3.5 AGENCY SUBPOENAS

Numerous administrative agencies in Minnesota have authority to issue investigative subpoenas, that is, subpoenas issued before the filing of any complaints or charges against any individual or business.[1] Investigative subpoenas have been authorized by the United States Supreme Court since the 1940s.[2] Such subpoenas may issue whenever they are reasonable. A subpoena is reasonable if the agency has statutory authority to issue it and the documents sought to be produced are relevant to the inquiry being conducted.[3] Administrative agencies have even been permitted to engage in "fishing expeditions" with investigatory subpoenas,[4] provided the requisite standards regarding agency authority have been met.[5] Moreover, agencies may issue subpoenas to persons who are not subject to the agency's authority.[6] In such circumstances, the agency has no obligation to inform the target of the investigation that subpoenas have been issued to third parties.[7] A court may only inquire into an agency's interest in issuing a subpoena if the recipient makes an adequate showing that the agency is acting in bad faith or for an improper purpose.[8] Courts do not want to get involved in exhaustive inquisitions into the investigative practices of agencies.[9]

The Minnesota Supreme Court has taken somewhat inconsistent positions on some of the issues discussed above. At least with respect to investigations of the public examiner (now known as the legislative auditor), the court's approach to the use of agency investigative subpoenas has been conservative.[10] The court recognizes the necessity for

1 A few of the many examples of agency subpoena power in Minnesota are found in: MINN. STAT. §15.08 (commissioners of management and budget and administration);45.027,80A.79 (commissioner of commerce), 144.054, 144A.12 (commissioner of health), 214.10 (various occupational licensing boards), 216B.28 (public utilities commission), and; 270C.32 (commissioner of revenue) (2014).) In addition, MINN. STAT. § 8.16 (2014) grants authority to the attorney general to issue administrative subpoenas to require the production of records by certain types of businesses when those records are relevant to an ongoing legitimate law enforcement investigation. The attorney general may also subpoena and require the production of any records relating to the location of a debtor or the assets of a debtor, for records that are relevant to an investigation related to debt collection, excluding the power to subpoena personal appearance of witnesses unless the attorney general is so authorized by other statute or court rule. *Id*.

2 Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 209-14 (1946).

3 *Id*. at 208-09; *accord* United States v. Powell, 379 U.S. 48, 57-58 (1964) (concluding that the investigation must be for legitimate purpose, the inquiry must be relevant to that purpose, the information must not already be within agency's possession, and any administrative steps required by statute must have been followed).

4 United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.").

5 *Id*. ("But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."); *see also Oklahoma Press*, 327 U.S. at 212.

6 Hannah v. Larche, 363 U.S. 420, 446 (1960).

7 SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 750-51 (1984).

8 Resolution Trust Corp. v. Frates, 61 F.3d 962, 965 (D.C.Cir. 1995).

9 *Id*.

10 *See* Roberts v. Whitaker, 287 Minn. 452, 457-58, 178 N.W.2d 869, 873-74 (1970).

broadly construing the authority of administrative agencies to issue investigative subpoenas.[11] Accordingly, such subpoenas are to have the same effect as those issued by a court of law.[12] Likewise, the court has held that subpoenas may issue to a person or corporation not immediately subject to the administrator's jurisdiction.[13] The court has recognized the broad authority granted by the United States Supreme Court to federal administrative agencies to issue investigative subpoenas to satisfy themselves that businesses are complying with the law.[14] However, the Court has also found that such broad investigative authority is unnecessary for the functioning of the office of public examiner.[15] Restrictions imposed by the court on administrative subpoenas issued by the public examiner to nongovernmental individuals or businesses (that is, those individuals not subject to the supervisory jurisdiction of the public examiner) were as follows:

> 1. the documents must be specified with sufficient clarity and detail to be readily identifiable;
> 2. the number of documents cannot be so great as to cause an unnecessary hardship or expense;
> 3. the source of the public examiner's suspicion of misconduct must be reliable or there must be reliable evidence to believe that misconduct has occurred;
> 4. there must be no other adequate source of evidence available that could be obtained at less expense or interference with privacy;
> 5. it might reasonably be expected that the subpoenaed documents will disclose relevant evidence of misconduct.[16]

Since this case, however, the Minnesota Supreme Court has relied on the three-part test[17] of *Oklahoma Press* and *Morton Salt, supra,* in upholding a civil investigative demand issued by the Minnesota attorney general.[18] In its holding, which is equally applicable to investigative subpoenas, the court held that an investigative demand meeting the test of *Oklahoma Press* and *Morton Salt* would be quashed only if it were undertaken for an improper purpose, such as harassment.[19] Moreover, in upholding an investigative subpoena issued by the Board on Judicial Standards, the Minnesota Supreme Court held that investigative subpoenas will generally be enforced if: (1) the investigation is within the jurisdiction and authority of the board or agency; (2) the subpoena is sufficiently specific; (3) the investigation is for a proper purpose and the information sought is relevant to that purpose; and (4) the use of the subpoena power is reasonable and does not violate constitutional rights.[20] In an unpublished opinion, the Minnesota Court of Appeals likewise concluded that application of these factors required the enforcement of an investigative

11 *Id.* at 459, 178 N.W.2d at 874.

