OAH 80-0305-37431

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Beverley Berg,

Complainant,

vs.

Minnesota Board on Aging,

Respondent

**ORDER DENYING MOTION TO AMEND COMPLAINT**

On March 19, 2021,[1] Beverley Berg (Complainant or Berg) filed a Complaint with the Office of Administrative Hearings. Berg alleges that the Minnesota Board on Aging (Respondent or Board) violated the Minnesota Government Data Practices Act (MGDPA) by failing to prepare and make available to the public required information and by failing to respond to multiple requests for data in violation of Minn. Stat. §§ 13.025, subds. 2, 3, and 4, .03 (2020), and applicable rules.

Zuri Balmakund, Assistant Attorney General, appears on behalf of the Board. Beverley Berg appears on her own behalf, without counsel.

On June 14, 2021, the Administrative Law Judge issued a Notice of Determination of Probable Cause and Order for Prehearing Conference and Hearing. During the prehearing conference on July 9, 2021, Complainant requested permission to amend her Complaint. On July 12, 2021, Complainant eFiled a written Motion to Amend her Complaint. The parties' final written submissions are due on August 5, 2021.[2]

Pursuant to Minn. Stat. § 13.085 (2020), Minn. R. Civ. P. 15.01, all the files and records in this matter, and for the reasons stated in the attached Memorandum,

[1] The Board did not receive notice of the Complaint until April 23, 2021, when the Office of Administrative Hearings emailed a copy of the Complaint along with a copy of the Notice of Complaint originally sent on March 22, 2021. The Board then requested and received an extension of time in which to respond to the Complaint, using April 23, 2021, as the date of receipt. *See* Order Extending Deadline for Response (Apr. 26, 2021).

[2] At the Prehearing Conference, Complainant requested that the matter be considered via affidavits and exhibits – essentially summary disposition – rather than in an evidentiary hearing. A deadline of August 5, 2021, was established for submission of written materials, subject to the Board's agreement. The Board filed a letter on July 13, 2021, agreeing to have the matter considered on the written materials.

**IT IS HEREBY ORDERED** that Complainant's Motion to Amend her Complaint is **DENIED.**

Dated: July 15, 2021

LAURASUE SCHLATTER
Administrative Law Judge

## MEMORANDUM

### I. Original Complaint and Motion to Amend

Berg's original Complaint (Complaint), filed March 19, 2021, identified five issues:

1) April 16, 2019, and ongoing, Kari Benson, Responsible Authority of Minnesota's Office of Ombudsman for Long-Term Care (OOLTC) and the Board failed to make available to the public and post in a conspicuous place a public document with her name, job title, and business address.

2) April 16, 2019, and ongoing, Kari Benson, Responsible Authority of OOLTC and the Board failed to make available to the public and post in a conspicuous place a public document with the names and job titles of any designees selected by her.

3) April 16, 2019, and ongoing to the present, Kari Benson, Responsible Authority of OOLTC and the Board failed to make available to the public and post in a conspicuous place a public document that identifies her as the responsible authority or designees as the persons responsible for answering inquiries from the public concerning the provisions of the act or this chapter.

4) August 2, 2020, February 13, 2021, and ongoing to the present, Responsible Authority Kari Benson of OOLTC and the Board failed to respond to Berg's request to review all data requests 1) addressed to the Responsible Authority and 2) the Data Practices Compliance Official since April 2019.

5) February 18, 2021, and thereafter, Responsible Authority Kari Benson of OOLTC and the Board failed to provide Berg public access to the policies of OOLTC and the Board for accessing 1) public data and 2) private data.

Berg alleged OOLTC and the Board had violated Minn. Stat. §§ 13.03, subds. 1, 3, .025, subds. 2, 3, and 4 (2020), and Minn. R. 1205.1200,[3] .0300, subpts. 1, 3 (2019).

In her July 12, 2021, Motion, Berg moves to amend her Complaint to add the following allegations:

1) Responsible Authority Kari Benson failed to provide Berg OOLTC and the Board's Data Inventory pursuant to Minn. Stat. § 13.025, subd. 1.

2) Responsible Authority Kari Benson failed to create the Data Inventory required by Minn. Stat. § 13.025, subd. 1.

3) Responsible Authority Kari Benson failed to establish procedures to insure appropriate and prompt responses to requests for government data as required by Minn. Stat. § 13.03, subd. 2(a).

4) The Board's Executive Director, Kari Benson, is not legitimately a Responsible Authority of the OOLTC or the Board.

## II. Analysis

This case was brought pursuant to Minn. Stat. § 13.085, which provides an expedited process for complaints alleging violations of the MGDPA "for which an order to compel compliance is requested."[4] The administrative remedy set forth in section 13.085 is unusual in several respects. Unlike most matters brought before the Office of Administrative Hearings, expedited data practices complaints are not contested cases within the meaning of Minnesota Statutes chapter 14 and are not otherwise governed by chapter 14.[5] Consequently all of the motion practice and discovery procedures available to parties in contested case proceedings are not available to parties in these cases.

In addition, data practices complaints require an expedited probable cause review and hearing.[6] Should a judge determine probable cause exists to support finding a violation, the hearing must be held within 30 business days after notifying the parties. The date of the hearing may be delayed for good cause by no more than ten business days.[7] Once the hearing record is closed, the judge must render a decision within ten business days.[8] Therefore, even if the statute allowed for amending the complaint, there is simply not enough time to for the Board to respond to the new allegations and to issue a probable cause determination prior to the August 5, 2021, hearing date.

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[3] Berg may rely on her citation of Minn. R. 1205.1200 in support of the requests she made in Issues 1) and 2). However, merely citing the rule is not the same as requesting all the documents the rule may require the Board and OOLTC to maintain. In this case, Berg requested the documents listed in issues 1) and 2), but not all of the documents in the Data Inventory, as she wishes to do with her amendment.
[4] Minn. Stat. § 13.085, subd. 2(a).
[5] Minn. Stat. § 13.085, subd. 5(d).
[6] *Id.* at subds. 3, 4.
[7] *Id.* at subd. 4(a).
[8] *Id.* at subd. 5(c).

If this were a contested case proceeding, the Administrative Law Judge would look to the rule governing amending complaints in contested case proceedings. Because it is not, the Administrative Law Judge turns to the Minnesota Rules of Civil Procedure for guidance. Minn. R. Civ. P. 15.01 governs amendments to pleadings:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 21 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Four months have passed since the Complaint was first served, and it has been two months since the Board and OOLTC have filed their response. Berg is long past the time when she could have amended her pleading as a matter of course under Minn. R. Civ. P. 15.01. Nor is this a situation where justice requires that the Complaint be amended. Berg has the option of filing another complaint if she chooses.

Berg has put OOLTC and the Board on notice regarding her concerns about their data practices compliance, and how seriously she takes those concerns. Because the governing statute does not allow for further continuances, the case must proceed to its final stage in less than 28 days from the date of this writing. Therefore, it is not in the interest of justice to allow the Complaint to be amended. Berg's motion to amend her Complaint is denied.

**L. S.**