Chapter 3. Agency Investigations

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3.1 Introduction

Administrative agencies possess various types of investigative authority. This chapter will examine the nature of and limitations on the prehearing investigative authority of administrative agencies.[1]

3.2 Investigations

Investigations are fact-finding activities of administrative agencies. The authority to investigate frequently exists independent of a pending administrative or civil proceeding.[2] For that reason, investigations must be distinguished from the process of agency adjudication.[3] Agency investigations may involve inspections, compulsory submission of statements or reports, compulsory testimony or production of documents[4], and even compulsory mental and physical examinations.[5] Agencies may engage in fact-finding activities for a variety of purposes.

[1] For additional materials regarding agency investigations and subpoena power, see 1 Kenneth C. Davis and Richard. Pierce, Jr., Administrative Law Treatise § 4 (5th ed. 2010), and 1 Charles H. Koch, Jr., Administrative law and Practice §§ 3.1-3.20 (3d ed. 2010). For purposes of this chapter, the prehearing investigative authority being examined is the authority to investigate that exists before the initiation of an administrative contested case proceeding under Minn. Stat. § 14.57 (2014). Thus, there is no discussion of the right of a party to invoke the subpoena authority of the Office of Administrative Hearings under Minn. Stat. § 14.51 (2014). Discussion of that authority is contained in § 7.4.2 infra, which relates to prehearing procedures.

[2] *United States. v. Oncology Servs. Corp.*, 60 F.3d 1015, 1019 (3rd Cir. 1995); *NLRB v. Carolina Food Processors Inc.*, 81 F.3d 507, 511 (4th Cir. 1996); *U.S. EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 451 (11th Cir. 1996).

[3] *Hannah v. Larche*, 363 U.S. 420, 446 (1960); *State ex rel. R. R. & Warehouse Comm'n v. Mees*, 235 Minn. 42, 52, 49 N.W.2d 386, 392 (1951) ("[A]n 'investigation' may be utilized in furtherance of nonjudicial functions . . . .").

[4] *But see Kohn v. State by Humphrey*, 336 N.W. 2d 292, 286 (Minn. 1983) (holding that an investigation cannot compel a corporate agent to give testimony that may be self-incriminatory under the Fifth Amendment).

[5] *Humenansky v. Minn. Bd. of Medical Exam'rs*, 525 N.W.2d 559, 562-563 (Minn. Ct. App. 1994) (stating that "the board may direct the physician to submit to a mental or physical examination" as a condition of licensure).

An investigation may be undertaken for the licensing of an individual or a business;[6] adjudication;[7] supervision of a business activity;[8] or the development of policy.[9]

In a sense, the agency power to investigate may be viewed as inquisitorial in that it may be based on a mere suspicion that the law is being violated or may be simply to satisfy the agency that no violation exists.[10] Agency investigations of specific activity by an individual or business need not be undertaken solely for the purpose of proving pending charges but may also be undertaken to ascertain whether any such charges should be brought.[11] However, investigations by agencies may only be conducted when the agency has the statutory authority to do so.[12]

3.3 General Procedures

Agency investigations are analogous to grand jury proceedings because no case or controversy is necessary to enable the agency to invoke its investigative authority.[13] An agency investigation may be informal and nonadversarial in nature.[14] Thus, where an agency is required only to have reasonable grounds to believe that there may be a violation of law, the agency is not precluded from proceeding with its investigation on the filing of an affidavit controverting the agency's allegations.[15] An agency investigation may not result in a final decision as provided for in Minnesota Statutes section 14.61, since such a decision may only follow an administrative contested case proceeding. Accordingly, the due process requirements relating to agency

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[6] *See, e.g.,* Minn. Stat. §§ 80A.61 (securities investigations), 82.58, subd. 2 (regarding real estate broker licensure), 144A.03, subd. 1 (reporting requirements that are preconditions to nursing home licensure), 332.33, subd. 4 (collection agencies) (2014).

[7] *See e.g.,* Minn. Stat. § 214.10 (permitting the attorney general to investigate various occupational licensees once appropriate state licensing board has received communication alleging violation of law and before initiation of formal disciplinary action against licensee; §332.40 (collection agencies)

[8] *See, e.g.,* Minn. Stat. §§ 501B.38,.40 (2014) (requiring a charitable trust to make periodic filings with the attorney general for the purpose of enabling the attorney general to monitor compliance with relevant laws by charitable trust). Other statutes authorizing supervision of business entities include: Minn. Stat. §§ 46.04,.05 (banking), 60A.031 (insurance), 60K.43 (insurance agents), 62D.14 (health maintenance organizations), 80A.79 (securities), 82.72 (real estate brokers), 332.40 (collection agencies) (2014).