12 *Id.*

13 *Id*. at 459-60, 178 N.W.2d at 875.

14 *Id*. at 458, 178 N.W.2d at 874.

15 *Id.* at 464, 178 N.W.2d at 877.

16 *Id*. at 463-64, 178 N.W.2d at 877.

17 The inquiry must be within the agency's authority, the demand must not be too indefinite, and the information sought must be reasonably relevant. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

18 Kohn v. State, 336 N.W.2d 292, 296 (Minn. 1983);

19 *Id ; see also* State *ex rel.* R.R. & Warehouse Comm'n v. Mees, 235 Minn. 42, 51-52, 49 N.W.2d 386, 391-92 (1951).

20 *In re* Agerter, 353 N.W.2d 908, 911 (Minn. 1984).

subpoena issued by the Board of Psychology.[21] In addition, the court determined that because the Board's investigation was a preliminary fact-finding investigation, due process rights were not in jeopardy.[22] Thus, the restrictions on investigative subpoenas contained in *Roberts v. Whitaker* may be limited to that case.

The Minnesota Court of Appeals has also addressed a unique issue regarding agency subpoena authority. In *State by Johnson v. Colonna*, the court faced an apparent conflict between the investigatory subpoena authority of the Commissioner of the Department of Human Rights and the duty of a city to maintain the privacy of data protected by the Minnesota Government Data Practices Act.[23] The commissioner investigated alleged discriminatory hiring practices by the City of Saint Paul and subpoenaed personnel data classified as private under Minnesota Statutes.[24] The city refused to honor the subpoena, citing its statutory obligation to refrain from releasing the data unless directed to do so by a valid court order.[25] The court held that the agency's broad investigative responsibilities and powers were sufficient to permit the agency to obtain a district court order compelling disclosure of the data.[26] The agency subpoena alone, however, was not the equivalent of a court order and was not sufficient to require the city to release the information.[27] While holding that the district court should issue an order requiring the city to disclose the data, the appellate court also instructed the district court to issue a protective order containing any safeguards necessary to protect the affected individuals' privacy and to further the objectives of the Data Practices Act.[28]

In particular circumstances, some jurisdictions have imposed limitations on administrative investigative subpoenas beyond those contained in United States Supreme Court decisions. In California, for example, an administrative subpoena of hospital medical records needs to be honored only if the demanding agency demonstrates that the patient's right to privacy will be protected.[29] A New York court held that an administrative investigative subpoena could issue following a complaint against a licensee only if the administrative agency first made a threshold demonstration of the complaint's authenticity.[30] Finally, in *Resolution Trust Corp. v. Walde*, the D.C. Circuit Court of Appeals held that an agency must have an "articulable suspicion" that an individual is engaged in wrongdoing before it can subpoena personal financial records.[31]

The standards established by the authorities cited above regarding the issue of the reasonableness of an investigative subpoena all bear on the issue of the individual's Fourth

21 *In re* Investigation of Underwager, No. CO-97-55, 1997 WL 370523, at *2 (Minn. Ct. App. July 8, 1997), a*vailable at* http://mn.gov/lawlib/archive/ctapun/9707/55.htm.

22 *Id. (*citing Humenansky v. Minn. Bd. of Medical Exam'rs, 525 N.W.2d 559, 565 (Minn. Ct. App. 1994 (stating that full due process requirements do not attach to a general fact-finding investigation conducted by an agency)).

23 371 N.W.2d 629, 632-33 (Minn. Ct. App. 1985).

24 *Id.* at 632 (citing MINN. STAT. § 13.43, subd. 4 (2014)).

25 *Id.* at 631.

26 *Id.* at 634.

27 *Id.*

28 *Id.* at 635.

29 Bd. of Med. Quality. Assurance. v. Gherardini, 93 Cal. App. 3d 669, 679, 156 Cal. Rptr. 55, 62 (1979). *But see In re* Albert Lindley Lee Memorial Hosp., 209 F.2d 122, 124 (2d Cir. 1953).

30 *In re* Levin v. Murawski, 59 N.Y..2d 35, 38, 449 N.E.2d 730, 731 (1983).

31 18 F.3d 943, 949 (D.C. Cir. 1994); *accord In re* McVane v. FDIC, 44 F.3d 1127, 1139 (2d Cir. 1995).

