



Rupp, Anderson, Squires & Waldspurger, P.A. Newsletter
August 22, 2014

Data Practices and Open Meetings Update

by Tessa Wagner, Associate Attorney

The Minnesota Supreme Court recently issued an opinion and the Minnesota Legislature recently issued statutory amendments that impact data practices and open meetings.

Performance Evaluations

Schwanke v. Minnesota Dep't. of Admin., A12-2062 (Minn. Aug. 6, 2014). A public employee challenged the "accuracy and completeness" of his performance evaluation under Minnesota Statutes section 13.04, subdivision 4(a). That section allows a data subject to contest the accuracy or completeness of public or private data. The Department of Administration did not accept the employee's appeal, explaining that a challenge under the Minnesota Government Data Practices Act ("MGDPA") is not the proper vehicle for a public employee to dispute a performance evaluation. The Department's position was that the employee's performance evaluation contained only subjective judgments and opinions that are not subject to challenge for "accuracy or completeness" because it is impossible to show that subjective judgments or opinions are inaccurate or incomplete. In other words, they are incapable of being proven false.

The Minnesota Supreme Court disagreed with that categorical approach and overturned the Department's dismissal, stating that some of the data in the employee's performance evaluation rested on facts that he could possibly show to be false. For example, the performance evaluation stated that the employee was asked to create a type of field training program but the employee claims that he was never asked to put that program together. Whether the employee was asked to create the program was a fact capable of being proven true or false. Therefore, such a challenge was within the purview of section 13.04, subdivision 4(a). To the extent that some of the employee's challenges reflected his dissatisfaction with the evaluation, rather than specifically contested facts that were incomplete or inaccurate, those challenges fell outside the MGDPA.

This decision opens the door to employees seeking to have data in their performance evaluations changed or removed. However, only data in an evaluation that rest on facts that can be proven true or false may be challenged. As the Court stated, "mere dissatisfaction with a subjective judgment or opinion cannot support a challenge under the [MGDPA]."

Data Breaches

Creation of Procedures - Minn. Stat. § 13.05, subd. 5. A government entity's responsible authority must establish appropriate security safeguards for all records containing data on individuals. The amendment requires those security safeguards to include "procedures for ensuring that data that are not public are only accessible to persons whose work assignment reasonably requires access to the data, and is only being accessed by those persons for purposes described in the procedure." The amendment further requires a government entity's responsible authority to "develop a policy incorporating these procedures." *Effective August 1, 2014.*

Disclosure of Data Security Breaches - Minn. Stat. § 13.055. Data breach requirements now apply to all "government entities" as opposed to only "state agencies." This means schools, cities, and counties must provide written notification of data breaches to any individual who is the subject of the data, inform the individual that a report will be prepared, and provide instructions regarding how the individual may obtain access to the report. After the government entity's responsible authority investigates the breach, it must "prepare a report on the facts and results of the investigation." The statute specifies what information the report must contain. If more than 1,000 individuals are notified of a data breach at one time, the government entity's responsible authority must also notify consumer reporting agencies. *Effective August 1, 2014, and applies to security breaches occurring on or after that date.*

Penalties - Minn. Stat. § 13.09. This section provides that any person who willfully violates the provisions of the MGDPA is guilty of a misdemeanor, which is just cause for suspension without pay or dismissal. The amendment expands this section to provide that any person "whose conduct constitutes the knowing unauthorized acquisition of not public data as defined in section 13.055, subdivision 1" is also guilty of a misdemeanor, which is just cause for suspension without pay or dismissal. Unauthorized acquisition means that a person has obtained, accessed, or viewed data without either the informed consent of the subject of the data or statutory authority, and with the intent to use the data for a nongovernmental purpose. *Effective August 1, 2014, and applies to crimes committed on or after that date.*

Government Contracts

Subject to MGDPA - Minn. Stat. § 13.05, subd. 11. This section states that if a government entity enters into a contract with a private person to perform any of its government functions, the contract must include a notice that the requirements of the MGDPA apply to the contract. This had been interpreted to impose the requirements of the MGDPA even if the notice was not included in the contract. In *Helmsberger v. Johnson Controls, Inc.*, 839 N.W.2d 527 (Minn. 2013), however, the Minnesota Supreme Court held that a contractor was not subject to the MGDPA if the required notice was not in the contract. In response, this section was amended to clarify that the requirements of the MGDPA apply even if the required notice is omitted from the contract. In practice, this means that if a school, city, or county enters into a contract with a private entity to perform any of the school's, city's, or county's functions, the private entity is subject to the requirements of the MGDPA and must comply with the MGDPA as if it were a government entity. For example, if a school contracts with a private bus company to provide its students transportation, the private bus company is obligated to produce government data under the contract upon request. *Effective following final enactment, i.e., May 29, 2014.*

Use of Social Media

Exception to OML - Minn. Stat. § 13D.065. This statute is new and states that the use of social media by members of a public body does not violate the Open Meeting Law ("OML") so long as the social media use is limited to exchanges with all members of the general public. Note that for purposes of this section, email is not considered a type of social media. Apart from this exclusion, however, social media is not defined. Practically, this means that school board members may comment on school issues on a blog, on Twitter, or on Facebook without fear of violating the OML so long as the exchanges are with all members of the general public, which requires the general public to have access to that particular type of social media. *Effective August 1, 2014.*

If your school, city, or county has questions regarding any of these new developments, contact us at (612) 436-4300.



Find us on
Facebook