[9] *See, e.g.,* Minn. Stat. § 144.693 (2014) (requiring insurers for hospitals, out-patient surgery centers, and health maintenance organizations to periodically submit to the commissioner of health information regarding malpractice claims that have been resolved; based on the data submitted, the commissioner of health is to make annual report to legislature regarding malpractice claims as well as any recommendations to reduce their incidence or size).

[10] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

[11] *Kohn v. State*, 336 N.W.2d 292, 296 (Minn. 1983).

[12] *State v. Lloyd A. Fry Roofing Co.*, 310 Minn. 528, 534, 246 N.W.2d 696, 700 (1976) (concluding that the Minnesota Pollution Control Agency may not compel private business to conduct emission tests at its own expense absent specific statutory authority).

[13] *United States v. Morton Salt Co., 338 U.S. 642 (1950).*

[14] *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Ass'n for Benefit of Non-Contract Emps.*, 380 U.S. 650, 662 (1965); *see, e.g.*, Minn. Stat. §§ 46.04,.05 (2014) (requiring periodic examinations of financial institutions).

[15] *Kohn v. State*, 336 N.W.2d 296 (Minn. 1983).

adjudications do not attach at the investigative stage of proceedings.[16] For example, the subject of an investigation ordinarily has no right to be apprised of the charges being made, to confront witnesses, or to cross-examine witnesses.[17]

3.4 Specific Procedures

3.4.1 Inspections

A good starting point for a review of current law on administrative inspections of premises is *Camara v. Municipal Court*.[18] *Camara* involved a routine housing inspection of an apartment building for possible code violations.[19] The U.S. Supreme Court held that an attempted warrantless search of a residential unit in a building constituted an unlawful search and seizure in violation of the Fourth Amendment.[20] In the absence of consent, officials could not conduct an inspection without first obtaining a warrant by establishing that probable cause existed to conduct the search.[21] The Court, however, broadly defined the probable cause standard for the conduct of routine administrative inspections.[22] In addition, the Court required only that the need for the particular inspection be weighed in terms of reasonable goals of the code being enforced.[23] Thus, if reasonable legislative or administrative standards existed for the conduct of an inspection, the warrant would issue.[24] Warrantless inspections could continue to be held in an emergency or, of course, where permission was granted by the owner of the property.[25]

On the same day as the *Camara* decision, the Supreme Court issued its ruling in *See v. City of Seattle.*[26] The only question in *See* was whether the *Camara* holding applied to commercial structures not used as private residences.[27] The Court found that a warrant was necessary for a nonconsensual inspection of commercial premises or portions of commercial premises that are not open to the public.[28]

The Minnesota Court of Appeals cited the *Camara* decision in upholding an administrative search of rental housing by a city.[29] A city ordinance authorized a search warrant

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[16] *Hannah v. Larche*, 363 U.S. 420, 440 (1960); *Humenansky v. Minn. Bd. of Medical Exam'rs*, 525 N.W.2d 559, 566 (Minn. Ct. App. 1994) (stating that a psychiatrist's protected interest was not implicated because her license to practice was not immediately at stake in the investigatory proceeding).

[17] *Hannah,* 363 U.S. at 440.

[18] 387 U.S. 523 (1967).

[19] *Id.* at 526.

[20] *Id.* at 534.

[21] *Id.* at 535.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 539.

[26] 387 U.S. 541 (1967).

[27] *Id.* at 542.

[28] *Id.* at 544-45.

[29] *In re Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 276 (Minn. Ct. App. 1998). In the criminal context, the Minnesota Supreme Court has looked to article 1, section 10, of the Minnesota

for the inspection of rental housing upon a showing of probable cause for its issuance, made to a court of competent jurisdiction.[30] The court of appeals determined that no statutory authority was necessary for the search warrant in light of the case law authority and that the warrant did not have to be executed by a peace officer as is usually required by Minn. Stat. § 626.15.[31] The court found that probable cause existed in this particular inspection since it was a re-inspection.[32] The court of appeals invited the legislature to consider enactment of a statute providing general authorization for administrative search warrants.[33]

