

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Tony Webster,

Complainant,

vs.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

Hennepin County and the Hennepin  
County Sheriff's Office,

Respondents.

This matter came before Administrative Law Judge Jim Mortenson for a hearing on March 25, 2016, at the Office of Administrative Hearings (OAH), 600 North Robert Street, St. Paul, Minnesota.

Scott Flaherty, Briggs & Morgan, P.A., appeared on behalf of Tony Webster (Complainant). Daniel Rogan, Senior Assistant Hennepin County Attorney, appeared on behalf of Hennepin County and the Hennepin County Sheriff's Office (Respondents or the County).

An expedited data practices complaint was filed with the OAH by Complainant on January 7, 2016. A response to the complaint was filed by Respondents on January 28, 2016. A Notice of Determination of Probable Cause, pursuant to Minn. Stat. § 13.085 (2014), and Order for Prehearing Conference and Evidentiary Hearing was issued by Judge Mortenson on February 19, 2016. A prehearing conference was held on March 4, 2016, and a Prehearing Order was issued later that day, setting forth the issues to be determined and the hearing schedule.

**ISSUES**

1. Did the Respondents violate Minn. Stat. § 13.03 (2014) by failing to establish procedures to ensure requests for government data are received and complied within an appropriate and prompt manner?

2. Did the Respondents violate Minn. Stat. § 13.03 by failing to keep records containing government data in an arrangement and condition as to make them easily accessible for convenient use?

3. Did the Respondents violate Minn. Stat. § 13.03 by failing to ensure Complainant was permitted to inspect and copy public government data at reasonable times and places?

4. Did the Respondents violate Minn. Stat. § 13.03 by failing to timely cite the specific statutory section, temporary classification, or provision of federal law upon which a denial of access to data was based?

### **SUMMARY OF CONCLUSIONS**

Respondents violated Minn. Stat. § 13.03 because they have: 1) not established procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner; 2) failed to keep records containing government data in an arrangement and condition as to make them easily accessible for convenient use; 3) failed to ensure Complainant was permitted to inspect and copy public government data at reasonable times and places; and 4) failed to timely cite the specific statutory section, temporary classification, or provision of federal law upon which denials of access to data were based.

Based on the record and all of the proceedings in this matter, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. The Hennepin County Board has selected Kristi Lahti-Johnson, the Hennepin County Data Governance Officer, as the Responsible Authority and Data Compliance Official under the Minnesota Government Data Practices Act (MGDPA).<sup>1</sup> Lahti-Johnson coordinates and executes Hennepin County's obligations under the MGDPA. Lahti-Johnson chairs Hennepin County's Data Governance Committee, which focuses on data governance and sets data practices policies for Hennepin County.<sup>2</sup>

2. Lahti-Johnson has four staff that work directly for her and she coordinates with 29 employees for different County departments, who are data practices contacts for these departments and assist Lahti-Johnson in responding to data practices requests.<sup>3</sup> The vast majority of data-practices requests to Hennepin County go directly to individual Hennepin County departments and the departments respond to requests without involving Lahti-Johnson or her staff. Some requests come directly to Lahti-Johnson as the Responsible Authority. She is also involved when requests cross multiple departments, are extensive, or are complicated.<sup>4</sup>

3. Lahti-Johnson has a process in place for responding to data practices requests that includes tracking requests to which her office is responding. She meets weekly with her staff member, Lucie Passus, to review the status of pending requests.<sup>5</sup>

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<sup>1</sup> Testimony (Test.) of Kristi Lahti-Johnson at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> Test. of Lucie Passus.

4. The Hennepin County Sheriff is the Responsible Authority for the Hennepin County Sheriff's Office (HCSO) and Carrie Hill is the Responsible Authority designee for the HCSO.<sup>6</sup>

5. Hill coordinates the responses to data practices requests made to the HCSO. She has a process in place that involves: communicating with the requestor; discussing the request with specific personnel with the HCSO who are likely to have responsive data; collecting the data; reviewing the data to ensure it can be disclosed; and then communicating with the requestor regarding the response.<sup>7</sup>

6. On August 12, 2015, Complainant Webster submitted a government data request to the County.<sup>8</sup> Webster e-mailed Lahti-Johnson, Hill, Tracey Martin, and Tim Stout the MGDPA request containing a list of fourteen separate inquiries relating to use of mobile biometric technologies. Requests 1-4 were requests to inspect certain data, and Requests 5-13 asked questions about the County's specific use of biometric data and mobile biometric technology by the County. Request 14 sought:

any and all data since January 1, 2013, including e-mails, which reference biometric data or mobile biometric technology. This includes, but is not necessarily limited to e-mails containing the following keywords, which I request the County conduct both manual and IT searches for:

- a. biometric OR biometrics
- b. rapid DNA
- c. facial recognition OR face recognition OR face scan OR face scanner
- d. iris scan OR iris scanner OR eye scan OR eye scanner
- e. tattoo recognition OR tattoo scan OR tattoo scanner
- f. DataWorks
- g. Morphotrust
- h. L1ID or L-1 Identity
- i. Cognitec
- j. FaceFirst<sup>9</sup>

7. Respondents acknowledged receipt of Webster's request on August 14, 2015.<sup>10</sup>

8. Over the three months that followed, Webster asked for additional information about what Respondents were doing to comply with his request, and whether

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<sup>6</sup> Test. of Carrie Hill at 1.

