OAH 5-0305-33135

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Tony Webster,

Complainant,

v.

Hennepin County and the Hennepin County Sheriff's Office,

Respondents.

NOTICE OF DETERMINATION OF PROBABLE CAUSE

AND

ORDER FOR PREHEARING CONFERENCE AND EVIDENTIARY HEARING

TO: The Parties

On January 7, 2016, Tony Webster (Complainant) filed a Complaint with the Office of Administrative Hearings. The Complainant alleges that Hennepin County and the Hennepin County Sheriff's Office (collectively, Respondents or County) violated the Minnesota Government Data Practices Act (MGDPA) by: 1) failing to comply with the appropriateness and timeliness requirements of Minn. Stat. § 13.03, subd. 2(a) (2014); 2) failing to keep records containing government data in such an arrangement and condition to make them easily accessible for convenient use, as required by Minn. Stat. § 13.03, subd. 1 (2014); 3) failing to comply with a request for access to data in violation of Minn. Stat. § 13.03, subd. 3 (2014); and 4) failing to provide written certification and statutory citation for its redactions, in violation of Minn. Stat. § 13.03, subd. 3. The factual basis for Complainant's allegations is the Respondents' replies to Complainant's data request of August 12, 2015. Respondents filed an initial response to the Complaint on January 28, 2016.

Scott Flaherty, Briggs & Morgan, P.A., appeared on behalf of Complainant. Daniel Rogan, Sr., Assistant Hennepin County Attorney, appeared on behalf of Respondents.

Based upon Minn. Stat. § 13.085 (2014), Minn. R. 1400.6500 (2015), the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

1. There is probable cause to believe that Respondents may have violated Minn. Stat. § 13.03 (2014) by failing to establish procedures to insure requests for government data are received and complied with in an appropriate and prompt manner; that records containing government data were not kept in an arrangement and condition as to make them easily accessible for convenient use; that Complainant has not been permitted to inspect and copy public government data at reasonable times and places; and that Respondents failed to timely cite the specific statutory section, temporary

classification, or provision of federal law upon which a denial of access to data has been based.

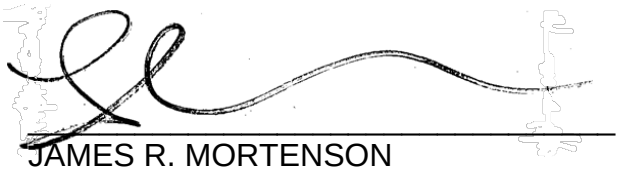
2. A telephone prehearing conference will be held on **Friday, March 4, 2016**, at **9:30 a.m.** At the appointed hour the parties are directed to:

a. Call **1-888-742-5095** and, when prompted,

b. Enter Conference Code: **685 684 1864#**.

3. The dates and times of the evidentiary hearing will be determined at the prehearing conference.

Dated: February 19, 2016



JAMES R. MORTENSON
Administrative Law Judge

MEMORANDUM

Factual Background

On August 12, 2015, Complainant sent Respondents a request to inspect records concerning how law enforcement agencies use and deploy mobile biometric technologies.[1] Complainant's letter included fourteen separate requests for data related to his research.[2]

Requests 1 through 13

Requests 1 through 13 included the following:

1. All purchasing and procurement documents for or pertaining to mobile biometric technology, including but not limited to: purchase orders, RFPs, responses to RFPs, invoices, contracts, agreements, and orders;

2. All policy, procedural, and training data for or pertaining to mobile biometric technology, including but not limited to: use policies, standard operating procedures, training materials, reports,

[1] Exhibit (Ex.) 1 at 2.
[2] *Id.* at 3-4.

presentations, privacy assessments, data retention policies, and other guidelines;

3. All programming documents or data for or pertaining to mobile biometric technology, including but not limited to: funding opportunity announcements, grant applications and grantor status or progress reports, reports to legislative bodies, annual reports or similar;

4. All audit documents and data for or pertaining to mobile biometric technology, including but not limited to: audits of the system, misuse reports, and reports to oversight bodies;

5. The total number of individuals whose biometric data has been collected by the County since January 1, 2012;

6. The total number of biometric data points contained in the County's databases or any databases the County accesses or uses;

7. The retention period for biometric data;

8. The number of mobile biometric technology devices purchased and in use, and identification of the brands and models of such devices;

9. The total number of authorized users of the mobile biometric technology devices;

10. Which external agencies and entities have access to biometric data in the database and under what conditions;

11. Whether biometric data is combined with biographic data such as name, subject identifiers, and address in any databases;

12. The process by which biometric data is entered into any databases; [and]

13. Use of mugshots and driver's license images for facial recognition technology[.][3]

Request 14

Request number 14 was for "[a]ny and all data since January 1, 2013, including emails, which reference biometric data or mobile biometric technology." The Complainant specified that the data he was seeking included, "but is not necessarily limited to emails containing the following keywords . . . :

a. biometric OR biometrics

[3] Ex. 1 at 3-4.