After *Camara* and *See,* the Supreme Court allowed warrantless administrative inspections in certain circumstances. In *Colonnade Catering Corp. v. United States,* the Court concluded that Congress could statutorily authorize a warrantless search of a liquor licensee's premises.[34] However, since the statute did not specifically authorize a forcible entry, the Court suppressed the evidence that was obtained when Internal Revenue Service agents forced their way into a locked storeroom.[35] In *United States v. Biswell,* a warrantless search of a licensed gun dealer was permitted for the purpose of determining whether the dealer was in compliance with the federal Gun Control Act.[36] The federal act authorized the warrantless search in such situations. The Court noted that the businesses involved in these cases were "pervasively regulated"[37] and "long subject to close supervision and inspection."[38] The rationale underlying both of these cases is that of implied consent to the inspection. The Court concluded that anyone entering businesses involving close government supervision must do so fully aware that inspections are likely. Therefore, these businesses are presumed to have consented to such inspections. In considering whether an agency can engage in a warrantless search of business premises, it is necessary to examine the statute or regulatory scheme by which the search is conducted and determine whether the method of regulation makes a warrant unnecessary.[39]

Constitution in order to provide greater protection for Minnesota citizens' right to be free from unreasonable searches, beyond the protections of the Fourth Amendment. *See, e.g., State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005) (self-storage unit exterior); *State v. Larsen*, 650 N.W.2d 144, 153-54 (Minn. 2002) (ice-fishing house); *Ascher v. Comm'r of Public Safety*, 519 N.W.2d 183, 187 (Minn. 1994) (drunk driving roadblock). The court has not specifically addressed whether the Minnesota Constitution would also provide greater protection from administrative searches.

[30] *Rozman*, 586 at 274-75.

[31] *Id.* at 276-77.

[32] *Id.*

[33] *Id.* at 276.

[34] 397 U.S. 72, 75 (1970).

[35] *Id.* at 77.

[36] 406 U.S. 311, 316 (1972); *see also State v. Wybierala*, 305 Minn. 455, 460, 235 N.W.2d 197, 200 (1975) (licensed junk and second hand dealers).

[37] *Biswell*, 406 U.S. at 316.

[38] *Colonnade,* 397 U.S. at 74.

[39] *Donovan v. Dewey*, 452 U.S. 594, 603-05 (1981). *See also New York v. Burger*, 482 U.S. 691 (1987) (warrantless search of "closely regulated" automobile junkyard permitted); *United States v. Griffin*, 555 F.2d 1323 (5th Cir. 1977); *Mendez v. Arizona State Bd. of Pharmacy*, 129 Ariz. 89, 628 P.2d 972 (1981); *State v. Tindell*, 272 Ind. 479, 399 N.E.2d 746 (1980); *Lanchester v. Pennsylvania Racing Comm'n*, 325 A.2d 648 (1974); *State Real Estate Comm'n v. Roberts*, 271 A.2d 246 (1970) (relied on required record doctrine of *Shapiro v. United States*,

Inspections conducted pursuant to the Occupational Safety and Health Act of 1970 (OSHA) were determined, in *Marshall v. Barlow's, Inc.* to require warrants when the owner of the property refuses to consent to the inspection.[40] In requiring that administrative agencies obtain warrants for nonconsensual OSHA inspections, the U.S. Supreme Court stated that the warrantless searches permitted by *Colonnade* and *Biswell* were exceptions arising out of "relatively unique circumstances."[41] Again, the Court stressed that probable cause for obtaining a warrant in a criminal law sense was not required.[42] The inspection intended to be conducted need only be reasonable, regardless of whether the agency had any evidence of a violation.[43] Later, in *Donovan v. Dewey,* a warrantless inspection conducted under the Federal Mine Safety and Health Act was found not to violate the Fourth Amendment.[44] The *Donovan* decision expressly limited *Marshall v. Barlow's, Inc.,* to OSHA inspections.[45] The Court found that in determining the constitutionality of a warrantless inspection, an analysis must be conducted of the particular statute.[46] Since *Donovan* involved a relatively new regulatory program, the Court rejected the implication of *Colonnade* that a long tradition of government supervision must be found before a warrantless search is permissible.[47] Instead, the Court held that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."[48] Consequently, courts must attempt to examine the nature and purpose of an administrative program to determine whether a search is reasonable and whether implied consent might be found. Under that analysis, a case worker visiting the home of an individual receiving public assistance has been found not to violate the Fourth Amendment.[49]

3.4.2 Other Investigations

In addition to the inspection of premises, agencies investigate matters in a variety of other ways. These include the use of subpoenas, the submission of reports, the submission to examinations, and the use of fact-finding hearings.

