



Advisory Opinion 14-018

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2014). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On September 24, 2014, the Information Policy Analysis Division (IPAD) received a letter dated September 22, 2014, from Leita Walker, on behalf of Star Tribune Media Company, LLC. In her letter, Ms. Walker asked the Commissioner to issue an advisory opinion about her client's right to gain access to certain data maintained by the Minnesota Department of Public Safety (DPS).

IPAD, on behalf of the Commissioner, wrote to Ramona L Dohman, DPS Commissioner, in response to Ms. Walker's request. The purposes of this letter, dated October 2, 2014, were to inform her of Star Tribune's request and to ask her to provide information or support for DPS's position. On October 22, 2014, IPAD received a response, dated same, from Drew Evans, Assistant Superintendent for the Bureau of Criminal Apprehension (BCA), a division of DPS.

A summary of the facts as Ms. Walker provided them follows. Star Tribune asked DPS for access to its contracts and non-disclosure agreements for the "Stingray II" and "Kingfish" cellular exploitation equipment. She wrote:

DPS cannot withhold the contracts and NDAs, *in their entirety*, based on the vague assertion that "a corporation supplying data to a government entity may claim portions are trade secret" and that "[t]he contracting company in this case has taken efforts to protect the data from disclosure." Rather, the vendor must provide "specific rationales" for its assertion that the contracts and NDAs contain trade secrets, and DPS "needs to make its own determination regarding the appropriateness of those claims." [See Advisory Opinions 96-035 and 05-024.] There is no indication that the vendor here has provided an explanation as to how disclosure of the contracts and NDAs would reveal its trade secrets. And even if it has, there is no indication that DPS has done anything more than simply take the vendor at its self-interested word. Such unexamined acquiescence to vendor wishes is not permitted.

In fact, Star Tribune is highly skeptical that *any* data in the contracts or NDAs ... satisfies the "rigorous definition" ... of "trade secret" found at Minn. Stat. § 13.37, subd. 1(b). [See Advisory Opinion 96-035.] The Commissioner "consistently has interpreted the trade secret definition narrowly," and has concluded that, "given the presumption of openness in Chapter 13 ... the Legislature intended that government entities employ section 13.37, subdivision 1 (b), in a limited manner." [See Advisory Opinion 03-009.] And any supposed "trade secret" that has already been made public - for example, through release of the Hennepin County documents or through release of other contracts for Stingray II and Kingfish equipment - are no longer "secret" and thus ought not be withheld as such. *See, e.g., Prairie Island Indian Cmty. v.*

Minnesota Dept. of Public Safety, 658 N.W.2d 876, 886 (Minn. Ct. App. 2003) (“[I]f data are readily ascertainable by proper means, those data cannot derive independent economic value from nondisclosure.”).

Regardless, the existence of some trade-secret information in the requested documents is not a basis to withhold them in their entirety. The protected portions can be redacted, and the rest should be released. *See Prairie Island Indian Cmty.*, 658 N.W.2d at 888.

DPS’s other justification for withholding the contracts and NDAs is that they “would reveal information regarding investigative techniques that would compromise ongoing and future criminal investigations.” DPS has not offered any further explanation.

Presumably, the requested contracts, NDAs, and their related attachments describe with some specificity the capabilities of the cellular exploitation equipment. However, to the extent these capabilities have already been publicly disclosed—for example, by DPS in its letter to Senator Dibble, by the media, on the vendor’s own website or in its marketing materials, or in a patent application filed by the vendor—there is no reason to withhold such data. [See Advisory Opinion 95-003.]

And to the extent DPS can establish that the contracts and NDAs get so detailed as to actually jeopardize its ability to apprehend criminals and/or locate individuals in need of help, the solution is to simply redact those portions. There is no basis to withhold the requested documents in their entirety. [Emphasis provided.]

(Footnotes omitted.)

Issue:

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

Pursuant to Minnesota Statutes, Chapter 13, did the Minnesota Department of Public Safety respond properly to a June 18, 2014, request for access to the Department’s contracts and non-disclosure agreements for the “Stingray II” and “Kingfish” cellular exploitation equipment?

Discussion:

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

The Commissioner has previously opined that data in government contracts are presumptively public (see Advisory Opinion 03-027).

In his response to the Commissioner, Mr. Evans stated that the contracts and NDAs in question are, in their entirety, nonpublic data pursuant to Minnesota Statutes, section 13.37, subdivision 1(b) (trade secret), and/or protected nonpublic data pursuant to Minnesota Statutes, section 13.82, subdivision 25 (as deliberative processes or investigative techniques).

Pursuant to section 13.37, subdivision 1(b) “trade secret information” means:

Government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

Per section 13.82, subdivision 25, data “that reflect deliberative processes or investigative techniques of law enforcement agencies” are not public.