<sup>7</sup> *Id.*

<sup>8</sup> Exhibits (Exs.) 1, 2.

<sup>9</sup> *Id.*

<sup>10</sup> Ex. 5.

he could begin a partial inspection of data.<sup>11</sup> The County sent Webster six communications informing him that it was “continuing to process” his request.<sup>12</sup> These communications did not provide any additional information regarding when Webster could expect a response, nor did they specifically respond to Webster’s specific inquiries in his follow-up correspondence.<sup>13</sup>

9. On November 3, 2015, Webster called Passus to inquire about the status of his requests. Passus told Webster she could not disclose what Respondents were doing to comply with Webster’s request, who was working on the request, or if Respondents were having any trouble complying with the request.<sup>14</sup>

10. Between August 12, 2015 and November 25, 2015, Lahti-Johnson consulted with different County departments to determine if they had any responsive information. Lahti-Johnson wanted to understand how biometric technology was used so that she could accurately respond to the questions posed in the data request.<sup>15</sup> Lahti-Johnson met in person and via telephone with at least 25 employees from the HCSO, County Attorney’s Office, Department of Community Corrections and Rehabilitation, Human Resources, the Medical Examiner’s Office, Emergency Management, Purchasing and Contract Services, and Information Technology Department. The purpose of these meetings was: to explain to these departments what Webster was requesting; to discuss what type of biometric technology each department used, if any; to determine whether Hennepin County had contracts with vendors or grants that were responsive to Webster’s requests and questions; to determine whether Hennepin County collected particular biometric data identified in the requests, and to determine how biometric data collected by Hennepin County was transferred to the State of Minnesota. Often these meetings required staff from these departments to consult with others in their department and for Lahti-Johnson to have follow up meetings or telephone calls.<sup>16</sup>

11. Once Lahti-Johnson and Hill were able to determine what biometric technology was used by Respondent and what data was responsive to Webster’s request, locating responsive data for Requests 1-3 was straightforward.<sup>17</sup>

12. Fifteen weeks after Webster submitted his request, on November 25, 2015, Lahti-Johnson sent Webster a letter advising him that he could inspect some paper contracts and reports regarding requests 1–3 (purchasing and contract documents). The letter also provided answers to requests 4–13. For request 14, Lahti-Johnson said that Webster’s request to inspect remaining data about biometric technologies and vendors was “too burdensome with which to comply.”<sup>18</sup>

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<sup>11</sup> Exs. 11, 14, 16.

<sup>12</sup> Exs. 5, 7, 9, 12, 13, 15.

<sup>13</sup> Exs. 5, 7, 9, 12, 13, 15.

<sup>14</sup> Test. of Tony Webster at 5-6; Test. of L. Passus on cross-examination; Ex. 51 at 2.

<sup>15</sup> Test. of K. Lahti-Johnson at 5.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 6-7; Test. of C. Hill at 3-4.

<sup>18</sup> Ex. 18.

13. While requests 5-13 were not data requests, but rather questions, Lahti-Johnson answered the questions because: 1) she wanted to be responsive, transparent, and not put form over substance by replying that the questions were not proper data requests; 2) she wanted to show Webster that Respondents did not have a significant amount of biometric technology in use and did not have a biometric database; 3) it was her experience that a response advising a requestor that they have not made the data request in the correct form invited additional requests that require more work than simply answering the question posed; and 4) she believed that by answering the questions posed, she provided Webster with substantial information that would allow him to significantly narrow his e-mail term-search request.<sup>19</sup>

14. Lahti-Johnson advised Webster that a test search of County e-mails took seven hours, resulting in 312 e-mails. Thus, according to Lahti-Johnson, a search through all 8,000 County employees' inboxes "would tie up Hennepin County's servers 24 hours a day for more than 15 months." Lahti-Johnson informed Webster that the County considered his request complete, but would work with him to narrow his request "to determine a reasonable limitation."<sup>20</sup>

15. With regard to requests 1–3, Webster made multiple attempts to set up an inspection with the HCSO via e-mail and phone, ultimately scheduling an appointment for December 14, 2015.<sup>21</sup> Shortly before the appointment, the HCSO cancelled and rescheduled the appointment for December 21, 2015.<sup>22</sup>

