

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Kyle Prall and Citizens Information
Associates,
Complainants,

v.

Hennepin County Sheriff's Office and the
Hennepin County Board of
Commissioners,

Respondents.

**NOTICE OF DETERMINATION
OF PROBABLE CAUSE**

AND

**ORDER FOR PREHEARING
CONFERENCE AND
EVIDENTIARY HEARING**

TO: The Parties

On February 21, 2012, Kyle Prall and Citizens Information Associates (Complainants) filed an Expedited Data Practices Complaint with the Office of Administrative Hearings. The Complainants alleged that the Hennepin County Sheriff's Office and the Hennepin County Board of Commissioners violated the Minnesota Government Data Practices Act by failing to provide copies of booking photos at a reasonable cost in response to data practices requests, failing to produce documentation supporting the County's \$5/photo charge, and failing to establish procedures to ensure that data requests are complied with in an appropriate and prompt manner. The Respondents filed an initial response to the Complaint on March 20, 2012.

Patricia E. Kuderer, Kuderer Law Group, PLLC, of Seattle, Washington, represented the Complainants Kyle Prall and Citizens Information Association. Toni A. Beitz, Senior Assistant Hennepin County Attorney, represented the Hennepin County Sheriff's Office and Hennepin County Board of Commissioners.

After reviewing the Complaint and the County's Response to the Complaint, the Administrative Law Judge has determined that the Complaint presents sufficient facts to believe that violations of Chapter 13 have occurred. Specifically, the Administrative Law Judge concludes that there is probable cause to believe that the County violated Minnesota Statutes § 13.03, subd. 2, and subd. 3 (c) & (e), by failing to provide copies of booking photos at a reasonable cost and failing to have procedures in place to ensure that requests for government data are received and complied with in a prompt manner.

Based upon the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED and NOTICE IS GIVEN THAT:

1. This matter has been assigned to Administrative Law Judge Kathleen D. Sheehy for an evidentiary hearing. The address of the Administrative Law Judge is 600 North Robert Street, P.O. Box 64620, St. Paul, Minnesota 55164-0620. The Administrative Law Judge may be reached at telephone number 651-361-7848 and the Office's fax number is 651-361-7936.

2. This matter will be scheduled for a prehearing conference to be held by telephone conference call and a later evidentiary hearing to be held at the Office of Administrative Hearings at 600 North Robert Street in St. Paul. The dates and times of the Pre-Hearing Conference and the evidentiary hearing will be sent to the parties under a separate cover.

Dated: March 26, 2012

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Factual Background

Based on the information in the Complaint and the Response thereto, it appears that on March 29, 2011, Complainant Kyle Prall on behalf of Citizens Information Associates sent an email to the Hennepin County Sheriff's Office (HCSO) general information website requesting booking photos/mug shots on every individual booked into the Hennepin County Jail (formerly known as the Adult Detention Center or ADC) between January 1, 2011, and March 29, 2011. He specifically requested that the photos be prepared in "electronic format (e.g. JPEG)." He also requested information contained on the "jail/arrest log" for each individual booked into the jail for the same time period, including date of birth, gender, race, city and zip code. Mr. Prall requested that this data be provided in "CSV or Excel format."¹

The HCSO website contains a notice as follows:

Note: **Please do NOT email us if your concern is urgent.** Emails are viewed once a week or less frequently. For issues that need immediate

¹ Complaint Ex. 1.

attention, please call the Sheriff's Office at the telephone number provided.²

When Mr. Prall did not receive a response to his email request, he called the HCSO and was instructed to submit a written request for the data via U.S. mail. Mr. Prall submitted a written request for the data to the Hennepin County Sheriff by letter dated May 1, 2011.

On May 12, 2011, Lynda Kochevar, an employee at the ADC, called Mr. Prall and informed him that the County would provide the jail log in the requested Excel format, but that the booking photos would only be provided in paper form and not electronically. When Mr. Prall questioned why he could not receive the booking photos electronically, Ms. Kochevar referred him to Assistant Hennepin County Attorney Toni Beitz. Mr. Prall received the jail/arrest log data on May 16, 2011.

