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September 19, 2014

Valerie Bombach
Principal Program Evaluator
Office of the Legislative Auditor
Room 140
Centennial Building
658 Cedar Street
Saint Paul, MN 55155-1603

Dear Ms. Bombach,

I am writing in reference to my Minnesota Government Data Practices Act request of April 22, 2014, which was submitted to your office on behalf of Public Record Media (PRM). In that request, I sought the following categories of records:

1. Any and all RFPs issued by the Office of the Legislative Auditor and/or the State of Minnesota that seek accounting firms or other entities to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, Subd. 9d;
2. Any and all bids submitted in response to the RFPs identified in Item 1 above;
3. Any and all contracts executed between the Office of the Legislative Auditor and/or the State of Minnesota and any entity contracted to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, Subd. 9d;
4. Any and all correspondence between staff members of the Office of the Legislative Auditor regarding Items 1-3 above.

Procedural background

On April 29, you produced an RFP responsive to Item 1 of my request, as well as a project description entitled "Managed Care Organizations' Administrative Expenses." On that same date, you denied access to all other items in my request, with Minn. Stat. 3.979 forming the basis for your denial.

On May 8, I replied to your correspondence by U.S. mail. In my letter, I did not contest your withholding of Item 4 records. However, I did restate my request for access to data responsive to Items 2 and 3, due to the public nature of that data. After several telephone calls and letters failed to produce a response from your office, counsel for PRM sought a Data Practices Advisory Opinion regarding access to RFP and contract data under

Minnesota Statutes Chapter 13.

Advisory Opinion 14-011

On September 17, 2014, the Commissioner of Administration issued Advisory Opinion 14-011 (enclosed). The opinion addressed the question of access to RFP and contract data, and the intersection of Minn. Stat. 3.979 with portions of Chapter 13.

In relation to the Item 2 data (RFP data) sought via my request, the Commissioner opined,

“The proposals/bids were due August 23, 2013, and the names of the bidders/responders were public on that date under section 13.591, subdivision 3. All of the remaining data (except for any trade secrets) a business/vendor provides become public when the government entity either completes the “selection process” for bids, or completes the “evaluation process” for proposals (see section 13.591, subdivision 3(a) and (b)). Assuming the evaluation process is complete, then the responses are public.

The Commissioner has not reviewed the data in question, but expects the data predominantly consist of procurement information. As noted above, data related to the procurement process, generally are public under section 13.591, subdivision 3. For example, the names of the responders, their experience conducting this kind of audit, and the names/qualifications of their personnel are likely data that OLA maintains, but are not data related to an audit. Any other data of this sort are also data that are public under section 13.591.”

In relation to the Item 3 data (contract data) sought via my request, the Commissioner opined,

“Similarly, data in contracts OLA maintains are presumptively public, and likely not data that qualify for protection under section 3.979. For example, names of the firms(s) with whom OLA enters into a contract, the firm’s qualifications, the contractual period, and the dollar amount the parties agree to, are not data subject to section 3.979.”

In summary, the Commissioner opined,

“Pursuant to Minnesota Statutes, Chapter 13, the Office of the Legislative Auditor must provide appropriate access to the data in question as follows:

- All bids submitted in response to the RFPs issued by the Office of the Legislative Auditor and/or the State of Minnesota that seek accounting firms or other persons to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subdivision 9(d)c, other than data “relating to an audit” under section 3.979, subdivision 3(a).*
- All contracts executed between the Office of the Legislative Auditor and/or the State of Minnesota and any person contracted to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subdivision 9(d), other than data “relating to an audit” under*

section 3.979, subdivision 3(a)."

Setting a date for inspection

Please contact me to arrange a time to inspect data responsive to Items 2 and 3 of my request. After inspection, I will make a determination about the production of copies, and will pay all applicable copy fees.

Sincerely,

A handwritten signature in black ink, appearing to read 'ME', written in a cursive style.

Matt Ehling
President, Public Record Media



Advisory Opinion 14-011

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.

Note: Pursuant to Minnesota Statutes, section 13.072, subdivision 2, “[t]he commissioner ... shall indicate when the principles stated in an opinion are not intended to provide guidance to all similarly situated persons or government entities.” The Commissioner does not intend for this opinion to be generally applicable.

Facts and Procedural History:

On July 29, 2014, the Information Policy Analysis Division (IPAD) received a letter dated July 28, 2014, from JT Haines, on behalf of Public Record Media (PRM). In his letter, Mr. Haines asked the Commissioner to issue an advisory opinion about his right to gain access to certain data the Office of the Legislative Auditor (OLA) maintains.