The authority of agencies to require the submission of reports has long been recognized. In *United States v. Morton Salt Co.*, the Supreme Court held that an agency with statutory authority may require a business to submit a report regarding its compliance with the law provided that the demand is "not too indefinite and the information sought is reasonably relevant."[50] Within this authority, an agency may be able to require more than the production

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335 U.S. 1 (1948), in holding that warrantless inspection of escrow records pursuant to statute requiring that such records be kept and open to inspection would not be unconstitutional).

[40] 436 U.S. 307, 322-24 (1978).

[41] *Id.* at 313.

[42] *Id.* at 309.

[43] *Id.* at 320.

[44] *Donovan,* 452 U.S. at 603-05.

[45] *Id.* at 601.

[46] *Id.*

[47] *Id.* at 605-06.

[48] *Id.* at 606.

[49] *Wyman v. James*, 400 U.S. 309, 326 (1971).

[50] 338 U.S. 632, 652 (1950).

of existing documents;[51] it may also be able to compel a party to develop and compile information.[52] In *Application of Northwestern Bell Telephone Co*., the Minnesota Court of Appeals held that the express authority of the Minnesota Public Utilities Commission (MPUC) to make investigations and determinations regarding the conduct of the businesses it regulates includes an implicit authority to impose record-keeping requirements such as the submission of accounting reports.[53]

In *United States v. Ward,* the Supreme Court examined a Fifth Amendment challenge to the requirement that an individual in charge of an onshore facility report oil discharges into navigable waters.[54] The Supreme Court upheld the requirement as constitutional on the basis that information in the report could result only in the imposition of a civil penalty, not a criminal penalty.[55] Accordingly, the Fifth Amendment protection against self-incrimination was found not to apply, despite the fact that a failure to file a report could result in a criminal penalty.[56] In *Hudson v. U.S.,* the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment is not a bar to a later criminal prosecution, because the administrative proceedings in the Office of the Comptroller of the Currency resulting in monetary penalties and occupational disbarment were civil, not criminal, reaffirming the rule exemplified in *Ward*.[57]

Along with the authority to require the submission of reports, certain occupational licensing agencies have the authority to require licensees to submit to medical examinations. In *Humenansky*, the Minnesota court of appeals upheld the Board of Medical Practice's authority, under Minn. Stat. § 147.091, subd. 6(a) (1992), to require a licensed physician to submit to a mental and physical examination as part of an investigation into the physician's fitness to practice.[58] The court determined that the proposed examination was an investigatory tool and that no disciplinary action would be forthcoming absent formal adjudicatory proceedings.[59] Therefore, the court found that Humenansky's protected interest in her license was not implicated and full due process requirements do not attach at this procedural stage.[60] In so finding, the court emphasized the government's interest in protecting the public from unsafe or incompetent practitioners.[61]

Agencies also use fact-finding hearings as a means of investigation. Such hearings are not a quasi-judicial function of the agency and, therefore, do not require the agency to apprise the subject of any allegations made or to permit confrontation or cross-examination of witnesses.[62] Only if the investigation results in a decision to adjudicate the rights of participants

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[51] *Id*. at 650.
[52] *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1038 (10th Cir. 1993).
[53] 371 N.W.2d 563, 567 (Minn. Ct. App. 1985).
[54] 448 U.S. 242, 244 (1980).
[55] *Id*. at 254-55.
[56] *Id.*
[57] 522 U.S. 93, 95-96 (1997).
[58] *Humenansky v. Minn. Bd. of Medical Exam'rs*, 525 N.W.2d 559, 568 (Minn. Ct. App. 1994).
[59] *Id*. at 566.
[60] *Id*.
[61] *Id*. at 567.
[62] *Hannah v. Larche*, 363 U.S. 420, 446 (1960); *see, e.g.,* Minn. Stat. § 62D.14 (2014) (investigative hearings of health maintenance organizations); § 216B.28-.31 (investigation of public utilities).

in the investigation do the constitutional and statutory provisions regarding contested cases apply.[63] An agency may use its subpoena power for an investigative hearing with respect to persons not subject to direct regulation by the agency.[64]

Finally, agencies frequently use methods of investigation comparable to those used by the police. Such investigative techniques range from interviewing witnesses to the use of undercover investigators to discover a violation.[65]

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.[66] Investigative subpoenas have been authorized by the United States Supreme Court since the 1940s.[67] 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.[68] Administrative agencies

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[63] *State ex rel. R.R. & Warehouse Comm'n v. Mees*, 235 Minn. 42, 50, 49 N.W.2d 386, 391 (1951).