On or about May 25, 2011, Mr. Prall spoke with Ms. Beitz on the telephone regarding his request for the booking photos. Mr. Prall objected to receiving the photos in paper, rather than electronic, form. Ms. Beitz indicated that she would review the matter with staff of the Sheriff's Office.³

In an email dated June 16, 2011, Ms. Beitz notified Mr. Prall that the Sheriff's Office would provide the mugshots in electronic format at a cost of \$5 per mugshot. Ms. Beitz stated further that there are approximately 11,160 mugshots within the time frame of Mr. Prall's data request and that upon receipt of \$55,800 from him, the Sheriff's Office would begin the processes necessary to transmit the photos electronically.⁴

In response emails sent in June and August 2011, Mr. Prall requested that Ms. Beitz provide documentation to support the \$5 per photo charge.⁵ Mr. Prall also sent an email to the Hennepin County Board of Commissioners, as the body establishing County fees, requesting any documents that support or explain why the fee for copies of booking photos was raised from \$1 to \$5 per photo.⁶ Mr. Prall did not receive a response from the County Board of Commissioners.

By letter dated December 14, 2011, Complainants' counsel asked Ms. Beitz to provide her with the actual cost for providing booking photos in electronic format, the computer medium in which the County currently stores the data and size of the requested data, and the justification for the cost to provide the requested data.⁷

Ms. Beitz did not respond to Complainants' December 14th letter. The Complainants' counsel called Ms. Beitz on January 9, 2012. Ms. Beitz indicated that

² HCSO Response Ex. A (emphasis in original).

³ Complaint Ex. 4.

⁴ Complaint Ex. 5.

⁵ Complaint Exs. 6-9.

⁶ Complaint Ex. 10.

⁷ Complaint Ex. 11.

she had referred the December 14th letter to the Sheriff's Office and that she would follow up with staff there and get back to Ms. Kuderer. Ms. Kuderer sent another letter to Ms. Beitz on January 24, 2012.⁸ When no response was received, this Complaint followed.

Probable Cause Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.⁹ 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.¹⁰ 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.

Analysis

All government data collected, created, or maintained by a government entity shall be public unless classified by statute or federal law as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential. 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. Photographic records shall be considered as accessible for convenient use regardless of the size of such records.¹¹

Under Minnesota law, an individual's booking photograph is public unless a law enforcement agency has temporarily withheld access based on a determination that access "will adversely affect an active investigation."¹²

When a governmental agency stores data electronically it must provide data electronically to any person making a request for a copy of the data if it reasonably can make a copy or have a copy made. This does not require a governmental entity to provide the data in an electronic format or program that is different from the format or program in which the data are maintained.¹³

⁸ Complaint Ex. 12.

⁹ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

¹⁰ *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. App. 1994).

¹¹ Minn. Stat. § 13.03, subd. 1.

¹² *Id.*; Minn. Stat. § 13.82, subd. 26(b).

¹³ Minn. Stat. § 13.03, subd. 3(e).

If a person requests copies or electronic transmittal of data, the governmental entity may require the requesting person pay the “actual costs of searching for and retrieving government data, including the cost of employee time, and for making, certifying, and electronically transmitting the copies of the data, but may not charge for separating public from not public data.”¹⁴

In determining the amount of the reasonable fee, the responsible authority for the government data shall be guided by the cost of materials, cost of labor, “any schedule of standard copying charges as established by the agency in the normal course of operations,” any special costs necessary to produce such copies from machine based recording keeping systems, and mailing costs.¹⁵ “Special costs” might include writing or modifying a computer program to format data.¹⁶

The responsible authority shall establish procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner.¹⁷