16. With regard to request 14, Webster wrote to the County on December 4, 2015, expressing concern that the County took 15 weeks to raise its concerns of purported burden. Nevertheless, he reduced the scope of request 14 to only the e-mails of the HCSO and Security Department employees, and any other County employees providing services to those departments. Webster asked to inspect the data responsive to requests 1–3, and the results of the test search referred to in Lahti-Johnson's November 25, 2015 letter. Webster also informed the County that he believed the County was in violation of the MGDPA, and that he had retained legal counsel.<sup>23</sup>

17. On December 7, 2015, Webster's attorney informed the County of potential litigation and requested that specified data be retained for that purpose.<sup>24</sup>

18. On December 18, 2015, Webster again inquired about, among other things, the response to request 14.<sup>25</sup> The HCSO next e-mailed Webster on

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<sup>19</sup> Test. of K. Lahti-Johnson at 6. (The answer to Request 4 was that the requested data was not maintained by the Respondents. Ex. 18 at 4.)

<sup>20</sup> Ex. 18.

<sup>21</sup> Exs. 19, 20, 22, 23, 28; Test. of T. Webster at 9.

<sup>22</sup> Ex. 29; Test. of T. Webster at 10.

<sup>23</sup> Ex. 20.

<sup>24</sup> Ex. 21.

<sup>25</sup> Ex. 32.

December 28, 2015, advising that it was “continuing to explore the options regarding your revised request from December 4th, specifically as it relates to ‘Request Item 14.’”<sup>26</sup>

19. On December 21, 2015, Webster inspected data responsive to requests 1–3 at the HCSO, but many pages he inspected had redactions.<sup>27</sup> The HCSO provided 160 pages for inspection, but the names of employees were redacted from invoices and contracts.<sup>28</sup> The HCSO provided Webster a letter at the time of the inspection, but did not provide written certification with citations for any denial of access.<sup>29</sup> Webster asked for citation and was not informed orally of any denial citations.<sup>30</sup>

20. On December 21, 2015, Webster also inspected results of the test e-mail search and was permitted to inspect 279 e-mails.<sup>31</sup> Twenty of the e-mails were redacted. An instruction sheet provided to Webster stated redactions were made “because the data was classified as defined by MN Stat. 13.02 as either Private Data or Non-Public Data.”<sup>32</sup> Webster asked about the redactions, and asked for statutory citation. He was told Lahti-Johnson would call him, which she never did.<sup>33</sup>

21. In a letter dated December 30, 2015, Webster raised concerns about the inspection of documents. Webster’s concerns included: being asked to produce photographic identification prior to inspecting the data; the County’s failure to cite the specific and applicable law classifying redacted or withheld data; his lack of access to attachments to e-mails and metadata; and continuing problems regarding Item 14.<sup>34</sup>

22. Daniel Rogan, counsel for Hennepin County, responded to Webster’s December 30 letter by e-mailing Mr. Webster’s attorney on January 7, 2016.<sup>35</sup> The letter explained that the redactions had been made in error and stated that unredacted versions would be made available for inspection.<sup>36</sup> Webster subsequently inspected the unredacted documents on January 14, 2016.<sup>37</sup>

23. Hennepin County has 13,163 e-mail accounts, of which approximately 8,000 are employee e-mail accounts.<sup>38</sup> There are 208,936,308 e-mails, representing 23.56 terabytes of data in these accounts. Typically, the County receives approximately six million e-mails per month, 70 percent of which are spam.<sup>39</sup> The County uses Microsoft

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<sup>26</sup> Ex. 41.

<sup>27</sup> Ex. 34.

<sup>28</sup> Test. of C. Hill at 5-6.

<sup>29</sup> Ex. 33.

<sup>30</sup> Test. of T. Webster at 11-12.

<sup>31</sup> Exs. 36, 37; Test. of T. Webster at 12-13.

<sup>32</sup> Ex. 36.

<sup>33</sup> Ex. 51 at 2; Test. of T. Webster at 5-6; Test. of L. Passus on cross-examination.

<sup>34</sup> Ex. 20.

<sup>35</sup> Ex. 44.

<sup>36</sup> *Id.*

<sup>37</sup> Test. of C. Hill at 6.

<sup>38</sup> Test. of Glen Gilbertson at 1; Test. of Christopher Droege at 1.

<sup>39</sup> Test. of G. Gilbertson at 1.