[64] *Id.*

[65] The use of undercover investigators may raise a question of entrapment. *State v. Grilli*, 304 Minn. 80, 89, 230 N.W.2d 445, 452 (1975), establishes that Minnesota follows the majority ("subjective") view on the entrapment defense in criminal proceedings, which is concerned primarily with the element of the particular defendant's predisposition to commit the crime. The minority ("objective") view focuses not on the defendant's predisposition to commit a crime, but rather on determining whether the state actions would induce a normally law-abiding individual to commit a crime. *Id.* Although the issue has not arisen frequently, it appears that an entrapment defense may legitimately be raised in an administrative action where the agency has used an undercover operation. *See Patty v. Board of Medical Exam'rs*, 9 Cal. 3d 356, 362, 508 P.2d 1121, 1125 (1973). *But compare Schaffer v. State Bd. of Veterinary Med.*, 143 Ga. App. 68, 77, 237 S.E.2d 510, 513 (1977) (stating that an entrapment defense is available in disciplinary action against a veterinarian), *with In re Kennedy*, 266 Ga 249, 466 S.E.2d 1 (1996) (concluding that the elements of an entrapment defense render it incompatible with the nature of an attorney disciplinary proceeding). Minnesota courts have not definitively addressed the availability of the entrapment defense in administrative proceedings. In *In re Disciplinary Actions against Pedley*, No. CX-92-1453, 1993 WL 79588, at *1 (Minn. Ct. App. Mar. 23, 1993), relators challenged the county's use of underage decoys to purchase alcoholic beverages, resulting in fines and suspensions of retail liquor licenses. The court stated "it is not clear whether the entrapment defense is available in administrative proceedings." *Pedley,* 1993 WL 79588, at *2. However, the court did not reach the entrapment issue because relators had not established inducement. *Id.*

[66] 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.*

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

[68] *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

have even been permitted to engage in "fishing expeditions" with investigatory subpoenas,[69] provided the requisite standards regarding agency authority have been met.[70] Moreover, agencies may issue subpoenas to persons who are not subject to the agency's authority.[71] In such circumstances, the agency has no obligation to inform the target of the investigation that subpoenas have been issued to third parties.[72] 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.[73] Courts do not want to get involved in exhaustive inquisitions into the investigative practices of agencies.[74]

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.[75] The court recognizes the necessity for broadly construing the authority of administrative agencies to issue investigative subpoenas.[76] Accordingly, such subpoenas are to have the same effect as those issued by a court of law.[77] Likewise, the court has held that subpoenas may issue to a person or corporation not immediately subject to the administrator's jurisdiction.[78] 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.[79] However, the Court has also found that such broad investigative authority is unnecessary for the functioning of the office of public examiner.[80] 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;

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must not already be within agency's possession, and any administrative steps required by statute must have been followed).

[69] *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.").

[70] *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.

[71] *Hannah v. Larche*, 363 U.S. 420, 446 (1960).

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

[73] *Resolution Trust Corp. v. Frates*, 61 F.3d 962, 965 (D.C.Cir. 1995).

[74] *Id*.

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

[76] *Id.* at 459, 178 N.W.2d at 874.

[77] *Id.*

[78] *Id*. at 459-60, 178 N.W.2d at 875.

[79] *Id*. at 458, 178 N.W.2d at 874.

[80] *Id.* at 464, 178 N.W.2d at 877.

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.[81]

Since this case, however, the Minnesota Supreme Court has relied on the three-part test[82] of *Oklahoma Press* and *Morton Salt, supra,* in upholding a civil investigative demand issued by the Minnesota attorney general.[83] 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.[84] 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.[85] In an unpublished opinion, the Minnesota Court of Appeals likewise concluded that application of these factors required the enforcement of an investigative subpoena issued by the Board of Psychology.[86] In addition, the court determined that because the Board's investigation was a preliminary fact-finding investigation, due process rights were not in jeopardy.[87] 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.[88] The commissioner investigated alleged discriminatory hiring

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[81] *Id*. at 463-64, 178 N.W.2d at 877.

[82] 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).

[83] *Kohn v. State*, 336 N.W.2d 292, 296 (Minn. 1983).

[84] *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).

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

[86] *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.

[87] *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)).