IPAD, on behalf of the Commissioner, wrote to James R. Nobles, the Legislative Auditor, in response to Mr. Haines’s request. The purposes of this letter, dated July 30, 2014, were to inform him of Mr. Haines’s request and to ask him to provide information or support for OLA’s position. On August 4, 2014, IPAD received a response, dated July 31, 2014, from Mr. Nobles.

A summary of the facts as Mr. Haines provided them follows. In a letter dated April 22, 2014, PRM requested access to certain data maintained by OLA. Of relevance here, PRM asked for:

1. Any and all RFPs issued by the Office of the Legislative Auditor and/or the State of Minnesota that seek accounting firms or other entities to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subd. 9(d);
2. Any and all bids submitted in response to the RFPs identified in Item 1, above;
3. Any and all contracts executed between the Office of the Legislative Auditor and/or the State of Minnesota and any entity contracted to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subd. 9(d).

Mr. Haines wrote that OLA responded on April 29, 2014, by providing an RFP responsive to Item 1 of PRM’s request, and an OLA “project description” document dated January 2014, entitled “Managed Care Organizations’ Administrative Expenses.” He wrote that OLA stated, “all of the other data listed in your request are currently classified as not public pursuant to Minnesota Statutes 2013, 3.979, until we release our final report,” and ‘any information or data

that is otherwise classified as not public will continue to retain such classification following release of our report later this year.”

In response, in a letter dated May 8, 2014, PRM wrote to OLA:

Minn. Stat. 13.591, Subd. 3(b) states that ‘data submitted by a business to a government entity in response to a request for proposal; as defined in section 16C.02, subdivision 12, are private or nonpublic until the time and date specified in the solicitation that proposals are due, at which time the name of the responder becomes public.’ The same is true of the names of bidders submitting in response to a request for bids under Minn. Stat. 13.591, Subd. 3(a).

According to the RFP produced by your office, proposals and/or bids were due on August 23, 2013. As of that date, the names of all responders and/or bidders were public data, and thereby should be released in response to Item 2 of my request.

And, if OLA has completed its selection and/or evaluation process for the proposals it solicited, all remaining data submitted by responders/bidders is public, with the exception of trade secret data, pursuant to Minn. Stat. 13.591, Subd. 3(a), (b).

If all responses/bids were rejected after the completion of the selection/evaluation process, all of the data described in the paragraph above would be public, and should be produced as responsive to Item 2 of my request, with one exception: If a government entity plans a resolicitation of proposals/bids within one year of the proposal/bid opening date, all data except the names of responders/bidders are private or nonpublic during that time. If this is the case, please clarify as much, as is obligated by Minn. Stat. 13.03, Subd. 3(f) (which requires that you describe the ‘specific statutory section, temporary classification’ upon which a denial is based).

Item 3 of my request seeks ‘any and all contracts executed between (OLA) and/or the State of Minnesota and any entity contracted to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, Subd. 9d.’

If any such contracts exist, they are presumptively public pursuant to Minn. Stat. 13.03, Subd. 1, which states that ‘all government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification’ as not public data of any kind. See Data Practices Advisory Opinion 03-027 for its discussion of the presumptively public status of state contracts.

According to OLA’s RFP, with the exception of any trade secrets, “[a]ll materials submitted in response to this RFP will become property of OLA and will become public record in accordance with Minnesota Statutes [section] 13.591, after OLA completes evaluation of the proposals.”

In his request to the Commissioner, Mr. Haines stated that PRM wrote again to OLA on May 30, 2014, and also contacted OLA by telephone, asking for a response to its May 8 letter to OLA. He wrote, “[n]o response has been provided to date.”

Issue:

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

Pursuant to Minnesota Statutes, Chapter 13, did the Office of the Legislative Auditor respond appropriately to a request for the following data?

- All bids submitted in response to the RFPs issued by the Office of the Legislative Auditor and/or the State of Minnesota that seek accounting firms or other persons to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subdivision 9(d).
- All contracts executed between the Office of the Legislative Auditor and/or the State of Minnesota and any person contracted to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subdivision 9(d).

Discussion:

Minnesota Statutes, section 256B.69, subdivision 9(d) is a relatively new section of law that requires that:

The legislative auditor shall contract with an audit firm to conduct a biennial independent third-party financial audit of the information required to be provided by managed care plans and county-based purchasing plans under subdivision 9c, paragraph (b).

Pursuant to Chapter 13, government data are public unless otherwise classified. (Minnesota Statutes, section 13.03, subdivision 1.) Under Chapter 13, government data include procurement data under Minnesota Statutes, section 13.591.

Pursuant to Minnesota Statutes, section 3.979, subdivision 1, the Legislative Auditor is subject to Chapter 13.