Outlook 2010. The County's e-mail is on 19 state-of-the-art servers.<sup>40</sup> The County's e-mail system was set up in the standard format and is indexed by sender, receiver, subject, date, and attachment name.<sup>41</sup> Microsoft Outlook 2010 does not index e-mails by words used in the body of the e-mail, unless specific words are specifically added as index terms.<sup>42</sup> The County does not index e-mails by words within the body of e-mails, and does not know of other counties that do.<sup>43</sup> The County does not maintain e-mail messages based on the classification of the correspondence and attachments as public or not public data.<sup>44</sup>

24. The County's e-mail files are maintained as PST files.<sup>45</sup>

25. Christopher Droege, Hennepin County Computer Forensics Unit IT Supervisor, performed three searches in response to Webster's request. Droege conducted searches on: September 18, 2015; January 6-11, 2016; and January 19, 2016.<sup>46</sup> Droege was the only person who conducted e-mail searches in response to Webster's request.<sup>47</sup>

26. Droege's first search was done using a forensic process whereby Droege asked an e-mail administrator to provide a complete copy of five County employees' e-mail boxes. The content of these e-mail boxes was then sent to a server, and then transferred to Droege's forensics personal computer.<sup>48</sup> Droege loaded the e-mails into a program by Vound, called Intella, and conducted a search that took seven hours, resulting in 312 e-mails.<sup>49</sup> Droege did not limit the search to January 1, 2013. As a result, the search contained e-mails as old as 2008.<sup>50</sup> Applying the date limitation would have reduced the search time.<sup>51</sup>

27. The 312 e-mails retrieved were reduced to 259 e-mails following review by the County Attorney's Office and the Data Governance Office.<sup>52</sup>

28. The 259 e-mails were provided for Webster's inspection in EML format.<sup>53</sup>

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<sup>40</sup> Test. of G. Gilbertson at 1, and on cross-examination.

<sup>41</sup> *Id.* on cross-examination.

<sup>42</sup> Test. of G. Gilbertson on cross-examination.

<sup>43</sup> *Id.*; Test. of C. Droege on cross-examination.

<sup>44</sup> Test. of K. Lahti-Johnson at 7-8; Test. of Christopher Droege at 1-2.

<sup>45</sup> Test. of Christopher Droege at 2.

<sup>46</sup> Ex. 204.

<sup>47</sup> *Id.* at 1.

<sup>48</sup> Test. of C. Droege on cross-examination.

<sup>49</sup> Ex. 204 at 5.

<sup>50</sup> Ex. 39; Test. of C. Droege on cross-examination.

<sup>51</sup> Test. of C. Droege on cross-examination.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.*

29. In subsequent searches, Droege used Exchange Control Panel (ECP) to perform searches instead of Intella.<sup>54</sup> ECP performs searches “directly onto the server” which is faster and the best way to get the responsive data in a timely manner.<sup>55</sup>

30. In Droege’s second search, started on January 6, 2016, he searched HCSO and Security Department staff e-mail for the vendor name keywords supplied by Webster. The process was broken up into multiple search segments, which took seven hours to process.<sup>56</sup> Droege attempted to limit the search by date, but the results were not date-limited.<sup>57</sup> Droege found 4,249 responsive e-mails, but this number may be exponentially inflated because results from the searches were not deduplicated.<sup>58</sup>

31. In Droege’s third search on January 19, 2016, he searched for biometric technology names across all HCSO employees with first names beginning D, E, or F.<sup>59</sup> He was told to search that grouping and did not create the grouping himself.<sup>60</sup> This search included 88 employees’ e-mail boxes and took two hours.<sup>61</sup> After applying date limitations, there were 1,726 responsive emails.<sup>62</sup>

32. Webster has not been permitted to inspect the results of Droege’s second or third searches.<sup>63</sup>

33. The County does have the ability to perform multi-mailbox searches. It is estimated that it will take approximately 18 hours to complete the search for responsive data.<sup>64</sup>

Based on these findings of fact, and the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following,

### **CONCLUSIONS OF LAW**

1. Minn. Stat. § 13.085 authorizes the Administrative Law Judge to consider and determine this matter.

2. Following a hearing on a complaint filed with the OAH pursuant to Minn. Stat. § 13.085, the judge must determine whether the violations alleged occurred and must take at least one of the following dispositions:

(1) dismiss the complaint;

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<sup>54</sup> Ex. 204 at 2, 9.

<sup>55</sup> Test. of C. Droege on cross-examination.

<sup>56</sup> Ex. 204 at 9.

<sup>57</sup> Test. of C. Droege on cross-examination.

<sup>58</sup> Ex. 204 at 2-9.

<sup>59</sup> *Id.* at 9.

<sup>60</sup> Test. of C. Droege on cross-examination.

<sup>61</sup> Ex. 204 at 12; Test. of C. Droege on cross-examination.

<sup>62</sup> Ex. 204 at 12.

<sup>63</sup> Test. of T. Webster at 16.

<sup>64</sup> Test. of C. Droege on cross-examination.

