



MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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Re: *In the Matter of Dept. of Labor and Industry v. Northern Industrial Erectors*; OAH Docket No. 7-1901-20455-2

Dear Counsel:

This letter is in response to the recent filings concerning the Protective Order issued on September 25, 2009. Counsel for Northern Industrial Erectors (NIE) maintains that a requested report (the DM&IR report) should be produced by the Minnesota Occupational Safety and Health Division (MN OSHA) of the Department of Labor and Industry and the DM&IR report should not be subject to the Protective Order in this matter.

The Protective Order does not indicate whether the DM&IR report is not public data. The terms of the Protective Order regarding disclosure of information are primarily in paragraph 2 of that Order. These terms prohibit further disclosure of the information that is private, namely the identities of employees, which is made private data by operation of Minn. Stat. § 182.659, subd. 8.

NEI relied upon the filing of a contested case proceeding in the DM&IR matter to maintain that the DM&IR report is now public data. NEI argues that the filing renders the entire report public data, following the holdings in several appellate court matters.¹

Under Minn. Stat. § 182.659, subd. 8, “Data that identify individuals who provide data to the department [of Labor and Industry] as part of an investigation conducted under this chapter shall be private.” This statute is specific to a particular type of information, in contrast to the general treatment of investigative data under Minn. Stat. Chap. 13. Under the rules of statutory construction, the more specific statute controls.²

Under the foregoing analysis, the identities of employees in the DM&IR report remain private data, regardless of the classification of the overall report. Absent redaction of the identifying information from that document, the DM&IR report itself is not public, due to the private information in the document. The ALJ notes that Judge Heydinger issued a Protective Order in the DM&IR matter that places significant restrictions on who may know the identities of employees covered by Minn. Stat. § 182.659, subd. 8.³ The DM&IR report can be redacted to remove the identities of employees, or it can be released pursuant to the terms of the Protective Order. There is no basis for releasing that information outside of one of those two options.

NEI's last objection to the the terms of the Protective Order is that the terms are too restrictive and impose an onerous burden on NEI regarding document handling and reporting. The obligations on NEI are not overly stringent. To protect private data, NEI is obligated to ensure that disclosure of employee identities is made only to those persons listed in paragraph 2 of the Protective Order and that those persons have executed an Exhibit A form. To ensure that the data is protected going forward, all copies of documents with those identities listed must be returned. To ensure that there is no misuse of the data, NEI must report its employee actions to the Department.

¹ *Westrom v. Minn. Dep't. of Labor & Indus.*, 686 N.W.2d 27 (Minn. 2004); *ITMO GlaxoSmithKlein PLC*, 713 N.W.2d 48 (Minn. App. 2006).

² *Correll v. Distinctive Dental Servs., P.A.*, 607 N.W.2d 440, 446 (Minn. 2000).

³ *Sviggum v. Duluth Mesabi & Iron Range Railway Co.*, OAH Docket No. 15-1901-19804-2 (Protective Order issued on November 13, 2008).

The disclosure of private data is authorized under the Protective Order. That Order carefully weighs the legitimate need for the information sought with the privacy interests to be protected. The Protective Order is designed to protect the legitimate statutory privacy interests of individuals while affording NEI access to otherwise unavailable information. If NEI finds complying with the protections too difficult, NEI can opt to forego obtaining the information sought.

Very truly yours,

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

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RCL:dsc