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."[4]

Response to Data Request

The County confirmed receipt of Complainant's data request on August 12, 2015.[5] The County and Complainant communicated repeatedly in wiring and via telephone about whether the County would respond to the data request.[6] The County was not always forthcoming in its communications.[7]

In a letter dated November 25, 2015, the County provided a substantive response to the first 13 data requests, including listing the name and number of a person Complainant could contact to set up a time to view requested documents.[8] As to request number 14 (Request No. 14), the County responded that the request was "unreasonable and too burdensome with which to comply."[9] The County advised that based on a test search it conducted for the requested data, it calculated that complying with that data request "would tie up Hennepin County's servers 24 hours a day for more than 15 months."[10] The County advised Complainant that it would work with him to narrow his request "to determine a reasonable limitation."[11]

After scheduling and rescheduling the inspection at least once, the County allowed and the Complainant inspected the provided data on December 21, 2015.[12]

In a letter dated December 4, 2015, Complainant advised the County that requests 4 through 13 had been addressed by the County's November 25, 2015 correspondence, but noted that he still had some questions about the meaning of the data.[13] Complainant informed the County that he believed it was in violation of the MGDPA for a number of reasons, including the length of time the County was taking to respond to his data request,

[4] *Id.* at 4.
[5] Ex. 2.
[6] Exs. 4, 5, 6, 7, 8, 9, 10, 11, 12; Complaint at ¶ 17; Response at 2.
[7] *Id.*
[8] Ex. 13.
[9] *Id.* at 6.
[10] *Id*. at 6-7.
[11] *Id.* at 7.
[12] Ex. 22 at 81.
[13] *Id.*

and its refusal to provide the data in response to Request No. 14.[14] Complainant again advised that he was willing to work with the County to address any issues surrounding Request No. 14.[15] On December 7, 2015, Complainant's attorney informed the County of potential litigation and requested that specified data be retained for that purpose.[16]

On December 18, 2015, Complainant again inquired about, among other things, the response to Request No. 14.[17] The Hennepin County Sheriff's Office replied on 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.'"[18]

In a letter dated December 30, 2015, Complainant raised concerns about the inspection of documents, which included: being requested 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 emails and metadata; and continuing problems regarding Request No. 14.[19] The present complaint was subsequently filed on January 7, 2016.

Probable Cause Standard

The purpose of a probable cause determination is to ascertain whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.[20] If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.[21] A judge's function in a probable cause determination does not extend to an assessment of the credibility of conflicting testimony; the task is simply to determine whether the facts available establish a reasonable belief that the County committed a violation.

Following a hearing on the merits, the Administrative Law Judge has the benefit of the record as a whole and is better positioned to assess credibility and the competing claims.

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[14] Ex. 15.
[15] *Id.* at 55.
[16] Ex. 16.
[17] Ex. 20 at 76.
[18] Ex. 21.
[19] Ex. 22 at 83-85.
[20] *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).
[21] *Id*. at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. *See, e.g.*, Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. Ct. App. 1994).

Analysis

The County's arguments for dismissing the complaint are as follows: 1) the response to the August 12, 2015, data request was within a reasonable time given the scope of the data request; 2) the County certified in writing the basis for redactions in produced documents; and 3) the County is not required by the MGDPA to conduct a term search, and so a failure to do so, in this circumstance, is not a violation. The County did not address Complainant's assertions that it failed to keep records containing government data in such an arrangement and condition to make them easily accessible for convenient use. The arguments raised are addressed below.

The Response Was Provided Within a Reasonable Time

The County argues that its response to Complainant's data request was provided within a reasonable time. A "reasonable time" is relevant to the amount of data requested and, according to the County, Complainant requested a large amount of data. Thus, according to the County, the 15 weeks between August 12 and November 25, when the first partially comprehensive response was provided, was reasonable.

This argument does not thwart the probable cause determination that a violation of MGDPA occurred based on the timeliness of the response. Government entities are required to "establish procedures . . . to insure that requests for government data are received and complied with in an appropriate and prompt manner."[22] "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."[23]

First, of the first 13 requests, only requests one through three generated documents for inspection by Complainant. These documents were purchasing and procurements documents held by the Hennepin County Sheriff's Office for IBIS-Mobile Fingerprint Scanner Related Technology; policies and procedures of the Hennepin County Sheriff's Office regarding fingerprinting; and documents related to a federal grant used for funding the IBIS-Mobile Fingerprint Scanner Related Technology.[24] The exact number of documents or pages involved with these records is not known. Thus, it cannot be concluded on this limited record that the gathering of these documents warranted 15 weeks of wait-time, much less the additional month before Complainant was actually permitted to inspect the documents.