- (2) find that an act or failure to act constituted a violation of Minnesota Chapter 13;
- (3) impose a civil penalty against the respondent of up to \$300;
- (4) issue an order compelling the respondent to comply with the provisions of law that were violated, and may establish a deadline for production of data, if necessary; and
- (5) refer the complaint to the appropriate prosecuting authority for consideration of criminal charges.<sup>65</sup>

3. “Government data” means all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use.<sup>66</sup> All government data is presumed to be public unless a statute, federal law, or temporary classification pursuant to Minn. Stat. § 13.06, makes it not public.<sup>67</sup>

4. A government entity’s responsible authority under the MGDPA must establish procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner.<sup>68</sup>

5. The County has not established procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner.

6. A government entity’s responsible authority must keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use.<sup>69</sup>

7. Records in the County’s possession, particularly e-mail correspondence and attachments, containing government data are not kept in an arrangement and condition to make them easily accessible for convenient use.

8. When any person (an individual, partnership, corporation, association, business trust, or a legal representative of an organization) requests to inspect and copy public government data, that person must be permitted to do so at reasonable times and places.<sup>70</sup>

9. Complainant was not permitted to inspect and copy all of the public government data he requested.

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<sup>65</sup> Minn. Stat. § 13.085, subd. 5.

<sup>66</sup> Minn. Stat. § 13.02, subd. 7 (2014).

<sup>67</sup> Minn. Stat. § 13.03, subd. 1; *See also* Minn. Stat. § 13.02, subd. 8a. (2014) (“‘Not public data’ are any government data classified by statute, federal law, or temporary classification as confidential, private, nonpublic, or protected nonpublic.”)

<sup>68</sup> Minn. Stat. § 13.03, subd. 2(a).

<sup>69</sup> *Id.*, subd. 1.

<sup>70</sup> *Id.*, subd. 3(a).

10. If a government entity's responsible authority or designee determines that requested data is classified so as to deny the requesting person access, the responsible authority or designee must inform the requesting person of the determination either orally at the time of the request, or in writing as soon after that time as possible. The responsible authority must cite the specific statutory section, temporary classification, or specific provision of federal law on which the determination is based.<sup>71</sup>

11. The Respondent's Responsible Authorities or Designees failed to timely inform Complainant of the legal citations for their determinations that he would not be provided access to certain data.

12. A rebuttable presumption exists that a complainant who substantially prevails on the merits in an action brought under Minn. Stat. § 13.085 is entitled to an award of attorney fees, not to exceed \$5,000.00.<sup>72</sup>

13. The OAH must refund the filing fee of a substantially prevailing complainant in full, less \$50.00, and the OAH's costs in conducting the matter must be billed to the respondent, not to exceed \$1,000.00.<sup>73</sup>

Based on these Conclusion of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following,

### **ORDER**

1. The County's failure to established procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner constitutes a violation of the MGDPA.

2. The County's failure to keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use constitutes a violation of the MGDPA.

3. The County's failure to permit Complainant to inspect and copy public government data he requested constitutes a violation of the MGDPA.

4. The County's failure to timely inform Complainant of the legal citation for the Responsible Authority's determination that access would not be provided to certain data constitutes a violation of the MGDPA.

5. A civil penalty of \$300.00 is imposed on the County, pursuant to Minn. Stat. §§ 13.08, subd. 4(b)(4), .085, subd. 5(a)(3) (2014).

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<sup>71</sup> *Id.*, subd. 3(f).

<sup>72</sup> Minn. Stat. § 13.085, subd. 6(a).

<sup>73</sup> *Id.*, subd. 6(c).

6. The County must implement a procedure to ensure that public government data, including data stored electronically (such as e-mail correspondence), is organized and stored so that electronically stored public data may be easily accessed and used by the public. This procedure must be implemented no later than June 1, 2016.

7. The County must provide Complainant with the opportunity to inspect the data he requested on August 12, 2015, and which he has not yet been provided access, beginning on May 2, 2016.

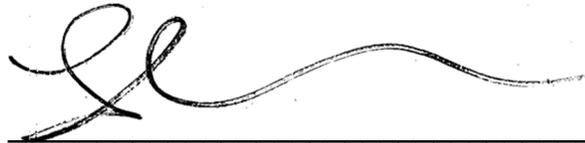
- a. Due to the volume of data requested, the County may provide the opportunity to inspect the requested data on a rolling basis, providing new batches of retrieved data at least weekly.
- b. The County must provide the e-mail data and attachments in the format or program in which the data are maintained by the County, in order to permit inspection of metadata associated with the e-mail correspondence and attachments.
- c. The County may provide the Complainant the opportunity to inspect the requested data remotely, including the ability to print copies of or download the data on his own computer equipment and without charge to the Complainant.
- d. If the County does not permit remote access, but the Complainant asks for copies or electronic transmittal of the data, the County may require Complainant to pay the actual costs of searching for and retrieving the data, including the cost of employee time, and for making, certifying, and electronically transmitting the copies of the data or the data, but may not charge for separating public from not public data.
- e. For any requested data that is classified as not public, the County must provide Complainant a written description of the data not provided and a legal citation providing the basis for the determination to not provide the requested data.
- f. If the County does not permit remote inspection, it must, at a minimum, permit inspection during all regular business hours at a location in a public County building. Due to the volume of the data request, if Complainant requests, the County must provide up to three terminals for inspecting the requested data.
- g. The County must complete the provision of requested data no later than June 3, 2016.