In his response to the Commissioner, Mr. Nobles stated,

I am writing to inform you that the documents Mr. Haines seeks are part of an ongoing OLA audit and are, therefore, currently classified as not public. *Minnesota Statutes* 2013, 3.979, subd. 3(a), states the following:

... Data relating to an audit are not public or with respect to data on individuals are confidential until the final report of the audit has been released by the legislative auditor or the audit is no longer being actively pursued. Upon release of a final audit report by the legislative auditor, data relating to an audit are public except data otherwise classified as not public.

This provision of law is clear. It classifies all documents that are 'related to' an ongoing audit as not public, even documents that are otherwise public. The not public classification does not end until the Legislative Auditor completes the audit and issues a final report, or is no longer conducting the audit. We anticipate that our audit of managed care organizations will be completed this fall.

To grant Mr. Haines access to the documents would violate state law and damage an important safeguard in the audit process. In fact, even legislators, including members of the Legislative Audit Commission, are not given access to OLA work papers until an

audit is completed. In sum, Mr. Haines will have to be patient and allow the law to work as intended.

The Commissioner acknowledges the broad authority OLA has to protect "data relating to an audit" under section 3.979 subdivision 3(a). The Commissioner also understands that section 13.591 provides for public access to the procurement process, including bids/responses related to the solicitation of contracted services. Here, the statutes appear to be irreconcilable.

Minnesota Statutes, section 645.26, sets forth the rules for determining which provision prevails when a general provision conflicts with a special provision in the same or another law. However, here, there appear to be two special provisions, and the general canons of statutory construction do not provide clear guidance to resolve the conflict as to which provision prevails in this situation. (See Minnesota Statutes, Chapter 645.). Consequently, this opinion seeks to distinguish between procurement related information which is public, and data related to an audit, which are also public but not until the audit is complete.

Data in government contracts are presumptively public (see Minnesota Statutes, section 13.03, subdivision 1, and Advisory Opinion 03-027). The proposals/bids were due August 23, 2013, and the names of the bidders/responders were public on that date under section 13.591, subdivision 3. All of the remaining data (except for any trade secrets) a business/vendor provides become public when the government entity either completes the "selection process" for bids, or completes the "evaluation process" for proposals (see section 13.591, subdivision 3(a) and (b)). Assuming the evaluation process is complete, then the responses are public.

The Commissioner has not reviewed the data in question, but expects the data predominantly consist of procurement information. As noted above, data related to the procurement process generally are public under section 13.591, subdivision 3. For example, the names of the responders, their experience conducting this kind of audit, and the names/qualifications of their personnel are likely data that OLA maintains, but are not data related to an audit. Any other data of this sort are also data that are public under section 13.591.

Similarly, data in contracts OLA maintains are presumptively public, and likely not data that qualify for protection under section 3.979. For example, names of the firms(s) with whom OLA enters into a contract, the firm's qualifications, the contractual period, and the dollar amount the parties agree to, are not data subject to section 3.979.

Following OLA's reasoning that all of the procurement and contract data are protected as data relating to an audit, and consequently not public, then OLA would be unable to share those data with anyone in the public until the audit is complete. Per section 3.979, subdivision 4, before releasing a report, OLA has authority to share data relating to an audit only "for the purpose of review and verification of the data". The practical effect of that provision is that if OLA determines that PRM is not entitled to get access to the bids/responses and contract(s), then neither are the managed care plans who are being audited, or any other member of the public.

As noted above, Chapter 645 does not provide clear guidance here. However, section 645.17 (1), provides that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable."

Thus, OLA may rely on the data classifications provided in section 13.591, in order to effectively perform its legislative duties while properly protecting not public data. Under section 13.591, OLA may share with the managed care firms (and the public), public data such as name of bidders and bid documents, professional experience of the vendor, and information about the vendor, name of vendor(s) contracted with and how much they are paid, and still protect data related to an audit under section 3.979.

Opinion:

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

Pursuant to Minnesota Statutes, Chapter 13, the Office of the Legislative Auditor must provide appropriate access to the data in question as follows:

- All bids submitted in response to the RFPs issued by the Office of the Legislative Auditor and/or the State of Minnesota that seek accounting firms or other persons to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subdivision 9(d)c, other than trade secrets or data "relating to an audit" under section 3.979, subdivision 3(a).
- All contracts executed between the Office of the Legislative Auditor and/or the State of Minnesota and any person contracted to conduct, or help conduct, the audits required by Minn. Stat. 256B.69, subdivision 9(d), other than trade secrets or data "relating to an audit" under section 3.979, subdivision 3(a).



Matthew Massman
Acting Commissioner

September 17, 2014