[88] 371 N.W.2d 629, 632-33 (Minn. Ct. App. 1985).

practices by the City of Saint Paul and subpoenaed personnel data classified as private under Minnesota Statutes.[89] 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.[90] 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.[91] 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.[92] 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.[93]

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.[94] 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.[95] 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.[96]

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 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.[97]

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.[98] The court found that, under these circumstances, application of the exclusionary rule in an

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[89] *Id.* at 632 (citing Minn. Stat. § 13.43, subd. 4 (2014)).

[90] *Id.* at 631.

[91] *Id.* at 634.

[92] *Id.*

[93] *Id.* at 635.

[94] *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).

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

[96] 18 F.3d 943, 949 (D.C. Cir. 1994); *accord In re McVane v. FDIC*, 44 F.3d 1127, 1139 (2d Cir. 1995).

[97] *Bouschor v. United States*, 316 F.2d 451, 458 (8th Cir. 1963).

[98] 437 N.W.2d 670, 672-76 (Minn. Ct. App. 1989).

arbitration proceeding furthered the purpose of the rule to deter future unlawful police conduct.[99] 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.[100]

The Fifth Amendment protection against self-incrimination may also be asserted by an individual receiving an investigative subpoena.[101] However, if the information being sought is of a corporation, partnership, or other business entity, no privilege against self-incrimination will be recognized,[102] because none exits.[103] This is true "even when the corporation is merely an alter ego of the owner."[104] 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.[105]

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.[106] 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."[107]

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 unavailable to the party from whom information is subpoenaed.[108] 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.[109] Once a court has issued an order

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[99] *Id*. at 676.

[100] *Id*. at 677.

[101] *State v. Nolan*, 231 Minn. 522, 530, 44 N.W.2d 66, 71-72 (1950).

[102] *Kohn v. State*, 336 N.W.2d 292, 296 (Minn. 1983).

[103] *State v. Alexander*, 281 N.W.2d 349, 353 (Minn. 1979).

[104] *Kohn*, 336 N.W.2d at 298.

[105] *Id*. at 296; *United States v. Kordel*, 397 U.S. 1, 8 (1970).

[106] *See Savina Home Indus., Inc. v. Sec'y of Labor*, 594 F.2d 1358, 1363 (10th Cir. 1979).

[107] *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*.

[108] 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.

[109] 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.

enforcing an administrative subpoena, a refusal to comply with the order may be punished by the court as contempt of court.[110] 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.[111]

3.6 Prosecutorial Discretion and Selective Enforcement

Agencies enjoy broad discretion both in determining whether to initiate enforcement proceedings and in deciding whom to prosecute. Factors that may weigh on an agency's decision to prosecute include cost-effectiveness and the need to make the best use of often scarce government resources.[112] Courts have historically been reluctant to review agency decisions to initiate administrative proceedings.[113] However, the tradition of prosecutorial discretion will not immunize from judicial scrutiny agency enforcement decisions motivated by improper factors or otherwise contrary to law.[114] In *United States v. Johnson,*[115] the Fifth Circuit stated "in the rare situation where the decision to prosecute is so abusive of this discretion as to encroach on constitutionally protected rights, the judiciary must protect against unconstitutional deprivations."[116] If, for example, it is shown that government officers were motivated by intentional or purposeful discrimination in their enforcement of a statute or regulation resulting in unequal application to those entitled to equal treatment, a violation of the Equal Protection Clause will be found.[117] The showing of discrimination is not limited to factors such as race or religion, but also may include other improper motives that can be characterized as vindictive or abusive prosecution.[118]

Yet, there is a strong presumption that government decisions are undertaken in good faith and the burden of proving arbitrariness or discrimination is on the person challenging the governmental action.[119] The unequal application of a statute or regulation by state officers is not a denial of equal protection unless the challenging party shows by a clear preponderance of

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[110] § 588.01, subd. 3 (2014).

[111] *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").

[112] *See* 2 CHARLES H. KOCH, JR, ADMINISTRATIVE LAW AND PRACTICE § 5.30 (3d. ed. 2010).

[113] *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 238-39 (1980).

[114] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (stating that the Due Process Clause may impose limits on the partisanship of administrative prosecutors.

[115] 577 F.2d 1304 (5th Cir. 1977).

[116] *Id*. at 1307.

[117] *Snowden v. Hughes*, 321 U.S. 1, 8, (1944); *Yick Wo v. Hopkins*, 118 U.S. 356, 374-75 (1886) (describing a laundry permitting that was neutral on its face but discriminatory in its application).