8. Within 14 days of this Order, Complainant may submit to the undersigned Administrative Law Judge a claim for attorney's fees. The claim must be supported by affidavit and appropriate documentation. Any award of attorney's fees will not exceed \$5,000.00, pursuant to Minn. Stat. § 13.085, subd. 6(b).

9. The Office of Administrative Hearings will refund \$950.00 of the Complainant's filing fee.

10. Respondents will remit to the OAH \$1,000.00 to cover hearing service costs incurred in conducting this proceeding, as documented in an invoice to be sent by the OAH to Respondents.

Dated: April 22, 2016



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JIM MORTENSON  
Administrative Law Judge

### NOTICE

This Order is the final decision in this case. Any party aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-.69 (2014).

### MEMORANDUM

The County argues that: Webster's request was responded to in an appropriate and prompt manner; its records containing government data are kept in an arrangement and condition as to make them easily accessible for convenient use; it permitted Webster to inspect and copy public government data at reasonable times and places; and it timely cited the specific statutory section which provided the basis for denial of access to some requested data. The law and the evidence does not support these positions.

#### Records and their accessibility

All government data is presumed to be public unless a statute, federal law, or temporary classification pursuant to Minn. Stat. § 13.06 (2014), classifies it as nonpublic, protected nonpublic, private, or confidential.<sup>74</sup> "The responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use."<sup>75</sup> "Upon request to a responsible authority, or designee, a person shall be permitted to inspect and copy public government data at reasonable times and places[.]"<sup>76</sup> There is no ambiguity in the legislature's intent and direction.

Webster requested to inspect data about the County's use of mobile biometric devices on August 12, 2015. It was not until December 21, 2015, over four months later, that he was provided the opportunity to inspect some of the requested data. There is an

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<sup>74</sup> Minn. Stat. § 13.03, subd. 1.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*, subd. 3(a).

unknown volume of requested data Webster has not yet been permitted to inspect. This latter data is, largely, in e-mail correspondence kept by the County.

Webster's data request included questions that were related to the data he was requesting (requests 5-13). Webster asked for the total number of individuals whose biometric data has been collected by the County since 2012; the number of biometric data points contained in databases; the retention period for biometric data; and so forth. The County's Responsible Authority, Lahti-Johnson, took fifteen weeks and meetings with at least 25 people to gather the answers to Webster's questions. There is nothing remarkable about the questions asked which would indicate they could not be answered more promptly than 15 weeks. But the questions were not requests for data, and the delay in answering them is not how the County violated the law. Nor is there a dispute about the substance of the responses to requests 1 through 13.

What is problematic is the fact that the County used the time it took to gratuitously answer Webster's questions as part of the basis for delaying the partial response to data requests 1 through 4 and 14. There does not even appear to have been an effort to search for and retrieve the data sought by request 14 until over a month after the request was made.

Then, despite repeated prompts from Webster for the status of his data requests, and requests to see data that had already been retrieved, the requested and retrieved data was not shared. Lahti-Johnson's reason, expressed after the complaint in this matter was filed, was that she wanted to be thorough and comprehensive, and did not want to prompt additional questions. Yet, the November 25, 2015, reply that provided answers to Webster's questions was anything but thorough and comprehensive. It did not include any requested public government data (besides the answers to questions) and advised Webster that much of the request for data was too burdensome for the County to comply with.

The MGDPA does not recognize "burden" as a basis to deny access to public government data. The County did not keep records containing government data, especially e-mail correspondence and associated attachments, in such an arrangement and condition as to make them easily accessible for convenient use. The County has over 13,000 e-mail accounts which contain over 209 million e-mails. The accounts are organized by user and the messages are organized by sender, receiver, subject, date, and name of attachments. The County is not required to index or organize e-mails in any particular way. However, e-mail correspondence is public, unless an exception applies.<sup>77</sup> It is up to the responsible authority to ensure a system is in place to separate nonpublic, protected nonpublic, private, or confidential data from all of the public information contained in e-mail correspondence.<sup>78</sup>

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<sup>77</sup> Op. Minn. Dept. Admin. No. 00-019 (June 16, 2000).

