13.9 APPLICATION OF THE DATA PRACTICES ACT TO CONTESTED CASES

The impact of the Data Practices Act on the contested case proceedings under the APA can be significant. In many contested cases proceedings, there will be a need for one or more of the parties to have access to "not public" data for the preparation and presentation of their case. Thus, questions of the accessibility of not public data to a party not otherwise entitled to access, and the treatment of that data in the hearing record, will arise. Of course, a party can gain access to private or nonpublic data with the informed consent and express written permission of the subject of that data.[1]

13.9.1 Discoverability of "Not Public" Data

The rules of the Office of Administrative Hearings (OAH) provide for discovery from both a party and a nonparty to a contested case:

> Any means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed. If the party from whom discovery is sought objects to the discovery, the party seeking discovery may bring a motion before the judge to obtain an order compelling discovery. In the motion proceeding, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery. In ruling on a discovery motion, the judge shall recognize all privileges recognized at law.[2]

In addition, in regard to non-parties, the OAH rules provide that:

> Requests for subpoenas for the attendance of witnesses or the production of documents, either at a hearing or for the purposes of discovery, shall be in writing to the judge, shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought, shall identify any documents sought with specificity, shall include the full name and home address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena.[3]

Thus, under normal circumstances, the administrative law judge (ALJ) could order discovery of information from either a party or authorize a subpoena to a nonparty to a contested case. However, questions may arise when the information sought by a party involves data that is classified as not public under the Data Practices Act.

The Data Practices Act includes a section on the discoverability of not public data that provides:

1 MINN. STAT. § 13.072, subd. 2 (2014); MINN. R. 1205.0400, subp. 2 (2013); Donald A. Gemberling & Garry A. Weissman, *Data Practices at the Cusp of the Millennium*, 22 Wm. Mitchell L. Rev. 767, 785-86 (1996).

2 MINN. R. 1400.6700, subp. 2 (2013); *see* § 8.5.

3 MINN. R. 1400.7000, subp. 1 (2013).

> If a state agency, political subdivision, or statewide system opposes discovery of government data or release of data pursuant to court order on the grounds that the data are classified as not public, the party that seeks access to the data may bring before the appropriate presiding judicial officer, arbitrator, or *administrative law judge* an action to compel discovery or an action in the nature of an action to compel discovery.
>
> The presiding officer shall first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil or administrative procedure appropriate to the action.
>
> If the data are discoverable the presiding officer shall decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data. In making the decision, the presiding officer shall consider whether notice to the subject of the data is warranted and, if warranted, what type of notice must be given. The presiding officer may fashion and issue any protective orders necessary to assure proper handling of the data by the parties. If the data are a videotape of a child victim or alleged victim alleging, explaining, denying, or describing an act of physical or sexual abuse, the presiding officer shall consider the provisions of section 611A.90 subdivision 2, paragraph (b).[4]

Under this language, the ALJ has the clear authority to order the discovery of not public data under the appropriate circumstances. The order can be obtained by filing a motion under the OAH rules.[5] Or, the issue can be raised through a motion to quash a subpoena.[6] The inspection of the materials sought is accomplished under the procedure set out in *Erickson v. MacArthur*.[7] In *Erickson,* the Minnesota Supreme Court required an *in camera* review of the requested material prior to the issuance of an order compelling disclosure, so that the requirements of section 13.03, subdivision 6 could be meaningfully applied.[8] The statutory two-part analysis is mandatory rather than optional.[9]

The agency in possession of the not public data is protected under a provision in the Data Practices Act that provides that "[a] government entity or person that releases not public data pursuant to an order under section 13.03 subdivision 6 is immune from civil and criminal liability."[10] For this reason an agency is usually reluctant to release not public data without an order directing it to do so.[11]

4 MINN. STAT. § 13.03, subd. 6 (2014) (emphasis added).
5 MINN. R. 1400.6600 (2013).
6 *Id*. 1400.7000, subp. 3.
7 414 N.W.2d 406 (Minn. 1987).
8 *Id*. at 409.
9 Montgomery Ward & Co. v. Cnty. of Hennepin, 450 N.W.2d 299, 306-08 (Minn. 1990).
10 MINN. STAT. § 13.08, subd. 5 (2014).
11 Gemberling & Weissman, *Data Practices*, *supra* note 1, at 797.