[118] *Cent. Airlines, Inc. v. United States*, 138 F.3d 333, 334-35 (8th Cir. 1998); *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998)); *Johnson*, 577 F.2d at 1307.

[119] *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 107 (Minn. Ct. App. 1987) (citing *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984)).

the evidence that there was intentional or purposeful discrimination.[120] An erroneous or mistaken performance of a statutory duty may constitute a violation of the statute but will not, without more, constitute a denial of equal protection.[121]

In *State v. Vadnais,* the Minnesota Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the intentional, discriminatory enforcement of municipal ordinances.[122] The court explained that a conscious exercise of some selectivity in enforcement, based on a rational exercise of police or prosecutorial discretion or mere laxity in enforcement, does not itself establish a constitutional violation.[123] However, an intentional or deliberate decision by public officials not to enforce penal regulations against a class of violators expressly included within the terms of the regulation does constitute a denial of the constitutional guarantee of equal protection under the laws.[124] In *Vadnais,* the defendant was convicted of parking his mobile home trailer on his land in violation of a township ordinance prohibiting the parking of trailers or "portable structures" outside of licensed trailer courts.[125] The Minnesota Supreme Court determined that township officials had enforced the ordinance in a discriminatory manner where people who parked camper trailers on their property, also in violation of the ordinance, were not prosecuted.[126] Township officials were precluded from prosecuting the defendant until such time as the town board could amend the ordinance or enforce it in a nondiscriminatory manner.[127]

In proving discriminatory enforcement, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right.[128] The defendant must prove discriminatory enforcement by a preponderance of the evidence.[129]

In *Northwestern College v. City of Arden Hills,* the Minnesota Supreme Court examined an equal protection challenge to a municipality's application of its zoning and building regulations.[130] In that case, a private college sought a declaratory judgment that the decision of the city denying its application for a special-use permit to build a fine arts center in a residential

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[120] *Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521, 526 n. 4 (Minn. 1985); *see also In re Contest of General Election*, 767 N.W.2d 453, 463-464 (Minn. 2009).

[121] *Id*.; *see also Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 359 (6th Cir. 1984); *Friedlander v. Cimino*, 520 F.2d 318, 319-20 (2d Cir. 1975).

[122] 295 Minn. 17, 19, 202 N.W.2d 657, 659 (1972).

[123] *Id*.

[124] *Id*.

[125] *Id*. at 18, 202 N.W.2d at 659.

[126] *Id*. at 20-21, 202 N.W.2d at 660.

[127] *Id*.

[128] *State v. Hyland*, 431 N.W.2d 868, 872-73 (Minn. Ct. App. 1988) (citing *State v. Russell*, 343 N.W.2d 36, 37 (Minn. 1984)).

[129] *Id*. at 873.

[130] 281 N.W.2d 865, 868 (Minn. 1979).

district was arbitrary, capricious, and void.[131] The Minnesota Supreme Court held that the denial of the special-use permit was discriminatory when similar permits had been granted previously to other private colleges and such a use was consistent with the municipality's zoning ordinance.[132] The court noted that the sole reason the permit was denied was because a neighborhood association expressed disfavor for the project. The court stated that while neighborhood sentiment may be taken into consideration in any zoning decision, it may not constitute the sole basis for granting or denying a given permit.[133] One applicant may not be preferred over another for reasons unexpressed or unrelated to the health, welfare, or safety of the community or any other permissible standard imposed by the relevant zoning ordinance.[134]

However, in *Draganosky v. Minnesota Board of Psychology,* the Minnesota Supreme Court rejected an equal protection challenge to the Board of Psychology's denial of a license application brought under the Board's variance procedure where the applicant failed to establish arbitrariness or discrimination on the part of the Board.[135] Specifically, the applicant made no comparative showing of other licensure approvals under the variance procedure and he failed to demonstrate that similarly situated applicants were treated differently.[136] The burden of proof to show that the Board applied its variance rule in a discriminatory manner is on the applicant.[137] The court held that the Board enjoys the presumption that it has abided by its procedures and, absent a showing of clear and intentional discrimination, a denial of equal protection claim will fail.[138]

Courts are even more wary of second-guessing an agency decision not to act. In *Heckler v. Chaney,* the U.S. Supreme Court determined that the decision by the Commissioner of the FDA not to examine whether a drug used to execute prisoners by lethal injection was "safe and effective" for that purpose was unreviewable.[139] The Court explained that, given the agency's expertise, the agency was "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[140] Furthermore, the Court noted that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."[141]

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[131] *Id.* at 866.
[132] *Id.* at 868.
[133] *Id.* at 869.
[134] *Id.*
[135] *Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521, 526 n. 4 (Minn. 1985).
[136] *Id.* at 525-56.
[137] *Id.*
[138] *Id.*
[139] 470 U.S. 821, 837-48 (1985).
[140] *Id.* at 831-32.
[141] *Id.* at 832.