Mr. Evans stated:

The BCA understands the technical specifications of the equipment as provided by the vendor. The BCA believes this equipment is unique and the method in which it operates is superior to other competitors. Release of information would give competitors insight into the technical workings of the equipment and jeopardize the competitive advantage of this equipment.

In addition, disclosure of any technical information about the equipment in any of the documentation would allow criminals to disrupt use of this technology, develop counter measures, and evade the technology.

We continue to maintain our original data classification was correct to protect the sensitive nature of this equipment, its proprietary nature, and its effectiveness in criminal investigations and disagree with the classification determination made by other governmental entities.

The Commissioner has not reviewed the data in question, so he cannot determine whether DPS has properly classified any data in the contracts and/or the NDAs as not public under sections 13.37 or 13.82. The Commissioner has consistently said that while the outside person supplying the data to the government entity bears the burden of establishing that the data meet all of the conditions set forth in section 13.37, subdivision 1(b), the entity is ultimately responsible for determining whether the data warrant classification as trade secrets. (See Advisory Opinion 03-009.)

Ms. Walker provided a copy of the contract and NDA between Harris Corporation, the manufacturer of the Stingray II and Kingfish equipment, and the Hennepin County Sheriff’s Office, which the County released in response to a Star Tribune data request. If any of the same data (or other data Ms. Walker stated have been disclosed to the public) are in BCA’s contracts/NDAs for that equipment, those data cannot be trade secret data, because they are in the public domain, and therefore are “readily ascertainable by proper means.” Chapter 13 does not classify sensitive or proprietary data.

Ms. Walker questioned BCA’s determination not to release any of the data in question, rather than releasing with proper redactions. In his comments to the Commissioner, Mr. Evans wrote, “[t]he documents were withheld in their entirety due to the fact that heavy redaction of the documents was so intertwined with the public data that we were unable to separate the public from the protected data in a meaningful manner.”

In *Northwest Publications, Inc. v. City of Bloomington*, 499 N.W.2d 509 (Minn. App. 1993), the Minnesota Court of Appeals held that a government entity may withhold an entire document only when public and not public data are so inextricably intertwined that segregation of the material would impose a significant financial burden and leave the remaining part of the document with little informational value. (See also Advisory Opinion 04-014.) In further support of redacting documents,

the Court of Appeals in *Prairie Island v. Dept. of Public Safety*, 658 N.W. 2d 876 (Minn. App. 2003), stated:

We conclude that to the extent there is any sensitive trade-secret information, the statements in question can be appropriately redacted. ... Although this limits the informational value of the documents, it provides public access to basic information.

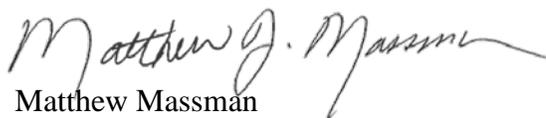
Chapter 13 generally classifies data elements, not documents. While the Commissioner has opined that an entity must determine which data elements are trade secrets, contracts typically contain some data that do not qualify for protection under section 13.37 (see Advisory Opinions 96-035 and 03-009). For example, typically contracts contain standard clauses such as definitions, general provisions, etc., as well as data specific to the contract, like names of vendors, addresses, dates, total cost, etc., all of which are presumptively public. Similarly, NDAs contain data such as terms, effective dates, names of authorized representatives, etc., all of which are presumptively public. Even if BCA appropriately redacted everything else, those data elements have “informational value” per *Northwest Publications*.

In addition, the Commissioner has opined that for data to reflect a deliberative process, it must be “data collected, created or maintained that explain or describe the actions, changes or functions that a given law enforcement agency follows to conduct formal discussion or debates of all sides of an issue.” Data about investigative techniques are those data that “describe the systematic procedures used ... to make detailed inquiries into the commission of crimes.” (See Advisory Opinion 95-003). As stated above, contracts and NDAs likely contain general terms and other data that do not qualify for the protection in section 13.82, subdivision 25. However, if any of the data elements in the contracts and NDAs meet the requirements of deliberative process and investigative techniques as previously opined by the Commissioner, DPS/BCA should redact and properly protect those data.

Opinion:

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

Pursuant to Minnesota Statutes, Chapter 13, the Minnesota Department of Public Safety did not respond properly to a June 18, 2014, request for access to the Department’s contracts and non-disclosure agreements for the “Stingray II” and “Kingfish” cellular exploitation equipment, because it must redact any data they contain that are properly classified under sections 13.37 and/or 13.82, and release the remaining public data.



Matthew Massman
Acting Commissioner
November 17, 2014