13.9.2 The Data Practices Act as a Discovery Tool

One of the purposes of the Data Practices Act is to ensure that public data maintained by agencies is readily available. Data is presumed to be public unless there is a law to the contrary.[12] Upon request a person must be permitted to inspect public government data without charge except for the costs of retrieving and copying the data.[13] The data must be provided as soon as reasonably possible, and, in the case of data on an individual, the data must be provided immediately or within 10 days if requested by the subject of the data.[14]

Litigants seeking public data in the hands of the government may find the Data Practices Act to be a useful companion to, but not a substitute for, civil or administrative discovery. A litigant would be entitled to not only public data, but also to private or nonpublic data about itself.[15] There is nothing in the Act, which restricts the availability of data on the basis of need, or the requestors intended use of the data.[16] Government entities may not require persons to identify themselves, or to state a reason for requesting public data or to justify a request for public data.[17] Legitimate entity concerns about requests from litigants include the possibility of duplicative searches for and production of documents and the possibility of requests for data that is not relevant to the litigation. It has been argued, however, that public access is the paramount objective under the Act and since a party has a clear right to access data before litigation, denying access to a litigant would not make sense and would only encourage the filing of requests prior to litigation. It has been suggested that pre-litigation requests would be more numerous and more oppressive to the entity if litigation requests are denied.[18]

The Act itself limits the availability of data collected as part of an active investigation for the purpose of a pending civil legal action or in anticipation of a pending civil legal action. This data is confidential if it is about individuals and protected nonpublic if it is data not on individuals.[19] The "chief attorney" for the agency determines whether or not a civil legal action is pending.[20] A challenge to the determination must be brought in district court.[21] But some inactive civil investigative data is public. The investigation becomes inactive when a

12 MINN. STAT. § 13.03, subd. 1 (2014); Demers v. City of Minneapolis, 468 N.W.2d 71, 73 (Minn. 1991); Gemberling & Weissman, *Data Practices*, *supra* note 1, at 773.

13 MINN. STAT. § 13.03, subd.3 (2014).

14 *Id*. § 13.04, subd. 3.

15 *Id*.

16 *Id.* § 13.03.

17 *Id.* § 13.05, subd. 12.

18 Martin & Redgrave, *Civil Discovery and the Data Practices Act*, BENCH & BAR, at 27 (Oct. 1995).

19 MINN. STAT. § 13.39 subd. 2 (2014). But, a notice of claimed damages sent to a city is not data collected in an active investigation. St. Peter Herald v. City of St. Peter, 496 N.W.2d 812, 814 (Minn. 1993); Uckun v. State Bd. of Med. Practice, 733 N.W.2d 778, 789 (Minn. Ct. App. 2007) (finding Board of Medical Practice publication of temporary suspension of appellant's license, which included confidential civil investigative data about physician, was permissible to promote public health and safety); Westrom v. Dep't of Labor & Indus., 667 N.W.2d 148, 152 (Minn. Ct. App. 2003) (finding order assessing a penalty for failure to maintain workers' compensation insurance, and objections filed to the order by the employer, are either data collected as part of an active investigation or data retained in anticipation of a pending civil legal action, and therefore confidential).

20 MINN. STAT. § 13.39, subd. 1 (2014).

21 *Id*., subd. 2a.

decision is made not to pursue the action or when the statute of limitations or the appeal period expires.[22]

13.9.3 Use of Not Public Data at a Contested Hearing

Notwithstanding the above two sections of the Data Practices Act, a question may still remain about whether an agency can introduce not public data that has not been the subject of a discovery order, as evidence at a contested case hearing. For example, suppose an agency, in defense of a discrimination charge, wishes to introduce certain private personnel data on other employees to show that it has treated all employees the same. The agency can, seek an appropriate order from the ALJ, before the contested case hearing, relying on provisions in the Minnesota APA:

> *All evidence, including records and documents containing information classified by the law as not public,* in the possession of the agency of which it desires to avail itself or which is offered into evidence by a party to a contested case proceeding, shall be made a part of the hearing record of the case. No factual information or evidence shall be considered in the determination of the case unless it is part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. *When the hearing record contains information which is not public, the administrative law judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.*[23]

The statute makes it clear that even not public data must be in the record to be considered in a contested case. Where it is appropriate to maintain the not public status of the data in the contested case record, the ALJ is authorized to close all or a portion of the hearing, or to seal all or a portion of the record, such as individual exhibits or portions of the transcript.[24] Under the authority to seal a part of the hearing record, an ALJ may also order that initials be used in place of proper names in a contested case record. This is most commonly ordered for minor and victims in cases in which the identification of these persons would have adverse consequences for them. The use of initials is authorized by rule.[25] The level of not public status accorded to any data by the judge should be the least restrictive necessary to accomplish the purpose.

22 *Id.*, subd. 3.

23 *Id.* § 14.60, subd. 2 (emphasis added). The OAH rules require a statement in the notice of and order for hearing to alert parties to the availability of this remedy to protect not public data. *See* MINN. R. 1400.5600, subp. 2(M) (2013).

24 By statute, some hearings are not public. *See* § 11.2.2 (discussing public hearings).

25 MINN. R. 1400.5500(M) (2013).