Until March 2011, the fee for providing copies of booking photos was \$1 per photo. The County asserts that after reviewing the costs associated with providing these copies, it raised the fee to \$5 per photo. According to the County, the fee covers the cost of ADC personnel time processing requests. Specifically, the County maintains that it takes ADC staff between 15-20 minutes to process and provide photos. Between 10-15 minutes is performed by a clerk at an average cost of \$20.26 per hour, and approximately 6 minutes is expended by an ADC accountant at an average rate of pay of \$30.74 per hour. The County argues that the average actual cost of completing these processes ranges from \$8.14 per photo to \$9.83 per photo. Based on these costs, and after a public hearing, the Hennepin County Board raised the fee to be charged for booking photos from \$1 to \$5 per photo in March 2011.¹⁸

The ADC stores all booking photographs in an imaging system called “PictureLink,” which was developed and is maintained by a third party vendor, Dynamic Imaging System, Inc. The County asserts that personnel at the ADC have the ability to select individual photographs to be copied and emailed to requestors, but that they cannot extract photos “in the manner and format requested by Mr. Prall.” The County has not identified the format in which the photos are stored or how that differs from the format requested by Mr. Prall. To retrieve the data in the fashion requested by Mr. Prall, the County maintains it would have had to contract with its third-party vendor either for a

¹⁴ Minn. Stat. § 13.03, subd. 3(c).

¹⁵ Minn. R. 1205.0300, subp. 4.

¹⁶ Cf. Minnesota Department of Administration Advisory Opinion 97-013 (Secretary of State did not justify schedule fee of \$2,000 for a copy of the Minnesota voter registration database); Advisory Opinion 04—072 (Minnesota Department of Corrections did not establish the reasonableness of its fee for providing an electronic copy of ten months of statewide jail bookings); Advisory Opinion 01-030 (Minnesota Department of Public Safety did not establish the reasonableness of its fee for providing a copy of the criminal history database).

¹⁷ Minn. R. 1205.0300, subp. 3.

¹⁸ HCSO Response at 4-5 & Ex. B.

one time “data dump” or request that the vendor create a special program capable of extracting photos based on time parameters.¹⁹ The County has provided no specific information about the cost of obtaining the photos in this manner, but it indicated in correspondence to counsel for Mr. Prall that the cost for a “data dump” would be approximately \$800, with additional costs for removing not public information and updating the files of inmates to reflect that the photo was copied and sent in response to a request.²⁰

The County also argues that it did not believe it was obligated to create a “unique method of access” for Mr. Prall because he apparently intends to use the photographs for commercial purposes. The County attached information to its response suggesting that Mr. Prall’s company, Citizen Information Services, posts the mug shots online, and then it or an affiliated company charges fees to individuals who want the photographs removed.²¹ The Administrative Law Judge understands the County’s reluctance to have the data used in this manner, but under the law the responsible authority is obligated to provide access to public data without regard to the nature of the person’s interest in the data.²²

The Administrative Law Judge concludes that there is probable cause to believe that the County violated Minn. Stat. § 13.03, subd. 3(c) and (e), by failing to provide copies of booking photos at a reasonable cost in response to Mr. Prall’s data practices request, at least after May 2011. Specifically, there is probable cause to believe that the standard fee of \$5 was not intended to and does not reasonably approximate the actual cost of providing large volumes of photographs in the electronic format requested by the Complainant.

There is also probable cause to believe the County violated Minn. Stat. § 13.03, subd. 2, by failing to have procedures in place to ensure that requests for government data are received and complied with in an appropriate and prompt manner.

There is not probable cause to believe that the County failed to inform the Complainant in writing of the basis for a denial of access, as required by Minn. Stat. § 13.03, subd. 3(f). The County did not deny access to the photographs based on their classification; it offered to provide them for a fee that the Complainant asserts is unreasonable.

An Order scheduling this matter for a prehearing conference and evidentiary hearing will be issued shortly.

K.D.S.

¹⁹ HCSO Response at 5-6.

²⁰ HCSO Response Ex. C.

²¹ HCSO Response Exs. D & E.

²² Minn. R. 1205.0300, subp. 2.

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 www.oah.state.mn.us 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 a 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, sub. 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 the Hennepin County Sheriff's Department and the Hennepin County Board 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 Complainants. 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 to 14.69.

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).