Second, Requests No. 4 through No. 13 did not result in any documents produced for inspection. The County responded to request four, concerning audit documents, stating no such documents existed within the County. Requests No. 5 through No. 13 were not, in fact, data requests, but rather questions about County operations.[25] Because

[22] Minn. Stat. § 13.03, subd 2(a).
[23] *Id.* at subd. 1.
[24] Ex. 13 at 41-42.
[25] Request No. 4 was a data request, and there were no documents that satisfied the request. Ex. 13 at 42.

Complainant was not asking for documents,[26] the County's explanation that responding to these requests consumed 15 weeks is not applicable to this situation. In other words, the County cannot rely on the fact that it was responding to operations questions, which were combined with data requests, as a basis for the lengthy response time.

Third, in response to Request No. 14, the most extensive data request, there was only partial compliance. The County states the partial response, generating nearly 300 emails, took seven hours. The County ignores the related requirements for prompt compliance with a data request, and that data be kept so that it can be easily accessed. As the Commissioner of the Minnesota Department of Administration has noted, "if government entities neglect their obligations to maintain data in easily accessible formats, this is the kind of situation that can arise."[27] In this case, the Respondents fail to even address the claim that they have not kept the requested data in an arrangement and condition as to make them easily accessible for convenient use. Rather, they focus on the challenges the request poses for them. Thus, the County has not demonstrated the basis for a greater-than 15 week delay, but also has not overcome the Complainant's claim that the data are not kept in such a way to enable the County to comply promptly.

The County Certified in Writing the Basis for Redactions in Produced Documents

The County admitted on January 7, 2016, that there were certain redactions that should not have been made, and subsequently provided the redacted information.[28] The County also informed Complainant on January 7, 2016, that 19 of 20 emails contained security information which were to be redacted in accordance with Minn. Stat. § 13.37, subd. 2 (2014). The other email included private personnel data which was redacted pursuant to Minn. Stat. § 13.43, subd. 4 (2014).[29] An additional 48 emails 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.[30] An attachment Complainant claimed was removed had, in fact, been provided as an attachment to another email.[31] Finally, the County again stated that Request No. 14, even with limitations added by Complainant, was still too burdensome, falling outside of the requirements of Minn. Stat. § 13.03, subd. 3(a). The County advised Complainant that it was still looking at how to respond to the request, however.[32]

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[26] "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. Minn. Stat. § 13.02, subd 7. Government data "contains information stored and recorded in a specific medium[.]" Minnesota Dept. of Admin., Advisory Op. 99-032.

[27] Minnesota Dept. of Admin., Advisory Op. 10-016, *citing* Minnesota Dept. of Admin., Advisory Op. 00-011. (In these cases, the "situation" that arose was the time and expense the government entity would incur to respond to the data requests.)

[28] Ex. A at 1-2.

[29] *Id.* at 2.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 3.

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[.]"[33] 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."[34]

In this case, the request was made August 12, 2015. The data was not produced until December 21, 2015. The County did not provide its explanation until January 7, 2016, nearly five months following the request. Even though the County ultimately did provide the explanation, this fact does not resolve whether the statute was violated, because the explanation was to be provided at the time of the request, or as soon after that time as possible. A question for hearing, then, is whether providing the explanation nearly five months after the request was as soon as possible.

Term Search is Not a Valid Data Request

Complainant is seeking documents, including emails, since January 1, 2013, relating to biometric data or mobile biometric technology.[35] To aid in this data request, Complainant provided 20 different words which would facilitate an electronic search for such documents.[36] Complainant was informed on November 25, 2015, that conducting this search, just on emails, would tie up County servers 24 hours per day for more than 15 months.[37] According to the County, of approximately 9,000,000 emails there are nearly 9,000 emails that would include at least one of the terms Complainant provided, and that each message must be reviewed for private or confidential data and to confirm it is responsive and not privileged.[38] This work is estimated to take approximately 290 hours.[39]

The County argues that Complainant's term search demand is not a proper data request because it requires the County to create or format data. The County also argues that requiring it to review 9,000,000 emails in order to respond to a data request would create an absurd result and would constitute acting as Complainant's research assistant. The County did not, however, address Complainant's claim that the County has failed to keep records containing government data in such an arrangement and condition to make them easily accessible for convenient use. Further, there is no case law or advisory guidance on the question of a data request based on a term search.

