certain types of data generated by an attorney acting in a professional capacity for a government entity and permits those data to be withheld from disclosure because they are not regulated by Chapter 13. (See Advisory Opinions 01-075, 03-003, and 05-009.) Therefore, the Board may properly withhold data Sen. Newman requested to the extent that the data are subject to section 13.393.

The Commissioner has previously considered statutory provisions where the Legislature has indicated an intention to protect some data from public disclosure but has not done so clearly or used the Chapter 13 classification terminology. (See Advisory Opinions 94-046, 00-004, and 07-005.) In those opinions, as here, it is difficult for the Commissioner to ascertain the Legislature’s full intent, and must therefore rely upon the plain statutory language. Because of the flaws in section 10A.02, the Commissioner is unable to determine which data the Board maintains are responsive to Sen. Newman’s request, if any. To the extent that the Board maintains data in recorded statements, documents, emails, phone calls, or other matter of record from the January 7, 2014 executive session that are appropriately classified as confidential data on individuals, the Board properly denied access to them. The Board must review Sen. Newman’s request in light of the discussion above and respond accordingly.

The Commissioner understands the competing policy considerations regarding the Board’s investigative process. He also appreciates that the Board’s practices are long-standing. However, the Board does not have the statutory support that it needs to justify those practices. It can rely only upon the plain language of the statute to classify data. The Commissioner encourages the Board to seek clarification from the Legislature, so that the important work of the Board may be protected and disclosed appropriately.

Opinion:

Based on the facts and information provided, the Commissioner’s opinion on the issue raised by Senator Newman is as follows:

The Commissioner is unable to determine whether the Minnesota Campaign Finance and Public Disclosure Board responded appropriately to a request for data about the January 7, 2014 executive session related to a conciliation agreement between the Board and the Minnesota Senate DFL Caucus.

A handwritten signature in cursive script that reads "Spencer Cronk". The signature is written in black ink and is positioned above the printed name and title.

Spencer Cronk
Commissioner

March 26, 2014