

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF ADMINISTRATION

In the Matter of the Appeal of the
Determination of the Responsible
Authority for Department of Human
Services that Certain Data About
Michael Hofbauer are Accurate and/or
Complete

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER**

This matter came before Administrative Law Judge Jim Mortenson for an evidentiary hearing on April 26, 2016, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. The record closed that day at the conclusion of the hearing.

William Young, Assistant Attorney General, appeared on behalf of the Department of Human Services (Department). Michael Hofbauer (Appellant) appeared on his own behalf, and without counsel, via interactive television from the Minnesota Sex Offender Program in Moose Lake, Minnesota.

STATEMENT OF ISSUE

Is the data challenged by Appellant accurate and complete within the meaning of the Minnesota Government Data Practices Act?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that certain data challenged by Appellant is accurate and complete within the meaning of the Minnesota Government Data Practices Act. The Administrative Law Judge therefore recommends that the Commissioner of Administration dismiss the appeal.

Based upon the evidence in the record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Appellant was indeterminately committed as a “sexually dangerous person” to the Minnesota Sex Offender Program (MSOP) on November 24, 2009, by Judge

Salvador Rosas in Ramsey County, Minnesota.¹ Appellant was admitted to MSOP-Moose Lake on December 17, 2009.²

2. Appellant initially notified the Department he challenged the accuracy of certain data in the Sexual Offender Assessment (SOA) of January 28, 2010, in October 2014.³

3. The Department determined that the data challenged was accurate and complete, and notified Appellant of this in a letter dated December 12, 2014.⁴

4. Appellant appealed the Department's determination to the Commissioner of Administration on January 4, 2015.⁵

5. Two of the four challenges made by Appellant were resolved prior to hearing. The following challenges remain:

- 1) The statement from the January 28, 2010, SOA: "He recalled he had previously been fired from a similar job, at a different employer, because of inappropriate sexual conduct."
- 2) The statement from the January 28, 2010, SOA: "According to reports, Mr. Hofbauer was working at the church in the capacity of a youth leader."⁶

6. Finding of Fact 13 of Judge Rosas' decision states:

Respondent [Appellant] has the following history with respect to inappropriate sexual behavior and thoughts, and criminal behavior, which he acknowledges to be accurate:

- 1973. At approximately age 20, Respondent seduced a neighbor's 15 year old son. They engaged in mutual masturbation. There was no criminal intervention.
- 1980's. Respondent placed himself in church and camp settings where he was in a position of authority. He had opportunities to satisfy his sexual interest and curiosity.
- 1988. Criminal Sexual Conduct 2, Ramsey County, MN. Respondent pleaded guilty to the criminal charge. Respondent acknowledged he tickled and rubbed the penis of a 9 year old

¹ Exhibit (Ex.) 3 at 10.

² Ex. 2 at 1.

³ NOTICE AND ORDER FOR HEARING at 2 (March 18, 2016); Letter to DHS Privacy Official from Hofbauer (undated).

⁴ Letter from Schworer to Hofbauer (December 12, 2014).

⁵ Letter from Hofbauer to Commissioner of Administration (January 4, 2015).

⁶ NOTICE AND ORDER FOR HEARING at 3.

boy. The boy was at Respondent's home where his wife was a daycare provider for the 9 year old boy.

- 2000. Respondent was notified by church officials that he was behaving in inappropriate behavior with minor boys while working for the church as a youth leader.
- 2001. Respondent pleaded guilty to Criminal Sexual Conduct 2, in Ramsey County, and was sentenced to 144 months. The underlying basis for the criminal conviction was criminal sexual conduct with an underage boy he had befriended through his work as a youth leader with the same church that had warned him the prior year. Respondent was taken into custody of the Commissioner of Corrections where he remains to this date.⁷

7. On January 28, 2010, a Sexual Offender Assessment (SOA) was completed on Appellant.⁸

8. The SOA was completed by Psychology Intern Jennifer Jones, who was supervised by Dr. Elizabeth Barbo.⁹ Dr. Barbo reviewed and signed the SOA.¹⁰

9. Jones had extensive training in conducting sexual offender assessments and her supervisor, Dr. Barbo, never found her to be untruthful.¹¹

10. In drafting the SOA, Jones listed Appellant's history as stated in Judge Rosas' finding of fact 13, and noted under the "1980's" bullet, "Mr. Hofbauer admitted he did work in the above described position [position of authority in church and camp settings]. He recalled he had previously been fired from a similar job, at a different employer, because of inappropriate sexual conduct."¹² Jones also noted that after Appellant had reviewed a draft of the SOA, Appellant denied he had been fired from a similar job because of inappropriate sexual conduct.¹³

11. Appellant volunteered to work with young boys.¹⁴

Based on the Findings of Fact and administrative record, the Administrative Law Judge makes the following:

⁷ Ex. 3 at 5-6.