There remains probable cause to believe that the County violated the MGDPA by failing to keep records containing government data in such an arrangement and condition to make them easily accessible for convenient use. This question remains particularly

[33] Minn. Stat. § 13.03, subd 3(f).
[34] *Id.*
[35] Ex. 1.
[36] Ex. 1.
[37] Ex. 13.
[38] Ex. C at 3.
[39] *Id.*

relevant where the County has argued that the search for the requested data will be extremely burdensome. One would expect a burdensome search when data is not maintained as required by the MGDPA. However, the final determination about this, and the other claims raised by Complainant, will not be reached until after the record is developed and arguments are considered, in a hearing in this matter.

J. R. M.

PREHEARING CONFERENCE AND HEARING PROCEDURES

At the prehearing conference, preliminary matters will be addressed such as identifying the issues to be resolved, the number of potential witnesses and exhibits, the dates for filing exhibits and witness lists, and determining whether the matter may be disposed of without an evidentiary hearing.

The evidentiary hearing has been ordered and will be conducted pursuant to the authority granted to the Administrative Law Judge by Minn. Stat. § 13.085. Information about the evidentiary hearing and copies of governing state statutes and rules may be obtained online at http://mn.gov/oah and at www.revisor.leg.state.mn.us. The Office of Administrative Hearings conducts proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota Supreme Court.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. The Administrative Law Judge must consider any evidence and argument submitted until the hearing record is closed, or may continue a hearing to enable the parties to submit additional testimony.

All hearings must be open to the public, except that the Administrative Law Judge may inspect *in camera* any government data in dispute. The Administrative Law Judge may conduct a closed hearing to consider information that is not public data, and may issue necessary protective orders and seal all or part of the hearing record, as provided in Minn. Stat. § 13.085, subd. 4 (c). The Administrative Law Judge may close any portion of the hearing as necessary to prevent disclosure of not public data which could be disclosed while a party is presenting its arguments.

COSTS AND FEES

The Complainant has paid a filing fee of $1,000.00. If the Complainant substantially prevails in this matter, the Office of Administrative Hearings will retain $50.00 of the filing fee, refund the balance to the Complainant and charge Hennepin County with the actual costs incurred by the Office of Administrative Hearings in conducting this matter, up to a maximum of $1,000.00. In addition, if a Complainant substantially prevails, a rebuttable presumption exists that the complainant is entitled to an award of reasonable attorney fees, not to exceed $5,000. This award may be denied if the Administrative Law Judge determines that the violation is merely technical or that there is a genuine uncertainty about the meaning of the governing law.

If the Complainant does not substantially prevail in this matter, the Complainant will receive a refund of the filing fee, less any costs incurred by the Office of Administrative Hearings in conducting this matter.

If the Administrative Law Judge determines that the complaint was frivolous or brought for the purposes of harassment, the Administrative Law Judge must order that the Complainant pay the Respondent's reasonable attorney fees, not to exceed $5,000. The Complainant shall not be entitled to a refund of the filing fee.

BURDEN OF PROOF

The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of chapter 13 is a preponderance of the evidence.

DISPOSITION OF COMPLAINT

At the conclusion of the evidentiary hearing, the Administrative Law Judge must determine whether the violation alleged in the complaint occurred and must make at least one of the following dispositions:

(1) The Administrative Law Judge may dismiss the complaint.

(2) The Administrative Law Judge may find that an act or failure to act constituted a violation of this chapter.

(3) The Administrative Law Judge may issue a civil penalty against the Respondent of up to $300.

(4) The Administrative Law Judge may issue an order compelling the Respondent to comply with a provision of law that has been violated; and may establish a deadline for production of data, if necessary.

(5) The Administrative Law Judge may refer the complaint to the appropriate prosecuting attorney for consideration of criminal charges.

The Administrative Law Judge must render a decision on the Complaint within ten business days after the hearing record closes. The Chief Administrative Law Judge shall provide for public dissemination of orders issued following a hearing. If the Administrative Law Judge determines that Respondent has violated a provision of law and issues an order to compel compliance, the Office of Administrative Hearings shall forward a copy of the order to the Commissioner of Administration. Any order issued pursuant to this process is enforceable through the district court for the district in which Respondent is located.

JUDICIAL REVIEW

A party aggrieved by a final decision on a complaint filed under section 13.085 is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63-.69 (2014).

REASONABLE ACCOMMODATION

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Office of Administrative Hearings must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, P.O. Box 64620, St. Paul, Minnesota 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TTY).