<sup>78</sup> Op. Minn. Dept. Admin. No. 95-006 (Feb. 2, 1995) ("Government entities have an affirmative obligation to make the determinations of data classification as necessary to provide prompt access to public data."); Op. Minn. Dept. Admin. No. 94-058 (Dec. 28, 1994) ("Hennepin County clearly has a duty under Minnesota

With regard to keeping data easily accessible, “[a]gencies need to act proactively to prepare their computer systems so that they are easily able to respond to requests for data[.]”<sup>79</sup> Thus, the better a government entity organizes its records in accord with Minn. Stat. § 13.03, the easier it will be to respond to any data requests. In other words, failure to keep records with public data in an order consistent with the MGDPA does not excuse the challenge in finding the public data when it is requested.

Webster is conducting research. He is looking into how law enforcement agencies use and deploy mobile biometric devices. He made that clear to the County in his data request. He also specifically asked to look at all records that deal, in some way, with mobile biometric devices. In situations where requested data is not sorted or formatted according to the specifics a requestor is looking for, it may be necessary for the government entity to permit the requestor to inspect records so that the requestor can find the data he or she seeks himself or herself.<sup>80</sup> This is because the MGDPA does not require government entities to provide research services or index data by any specific criteria, other than public and not public. However, when a requestor provides criteria that enables a government entity to identify and retrieve the specific data being sought, the government entity must meet its obligation under Minn. Stat. § 13.03 to search for and retrieve the specific data requested.<sup>81</sup> To aid the County in responding to his data request, Webster provided a list of over 20 keywords. This list was provided as an aid to assist the County in searching for and retrieving the requested data about mobile biometric devices. Had Webster not provided the criteria, the County would still have to find the requested data, or permit Webster access to the public data in the e-mail accounts to find the public information useful to his research.

The County argues that Webster demanded data in a particular form, and it is not required to provide data in a particular form when the requested data is not kept in that form. The County is correct that it is not required “to provide the data in an electronic format or program that is different from the format or program in which the data are maintained by the government entity.”<sup>82</sup> However, Webster did not request data in a different format or program than the County kept it in. Yet, rather than provide Webster PST files, the format in which the County maintains e-mail messages, it provided the data in EML files. This was not at Webster’s request.

The focus on answering non-data request questions, and the failure to conduct more than a day’s work searching for and retrieving requested data from e-mail correspondence and attachments, does not justify the nearly 19 week span of time between the request for data and the initial inspection of only a small part of the requested

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law to understand what types of data it collects, how those data should be classified, and to whom those data can be disseminated.”).

<sup>79</sup> Op. Minn. Dept. Admin. No. 00-067 (Dec. 5, 2000); See also Op. Minn. Dept. Admin. No. 99-040 (Nov. 15, 1999).

<sup>80</sup> Op. Minn. Dept. Admin. No. 97-005 (Jan. 31, 2000); Op. Minn. Dept. Admin. No. 02-028 (Aug. 7, 2002).

<sup>81</sup> See, e.g., Op. Minn. Dept. Admin. No. 00-026 (July 12, 2000).

<sup>82</sup> Minn. Stat. § 13.03, subd 3(e).

data.<sup>83</sup> Thus, the process the County has in place to respond to data requests does not ensure data is kept easily accessible in order to ensure a prompt response to data requests.

### **Reasonable time and place to inspect**

As noted above, Webster was not permitted to inspect the partial data retrieved until 19 weeks following his data request. “[A] person shall be permitted to inspect and copy public government data at reasonable times and places[.]”<sup>84</sup> The record in this matter does not demonstrate a reason for a 19 week delay in what turned out to be a partial response to a valid data request. Thus the inspection on December 21, 2015, was not at a reasonable time, and the failure to permit inspection of the remainder of the data requested is a violation of Minn. Stat. § 13.03, subd. 3.

### **Reasons for withheld data**

The MGDPA requires that a requesting person be informed “either orally at the time of the request, or in writing as soon after that time as possible,” when “the responsible authority or designee determines that the requested data is classified so as to deny the requesting person access[.]”<sup>85</sup> This response must be substantive and advise the requesting person of “the specific statutory section, temporary classification, or specific provision of federal law on which the determination is based.”<sup>86</sup>

The data request was made on August 12, 2015. The County responded to questions on November 25, 2015, and provided notice that access to some documents was being denied. An inspection was permitted on December 21, 2015. During the inspection, Webster found documents included redactions without any explanation.

The County argues it has timely cited the specific statutory section, temporary classification, or federal law upon which its denial of access was based. The County admitted to Webster on January 7, 2016, that there were certain redactions that should not have been made, and subsequently provided the redacted information. The County also informed Complainant on that date that 19 of 20 e-mails he was denied access to contained security information which were to be redacted in accordance with Minn. Stat. § 13.37, subd. 2 (2014). The other e-mail included private personnel data which was redacted pursuant to Minn. Stat. § 13.43, subd. 4 (2014). An additional 48 e-mails were withheld because they were protected by attorney/client privilege, fell outside of the timelines of the request, or were non-responsive to the request. An attachment Complainant claimed was removed had, in fact, been provided as an attachment to another e-mail.