⁸ Ex. 2.

⁹ Ex. 2 at 17; Testimony (Test.) of Elizabeth Barbo.

¹⁰ *Id.*

¹¹ Test. of E. Barbo.

¹² Ex. 2 at 2.

¹³ Ex. 2 at 3.

¹⁴ Test. of Michael Hofbauer.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Administration have jurisdiction in this matter.¹⁵
2. The Department of Administration complied with all relevant substantive and procedural requirements of rule or law.
3. The Department of Administration gave proper notice of the hearing in this matter.
4. The statements about Appellant within the January 28, 2010, SOA constitute government data within the meaning of the Minnesota Government Data Practices Act (Act).¹⁶
5. The Department of Human Services is a state agency within the meaning of the Act.¹⁷
6. Appellant is the subject of data on individuals that is maintained by the Department of Human Services.¹⁸
7. Under Minnesota law, an individual may contest the accuracy or completeness of public or private data concerning him or her, and may appeal the determination of the responsible authority in this regard pursuant to the Administrative Procedure Act.¹⁹
8. “Accurate” means that the data in question is reasonably correct and free from error.²⁰
9. “Complete” means that the data in question reasonably reflects the history of an individual’s transactions with the particular entity. Omissions in an individual’s history that place the individual in a false light shall not be permitted.²¹
10. The burden of proof in this proceeding is on Appellant to prove by a preponderance of the evidence that the data in question is not accurate or complete.²²
11. Appellant has not demonstrated the challenged data maintained by the Department in which Appellant is a subject is inaccurate or incomplete.

¹⁵ Minn. Stat. §§ 13.04, subd. 4, 14.50 (2014); Minn. R. 1205.1600 (2015).

¹⁶ See Minn. Stat. § 13.02, subd. 5 (2014).

¹⁷ *Id.*, subd. 17 (2014).

¹⁸ *Id.*, subds. 5, 7 (2014).

¹⁹ Minn. Stat. § 13.04, subd. 4.

²⁰ Minn. R. 1205.1500, subp. 2A (2015).

²¹ *Id.*, subp. 2B (2015).

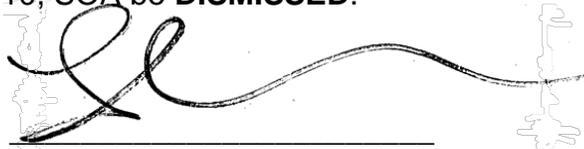
²² Minn. R. 1400.7300, subp. 5 (2015).

Based on the Conclusions of Law, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

1. The Administrative Law Judge recommends that Appellant's remaining challenges to data in the January 28, 2010, SOA be **DISMISSED**.

Dated: May 18, 2016



JIM MORTENSON
Administrative Law Judge

Digitally recorded; no transcript prepared.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Matthew J. Massman, Commissioner, Minnesota Department of Administration, 50 Sherburne Avenue, 200 Administration Building, St. Paul, MN 55155, (651) 201-2555 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2014), the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Respondent appeals the Department of Human Services' determination that his challenge to the accuracy or completeness of data prepared by medical professionals at MSOP as part of his ongoing treatment while committed as a sexually dangerous person. Such a challenge is permitted under Minn. Stat. § 13.04, subd. 4. The Administrative Law Judge held a hearing on April 26, 2016. At the outset of the hearing, two of four challenges to data were resolved between Respondent and the Department. The remaining two challenges are resolved here.

First, Respondent challenges the statement in the January 28, 2010, SOA that he "recalled he had previously been fired from a similar job, at a different employer, because of inappropriate sexual conduct." Respondent told the author, Ms. Jones, shortly after this statement was recorded by her that it was not true. Ms. Jones recorded that statement as well, creating a record of what she was told by Respondent. Because Jones recorded both versions of what she heard Respondent say, and there is no additional evidence to show that either Jones was in error in making the first recording, there is no basis to conclude the challenged data in the SOP is inaccurate or incomplete. Further, Respondent has not demonstrated that Jones' recording cannot be trusted.

Second, Respondent challenges the statement in the January 28, 2010, SOA that he had been "working at the church in the capacity of a youth leader." Respondent seemed to argue at hearing that this is incorrect because he was a volunteer, not an employee. Such a distinction does not render the statement inaccurate or incomplete, because it reflects, nearly verbatim, the district court's finding of fact that Respondent had been "working for the church as a youth leader." The court did not elaborate on whether this work was for pay or as a volunteer. The court's findings of fact were made based on a stipulation between Respondent and Ramsey County. Thus, the data in the SOA are both accurate and complete.

Because the data challenged by Appellant are accurate and complete, it is respectfully recommended that the Commissioner of Administration dismiss the appeal.

J. R. M.