3.7 Combination of Investigatory and Adjudicative Functions

After investigating an allegation of misconduct, an agency is not precluded from sitting in an adjudicative capacity to ultimately determine the truth of the allegations.[142] The combination of investigative and adjudicative functions does not necessarily create a risk of bias in an administrative agency sufficient to constitute a denial of due process. Unless a showing of actual bias has been made, administrative officials are presumed to be capable of deciding a contested case based on information presented at the hearing alone.[143] The Minnesota court of appeals has cautioned that participation, no matter how minimal, in the decision-making process of an agency by an attorney who was the agency's advocate in a contested case hearing creates an appearance of bias and is to be avoided.[144] It is therefore common for one assistant attorney general to represent the agency staff in a licensing case while another will advise the Board or Commissioner in making the final decision.[145]

3.8 Classification of Investigative Data under Minnesota Law

Under the Minnesota Government Data Practices Act, investigative data is specifically classified for purposes of determining a person's right of access to the data.[146] Under the act, data "collected by state agencies, political subdivisions, or statewide systems as part of an active investigation undertaken for the purpose of commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action,"[147] is classified either as protected nonpublic, in the case of data not on individuals, or confidential, in the case of data on individuals. With either classification, the data is not available either to the public or to the subject of the data.[148] Notwithstanding the general classification of investigative data under the Minnesota Government Data Practices Act, the investigative data of a particular unit of government may have a separate statutory classification.[149]

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[142] *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

[143] *Id.* at 57-58; *see also, In re Kennedy v. L.D.*, 430 N.W.2d 833, 835 (Minn. 1988)

[144] *Richview Nursing Home v. Minn. Dep't of Pub. Welfare*, 354 N.W.2d 445, 460 (Minn. Ct. App. 1984); *Schmidt v. Indep. Sch. Dist. No. 1*, 349 N.W.2d 563, 567-68 (Minn. Ct. App. 1984) (holding that an agency must keep its advocacy and decision-making functions separate in a contested case proceeding).

[145] *See In re Sleepy Eye Care Ctr. v. Comm'r of Human Services*, 572 N.W.2d 766, 771-72 (Minn. Ct. App. 1998) (demonstrating that, absent any evidence of improper conduct on the part of the assistant attorney general or any actual bias on the part of the commissioner, the court declined to change the agency review process).

[146] Minn. Stat. § 13.39 (2014). For a discussion of covered under the Minnesota Government Data Practices Act, see, § 13.2 *infra*.

[147] A "pending civil legal action" is defined as including judicial, administrative, or arbitration proceedings. Minn. Stat. § 13.39, subd. 1 (2014). *See generally Westrom v. Dep't of Labor & Industry*, 686 N.W.2d 27, 33 (Minn. 2004).

[148] An exception is provided if the agency decides that providing access to the data "will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest." Minn. Stat. § 13.39, subd. 2 (2014).

[149] *See, e.g.,* Minn. Stat. §§ 13.3805, subds. 1, 3 (epidemiologic and health facility complaint investigations by department of health), 13.41, subd. 4 (investigative data of licensing agencies), 13.46, subd. 3 (investigative data of state welfare system), 13.65 (investigative data of office of attorney general), 13.86,

Inactive civil investigative data are public, unless the release of the data would jeopardize another pending civil legal action or the data are classified as not public by other law.[150] Civil investigative data become inactive upon the occurrence of any of the following events: (1) a decision by the government entity or by the chief attorney acting for the government entity not to pursue the civil action; (2) expiration of the time to file a complaint under the statute of limitations or agreement applicable to the civil action; or (3) exhaustion of or expiration of rights of appeal by either party to the civil action.[151]

subd. 2 (investigative data of correctional and detention facilities), 626.557, subd. 12b (investigations of maltreatment of vulnerable adults) (2014).

[150] Minn. Stat. § 13.39, subd. 3 (2014).

[151] *Id*. If the government entity or its attorney decides to renew the civil action, data that is inactive because of the occurrence in clause (1) may become active.