Amendment right to be free from unreasonable searches and seizures. The individual challenging the issuance of the subpoena, however, must be the one whose Fourth Amendment rights are allegedly being violated. Accordingly, only the party to whom the subpoena is issued has standing to object on Fourth Amendment grounds.[32]

The Minnesota Court of Appeals has held that the Fourth Amendment exclusionary rule, which requires suppression of illegally obtained evidence, is applicable in an arbitration hearing regarding an employee discharge. In *Minnesota State Patrol Troopers Association v. Department of Public Safety*, a law enforcement agency wrongfully seized evidence on a defective search warrant and then transferred the evidence to another branch of the same administrative agency for use in an employee dismissal proceeding against a state trooper.[33] The court found that, under these circumstances, application of the exclusionary rule in an arbitration proceeding furthered the purpose of the rule to deter future unlawful police conduct.[34] However, the court declined to extend the Fifth Amendment *Miranda* requirements to the arbitration proceeding, holding that oral statements given to law enforcement officials in the absence of a *Miranda* warning are admissible in a civil employee discharge hearing.[35]

The Fifth Amendment protection against self-incrimination may also be asserted by an individual receiving an investigative subpoena.[36] However, if the information being sought is of a corporation, partnership, or other business entity, no privilege against self-incrimination will be recognized,[37] because none exits.[38] This is true "even when the corporation is merely an alter ego of the owner."[39] If an agent of a corporation is being compelled to give testimony, the agent may invoke the privilege against self-incrimination. Under such circumstances, the corporation must appoint an agent who can give the information that is available to the corporation.[40]

Some courts have limited the application of the exclusionary rule to those administrative proceedings that are "quasi-criminal" in nature. A "quasi-criminal" administrative proceeding has been defined as one that provides for punishment, such as the forfeiture of property or the loss of public employment.[41] Disciplinary hearings, on the other hand, are *sui generis* and courts have found parties to such hearings not to be entitled to the "full panoply of rights afforded an accused in a criminal case."[42]

Because investigative subpoenas issued in Minnesota ordinarily precede the initiation of a contested case proceeding, the procedure contained in the rules of the office of administrative hearings for quashing or modifying a subpoena would ordinarily be

32 Bouschor v. United States, 316 F.2d 451, 458 (8th Cir. 1963).
33 437 N.W.2d 670, 672-76 (Minn. Ct. App. 1989).
34 *Id*. at 676.
35 *Id*. at 677.
36 State v. Nolan, 231 Minn. 522, 530, 44 N.W.2d 66, 71-72 (1950).
37 Kohn v. State, 336 N.W.2d 292, 296 (Minn. 1983).
38 State v. Alexander, 281 N.W.2d 349, 353 (Minn. 1979).
39 *Kohn* , 336 N.W.2d at 298.
40 *Id*. at 296; United States v. Kordel, 397 U.S. 1, 8 (1970).
41 *See* Savina Home Indus., Inc. v. Sec'y of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979).
42 *See* Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1435 (10th Cir. 1984). For further discussion on admissibility of illegally obtained evidence in contested case hearings, see § 10.10 *infra*.

unavailable to the party from whom information is subpoenaed.[43] Therefore, the party seeking to challenge an investigative subpoena may presumably do so either by making its objections directly to the agency or by refusing to comply with the subpoena, in which case the agency would be compelled to seek enforcement in district court.[44] Once a court has issued an order enforcing an administrative subpoena, a refusal to comply with the order may be punished by the court as contempt of court.[45] In addition to one's constitutional immunities, an individual who is the subject of an administrative subpoena may ordinarily claim any applicable testimonial privilege, such as the attorney-client privilege.[46]

[43] MINN. R. 1400.7000 (2013) applies to subpoenas issued by the chief administrative law judge pursuant to MINN. STAT. § 14.51 (2014) following initiation of a contested case proceeding.

[44] In reviewing a challenge to an investigative subpoena, the courts ordinarily inquire only whether the agency has authority to issue the subpoena and whether the materials sought are relevant to the investigation. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 215 (1946) . Questions of agency jurisdiction are generally reserved for determination in any adjudicative proceeding that might arise from the investigation. In Holt v. Bd. of Medical Exam'rs, 431 N.W.2d 905, 906 (Minn. Ct. App. 1988), a party challenging an agency subpoena sought a district court order quashing the subpoena. After being denied the order, the subject of the subpoena sought a writ of prohibition from the court of appeals. Holding that Holt failed to establish that the trial court permitted disclosure of information that was clearly not discoverable, the court denied the petition for a writ of prohibition. *Holt*, 431 N.W.2d at 907.

[45] MINN. STAT. § 588.01, subd. 3 (2014).

[46] *Holt*, 431 N.W.2d at 907 (absent constitutional prohibitions, an issue on which the court reserved judgment, the legislature may grant an agency statutory authority to subpoena information notwithstanding the Data Practices Act, Patient Bill of Rights, or "any other law limiting access to medical or other health data").