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<sup>83</sup> See, e.g., Op. Minn. Dept. Admin. No. 04-027 (April 28, 2004) (Six to seven months to provide requested data appeared excessive when law requires records containing government data to be kept “in such an arrangement and condition as to make them easily accessible for convenient use.”).

<sup>84</sup> Minn. Stat. § 13.03, subd 3(a).

<sup>85</sup> Minn. Stat. § 13.03, subd 3(f).

<sup>86</sup> *Id.*

The MGDPA “does not recognize ‘good faith’ efforts to comply.”<sup>87</sup> In this case, the request was made August 12, 2015, and the basis for denial was not produced until January 7, 2016. Thus, the County violated Minn. Stat. § 13.03, subd. 3(f).

## Disposition

If violations of the MGDPA are found the Administrative Law Judge must make at least one of the following dispositions:

- (1) dismiss the complaint;
- (2) find that an act or failure to act constituted a violation of Minnesota Chapter 13;
- (3) impose a civil penalty against the respondent of up to \$300;
- (4) issue an order compelling the respondent to comply with the provisions of law that were violated, and may establish a deadline for production of data, if necessary; and
- (5) refer the complaint to the appropriate prosecuting authority for consideration of criminal charges.<sup>88</sup>

In determining whether to assess a civil penalty, the Administrative Law Judge must consider whether, among other things, the government entity has developed public access procedures under Minn. Stat. § 13.03, subd. 2, and acted in conformity with an opinion issued under Minn. Stat. § 13.072 (2014) that was sought by a government entity or another person.<sup>89</sup>

Because each of the four issues examined are found to have been violations of the MGDPA by the County, the complaint is not dismissed and findings are made that the County’s action, or failure to act, constitute violations of the MDGPA.

A civil penalty of \$300 is imposed against the County because its public access procedures are deficient. The County could not or did not provide a response for 19 weeks following a data request, and then provided only a partial response. The County failed to provide access to additional data requested because of deficient public access procedures. Further, multiple opinions have been issued by the Department of Administration advising government entities to design their computer systems to permit appropriate timely public access.<sup>90</sup> Under these circumstances, the County’s failure to be

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<sup>87</sup> Op. Minn. Dept. Admin. No. 00-067 (Dec. 5, 2000).

<sup>88</sup> Minn. Stat. § 13.085, subd. 5.

<sup>89</sup> Minn. Stat. § 13.08, subd. 4(b)(4) & (5) (2014).

<sup>90</sup> See, e.g.: Op. Minn. Dept. Admin. Nos.: 94-058 (Dec. 28, 1994) (“Hennepin County clearly has a duty under Minnesota law to understand what types of data it collects, how those data should be classified, and to whom those data can be disseminated.”); 95-006 (Feb. 2, 1995) (“[A]n entity’s compliance practices are not reasonable if it must make data classification determinations any time it receives a request for access to data.”); 96-032 (July 24, 1996); 99-040 (Nov. 15, 1999) (citing 96-032); 00-019 (June 16, 2000) (Despite cost of retrieving data, nearly \$100,000, “it is a government entity’s responsibility to make public data contained on back-up tapes easily accessible and intelligible for public inspection.”); 00-026 (July 12, 2000)

proactive in ensuring it is able to respond at all, much less in a timely fashion, warrants application of the civil penalty.

Finally, because the requested data has still not been provided, and the evidence shows it can be provided with some sustained and alternative effort on behalf of the County, it is appropriate to require compliance. This is required for both future requests for data and Webster's August 2015 request.

**J. R. M.**

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(Government entity "is obligated to search for and retrieve government data, and to maintain its data such that they are easily accessible for convenient use. In this case, [requestor] provided criteria that would enable [government entity] to identify and retrieve the specific data he was seeking."); 00-067 (Dec. 5, 2000) ("Agencies need to act proactively to prepare their computer systems so that they are easily able to respond for requests for data[.]") The MGDPA "does not recognize 'good faith' efforts to comply. Rather, the provisions of Chapter 13 must be followed as set forth by the Legislature."); 04-027 (April 28, 2004) ("Given the voluminousness of [request of at least 1300 personnel files], it seems reasonable that the City determined it needed to break up the request and respond by providing a continual flow of data for [inspection]. However, "six to seven months to provide the data. . . . seems excessive[.]"); and 05-032 (Oct. 25, 2005) ("[T]he Commissioner encourages data requestors to ask for specific data rather than asking for documents[.]" in order to ensure a discussion about what whether the data does or does not exist.).