Admin Minnesota
DEPARTMENT OF ADMINISTRATION

Advisory Opinion 15-001

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 February 9, 2015, the Information Policy Analysis Division (IPAD) received an advisory opinion request from Dr. Edward P. Ehlinger, Commissioner of the Minnesota Department of Health (MDH). In his letter, Commissioner Ehlinger asked the Commissioner of Administration to issue an advisory opinion regarding the classification of certain data that MDH maintains. MDH provided additional information on February 27.

IPAD wrote to Conor P. Filter, Chief Executive Officer of Sano Remedies, to offer him an opportunity to submit comments on the issues the Commissioner will address; he did not.

Commissioner Ehlinger provided a summary of the facts as follows:

> By way of background, in 2014 the Minnesota Legislature enacted Minn. Stat. §§152.22 through 152.37, pertaining to the production, distribution, and patient use of medical cannabis. Minn. Stat. §152.25, Subd. l(a) required MDH to register two in-state manufacturers for the production and distribution of all medical cannabis within Minnesota .... To accomplish this mandate ... the MDH Office of Medical Cannabis (OMC) published a Request for Application for the Registration of Medical Cannabis Manufacturers (RFA). The RFA instructed applicants with regards to data classifications pursuant to the Minnesota Government Data Practices Act and, more specifically, Trade Secret Information pursuant to Minn. Stat. §13.37, Subd. l(b).

After evaluating all applications, MDH registered the two highest-scoring applicants as medical cannabis manufacturers. Commissioner Ehlinger stated that OMC staff then reviewed the application materials and redacted all security information and trade secret data pursuant to Minnesota Statutes, section 13.37; financial information, including business plans, per Minnesota Statutes, section 13.591, subdivisions 1 and 2; and criminal history data per Minnesota Statutes, section 13.87, subdivision l(b).

Commissioner Ehlinger wrote that OMC similarly reviewed the applications submitted by the next two highest-scoring applicants, neither of which was registered as a manufacturer. He wrote:

> The OMC redacted security, trade secret, financial, and criminal background check information from those two applications and … forwarded the redacted applications to each applicant with notice that the redacted applications would be posted on the OMC website.… Each applicant was invited to contact the OMC … if they believed additional materials in their application should also be removed.

One of those two unsuccessful applicants, Sano Remedies, responded that pursuant to section 152.25, subdivision 1, because it was not a registered manufacturer, none of the application materials it submitted were public.

Commissioner Ehlinger further wrote that OMC tried to clarify with Sano whether it was objecting to the release of all portions of its application, or just those portions Sano considers its business plan. If the latter, OMC asked Sano to identify the portions of its application that constituted its business plan, "as Sano did not label or otherwise mark any specific portion of its application as its 'Business Plan.'" Sano did not provide MDH with clarification.

Issues:

Based on Commissioner Ehlinger's opinion request, the Commissioner agreed to address the following issues:

1. Pursuant to Minnesota Statutes, Chapter 13, what is the classification of data in an application submitted by a non-registered medical cannabis manufacturer applicant that are not otherwise specifically classified as not public data?

2. To the extent that those application materials include a "business plan," what is the classification of those data pursuant to Minnesota Statutes, section 13.591?

Discussion:

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

Issue 1. *Pursuant to Minnesota Statutes, Chapter 13, what is the classification of data in an application submitted by a non-registered medical cannabis manufacturer applicant that are not otherwise specifically classified as not public data?*

Minnesota Statutes, section 152.25, subdivision 1, in relevant part, provides:

> Data submitted during the application process are private data on individuals or nonpublic data as defined in section 13.02 until the manufacturer is registered under this section. Data on a manufacturer that is registered are public data, unless the data are trade secret or security information under section 13.37.

Commissioner Ehlinger explained MDH's position:

> The language in this statute is clear and unambiguous and, as a result, is controlled by the plain meaning of the words and is not subject to interpretation. The statute simply

> clarifies and emphasizes that all data submitted during the application process by any applicant who is eventually registered as a medical cannabis manufacturer is public data with the exception of Trade Secret or Security Information. Contrary to Sano's assertion, this statute clearly does not *per se* classify all data and information contained in materials from all non-registered applicants as not public data. Sano misinterprets the phrase "data on a manufacturer that *is* registered *are* public data" as also mandating the contrary: that data on an applicant that is *not* registered is *not* public data. Sano's interpretation is without legal merit, in that Sano is simply attempting to place words into this statute that the Legislature intentionally chose not to use. [Emphasis provided; notes omitted.]

In Advisory Opinion 05-036, the Commissioner (of Administration) addressed a similar issue, about the classification of data under Minnesota Statutes, section 13.601, subdivision 3, which at the time provided: "[t]he following data on all applicants for election or appointment to a public body … are public: name, city of residence … and prior government service or experience." The Commissioner opined:

> Pursuant to section 13.03, subdivision 1, government data are public unless otherwise classified. Section 13.601, subdivision 3, provides that certain data are public - essentially, restating the general presumption. This does not mean that all other data on applicants for election or appointment to a public body are not public. Given the operation of Chapter 13, if the Legislature intended for all other data on applicants for election/appointment to be not public, the Legislature needed to enact a provision so stating. [The Legislature subsequently amended section 13.601, subdivision 3; it now classifies all data as private except for those elements it specifically states are public.]

The Commissioner (of Administration) acknowledges Sano Remedies' confusion regarding the operation of section 152.25, subdivision 1(a), which classifies all data submitted during the application process as not public. That provision does not reverse the general presumption; rather, it classifies applications data temporarily, until a manufacturer is registered. The sentence, "Data on a manufacturer that is registered are public data, unless the data are trade secret or security information under section 13.37," simply restates the general presumption and continues to classify certain data as not public. Therefore, MDH is correct, application data (except trade secret or security information) submitted by unregistered manufacturers become public, along with the data submitted by registered manufacturers, after a manufacturer is registered.

Commissioner Ehlinger stated that MDH redacted financial information pursuant to section 13.591, subdivisions 1and 2. Those provisions do not apply to the data at issue here. They classify data that are "submitted to a government entity by a business requesting financial assistance or a benefit financed by public funds". (Section 13.591, subdivisions 3 and 4 classify data related to a procurement process that MDH did not use.)

Issue 2. *To the extent that those application materials include a "business plan," what is the classification of those data pursuant to Minnesota Statutes, section 13.591?*

Minnesota Statutes, section 13.591 is not applicable to the data in question.

Opinion:

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

1. Pursuant to Minnesota Statutes, Chapter 13, after a medical cannabis manufacturer is registered, data (except trade secret or security information) in an application submitted by a non-registered manufacturer applicant are presumptively public.

2. Minnesota Statutes, section 13.591, is not applicable to the application materials. Those data are classified as provided in section 152.25, subdivision 1.

Matthew Massman
Commissioner
April 3, 2015