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May 26, 2017

E. Joseph Newton
General Counsel
Minnesota Department of Public Safety
445 Minnesota Street
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RE: Redactions in Dakota Access Pipeline deployment data

Dear Mr. Newton,

I am in receipt of your letter of April 28th, in which you discuss Public Record Media's (PRM's) March 29th request to revisit redactions made to documents related to the Dakota Access Pipeline deployment.

Thank you for removing redactions previously made to "cost total" and personnel rate information listed in document 1 of the attachments that accompanied PRM's letter of March 29, 2017. Given your invocation of Minn. Stat. 13.82 subd. 14 in relation to certain "personnel data" listed in documents numbered 1 and 3, PRM does not contest your agency's withholding of such data. However, PRM is still seeking public data related to particular equipment that may be listed within the documents in question.

The revised set of documents provided by your agency (portions of which are attached as documents 1A-3A) still contain redaction markings over specific items listed in the "equipment" sections of documents 1A (pg. 4), 2A (pg. 2), and 3A (pgs. 2, 4, and 5). In your letter of April 28th, you note that such data continues to be withheld, as its release would reveal police procedures and investigative techniques protected by the "deliberative processes" exemption found at Minn. Stat. 13.82 subd. 25.

Scope of "deliberative processes" exemption

The interpretive history of the "deliberative processes" exemption is contained within two Data Practices Advisory Opinions - 95-003 and 14-018. The text of the "deliberative

processes" exemption at Minn. Stat. 13.82 subd. 25 contains two distinct components, and reads as follows:

"Data that reflect *deliberative processes* or *investigative techniques* of law enforcement agencies are confidential data on individuals or protected nonpublic data; provided that information, reports, or memoranda that have been adopted as the final opinion or justification for a decision of a law enforcement agency are public data." (emphasis added)

In advisory opinion 95-003, the Commissioner of Administration addressed the question of whether the Saint Paul Police Department could withhold a videotaped interview with a crime suspect under the "deliberative processes" exemption (then codified at Minn. Stat. 13.82 subd 16). In regard to the meaning of "deliberative processes" as used in the statute, the commissioner opined that:

"Deliberative" means assembled or organized for deliberation or debate or characterized by or for use in deliberation or debate ... This definition appears to have little to do with a videotape that records a number of police officers interviewing a suspect about his commission of a crime and otherwise interacting with that suspect."

In regard to the meaning of "investigative techniques" as used in the statute, the commissioner further opined that:

"Investigative" means to observe or inquire into detail, to examine systematically or to make a detailed inquiry. "Technique" means the systematic procedure by which a complex or scientific task is accomplished. Given the definition of those terms, it would appear that data which reflect investigative techniques are those data that describe the systematic procedures used by the officers of the Department to make detailed inquiries into the commission of crimes. The videotape data in question here do not seem to fit that definition. The videotape appears to contain a visual record of the actual interrogation of the suspect."

Data Practices Advisory Opinion 14-018 dealt with questions surrounding access to a contract between the Minnesota Department of Public Safety (DPS) and the Harris Corporation related to cell phone exploitation equipment. In the opinion, the commissioner referenced the definitions originally set out in 95-003 and then further opined that:

"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."

Background information provided in opinion 14-018 indicates that prior to the issuance of the commissioner's opinion, DPS had attempted to withhold the contract in its entirety. After the opinion was published, DPS produced a semi-redacted version of the contract plus several attachments that included a Department of Justice memo that referenced "wireless collection equipment/technology" manufactured by the Harris Corporation. Within the contract and attachments, DPS redacted specific lines of text, as well as larger portions of paragraphs. Some of the redacted lines of text appeared in a contract addendum labeled "Schedule A: Leased Line Items." Given the overall context of the contract, it would appear that the redacted data in the "Schedule A" document likely referenced specific pieces of "wireless collection equipment" leased from the Harris Corporation.

While the Star Tribune did not further challenge the withholding of data in the DPS/Harris contract, PRM notes that the withholding of data which solely identified equipment was impermissible under the "deliberative processes" exception as defined in Data Practices Advisory Opinion 95-003.

As noted by the commissioner, "data which reflect investigative techniques are those data that describe the systematic procedures used by (officers) to make detailed inquiries into the commission of crimes." To the extent that data in the DPS/Harris contract and/or attachments described "systematic procedures," such data could have been withheld under the "deliberative processes" exemption. However, not all of the data in the contract and/or attachments likely fit within those parameters - specifically, data that was comprised solely of a list of equipment.

As the commissioner stated in opinion 95-003, a videotaped interview of a suspect did not itself qualify for withholding under the "deliberative processes" exemption. In similar fashion, a list of equipment alone would not constitute "systemic procedures" used to investigate the commission of crimes, and thus would not qualify for withholding under Minn. Stat. 13.82 subd. 25.

The "deliberative processes" exemption does not apply to data that document the existence of surveillance technology

In 2015, the Minnesota Legislature amended the law enforcement section of Chapter 13 to include new language relating to the classification of surveillance technology

maintained by law enforcement agencies. The language, codified at Minn. Stat. 13.82 subd. 31, reads as follows:

"Notwithstanding subdivision 25 and section 13.37, subdivision 2, the existence of all technology maintained by a law enforcement agency that may be used to electronically capture an audio, video, photographic, or other record of the activities of the general public, or of an individual or group of individuals, for purposes of conducting an investigation, responding to an incident or request for service, monitoring or maintaining public order and safety, or engaging in any other law enforcement function authorized by law is public data."

The provision at 13.82 subd. 31 makes clear that should a law enforcement agency maintain surveillance technology, the existence of such technology is classified as public data. The "existence" of surveillance technology is demonstrated through discreet elements of government data - for instance, a list of surveillance equipment maintained by a law enforcement agency.

Furthermore, 13.82 subd. 31 notes that the exemption provided at 13.82 subd. 25 (the "deliberative processes" exemption) cannot be used to withhold data documenting the existence of surveillance technology. While descriptions of specific investigative *techniques* can be withheld under 13.82 subd. 25, references to surveillance *equipment* by themselves cannot, since such references document the "existence" of surveillance technology maintained by a law enforcement agency.

Data comprised of names/lists of equipment must be released

As previously described, certain data listed within the "equipment" sections of documents 1A-3A continues to be withheld by your agency under Minn. Stat. 13.82 subd. 25. As detailed in this letter, if such data solely describes equipment maintained by a law enforcement agency, it is classified as "public" and must be released to PRM.

Please provide copies of documents 1A-3A in which redaction markings have been removed from any data that documents the existence of equipment (including surveillance equipment) maintained by a law enforcement agency. I can be reached at 651-556-1381 if you wish to discuss this matter in more detail.

Sincerely,

/s/Matt Ehling
Public Record Media