

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Administrative Order  
Issued to LeMaster Companies, Inc.

**ORDER ON MOTION  
TO EXCLUDE EVIDENCE**

This matter is before Administrative Law Judge Steve M. Mihalchick<sup>1</sup> on Respondent LeMaster Companies, Inc.'s, Motion for Summary Disposition. The motion was first made during a conference at the start of the hearing in this matter on May 24, 2010. Because of the number of arguments and citations to legal authorities, the Administrative Law Judge asked the parties to submit written arguments and continued the hearing to July 19, 2010. Subsequently, the hearing was further continued to July 26, 2010. The motion record closed on June 22, 2010, upon receipt of the Department's reply letter memorandum in opposition to the motion.

Although entitled a Motion for Summary Disposition, Respondent's motion actually requests that certain documents to be offered by the Department of Labor and Industry (the Department or DLI) be found to be "protected documents" under Minn. Stat. ch. 13, the Minnesota Government Data Practices Act (the MGDPA), and be precluded from and denied admission to the record. Other arguments against admission of the documents were also raised. Because of that, the Administrative Law Judge has treated Respondent's motion as a motion *in limine*, a motion to exclude evidence.

Christopher M. Kaisershot, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, represents the Department. Valerie LeMaster, Attorney at Law, Mackenzie & Dornik, P.A., 150 South Fifth St, Suite 2500, Minneapolis, MN 55402, represents Respondent.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in a Memorandum that will be issued by the start of the hearing on July 26, 2010, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

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<sup>1</sup> Retired Administrative Law Judge appointed pursuant to Minn. Stat. § 14.48, subd. 4. Unless otherwise specified, statutory references are to 2009 Minnesota Statutes, which are available at [www.revisor.mn.gov/statutes](http://www.revisor.mn.gov/statutes).

1. Respondent's motion to exclude evidence on the basis that it is not public is **DENIED**. However, the Administrative Law Judge will consider specific objections that some of the offered evidence is irrelevant, immaterial, or repetitious.

2. This matter shall proceed to hearing on July 26, 2010, at ~~9:30~~ 9:00 a.m. at the Office of Administrative Hearings.

Dated: July 26, 2010

/s/ Steve M. Mihalchick

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STEVE M. MIHALCHICK  
Administrative Law Judge

### MEMORANDUM

#### Background Facts for Purposes of this Motion

Respondent has objected to the admission of pages DLI 000048 - DLI 000172 of Department Exhibit 1 (the Questioned Documents).<sup>2</sup> The Questioned Documents concern court and administrative proceedings involving LeMaster Restoration, Inc., (sometimes, LeMaster Restoration or LRI) and Verdean LeMaster, individually.<sup>3</sup>

Verdean LeMaster is the sole owner and officer of LeMaster Restoration. Verdean LeMaster is not a shareholder, officer, or employee of Respondent. In July of 2009, the Department initiated disciplinary action against LeMaster Restoration and Verdean LeMaster in a Licensing Order (the 2009 Licensing Order), which they contested. This 2009 Case was consolidated with a related matter involving LeMaster Restoration and heard by Administrative Law Judge Kathleen D. Sheehy at a hearing on March 18, 2010.<sup>4</sup>

A few days after that hearing, on March 23, 2010, the Department issued an Administrative Order to Respondent (the 2010 Administrative Order)<sup>5</sup> ordering it to cease and desist from acting or holding itself out as a residential building contractor, remodeler, or roofer until it obtained appropriate licensure. It also assessed a monetary

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<sup>2</sup> Respondent's Motion for Summary Disposition at 1-2 and Respondent's Memorandum of Law in Support of Respondent's Motion for Summary Disposition (Respondent's Memorandum) at 14.

<sup>3</sup> Exhibit 1 at DLI 000048 - DLI 000172; Respondent's Memorandum at 2-3.

<sup>4</sup> Affidavit of Verdean LeMaster; Exhibit 1 at DLI 000066 – 71 and DLI 000157 – 172.

<sup>5</sup> The 2010 Administrative Order is attached to the Notice and Order for Hearing in this matter.

penalty of \$5,000. Neither LeMaster Restoration nor Verdean LeMaster was named as a respondent in the 2010 Administrative Order. However, the 2010 Administrative Order does allege some connection between LeMaster Restoration, Verdean LeMaster, and Respondent beyond the LeMaster name, including allegations that Respondent's Web site listed a telephone number that was answered as "LeMaster Restoration" and that Respondent was located at the same address as LeMaster Restoration, Inc.

On April 30, 2010, Administrative Law Judge Sheehy issued Findings of Fact, Conclusions of Law and Recommendation in the 2009 Case, which recommended affirming the 2009 Licensing Order and recommended disciplinary action against LeMaster Restoration and Verdean LeMaster.<sup>6</sup> To date, no final administrative decision has been issued by the Commissioner in the 2009 Case.

On April 22, 2010, Respondent requested a hearing on the 2010 Administrative Order. On April 27, 2010, the Department served the Notice and Order for Hearing in this matter upon Respondent.

### **Evidence in Contested Cases**

This matter is a "contested case" under Minn. Stat. §§ 14.02 and 14.48 – 14.69. Minn. Stat. § 14.60 governs evidence in contested case hearings. It provides, in relevant part:

Subdivision 1. **Admissibility.** In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.<sup>7</sup>

Subd. 2. **Made part of record.** All evidence, including records and documents containing information classified by law as not public, in the possession of the agency of which it desires to avail itself or which is offered into evidence by a party to a contested case proceeding, shall be made a part of the hearing record of the case. No factual information or evidence shall be considered in the determination of the case unless it is part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. When the hearing record contains information which is not public, the administrative law judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record. . . .

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<sup>6</sup> Exhibit 1 at DLI 000157 – DLI 000172.

<sup>7</sup> Minn. R. 1400.7300, subpt. 1, which applies specifically to Administrative Law Judges conducting contested cases, contains essentially equivalent provisions.

## Impact of the Minnesota Government Data Practices Act

### A. Investigative Data

Respondent relies upon Minn. Stat. § 13.39 to argue that the MGDPA precludes admission of the documents from the 2009 Case because, in Respondent's view, it is not public data until final disposition of the 2009 Case. The statute provides, in relevant part:

#### 13.39 CIVIL INVESTIGATION.

Subdivision 1. **Definitions.** A "pending civil legal action" includes but is not limited to judicial, administrative or arbitration proceedings. Whether a civil legal action is pending shall be determined by the chief attorney acting for the government entity.

Subd. 2. **Civil actions.** (a) Except as provided in paragraph (b), data collected by a government entity as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are classified as protected nonpublic data pursuant to section 13.02, subdivision 13, in the case of data not on individuals and confidential pursuant to section 13.02, subdivision 3, in the case of data on individuals. Any government entity may make any data classified as confidential or protected nonpublic pursuant to this subdivision accessible to any person, agency or the public if the government entity determines that the access will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest.

(b) A complainant has access to a statement provided by the complainant to a government entity under paragraph (a).

...

Subd. 3. **Inactive investigative data.** Inactive civil investigative data are public, unless the release of the data would jeopardize another pending civil legal action, and except for those portions of a civil investigative file that are classified as not public data by this chapter or other law. Any civil investigative data presented as evidence in court or made part of a court record shall be public. Civil investigative data become inactive upon the occurrence of any of the following events:

(1) a decision by the government entity or by the chief attorney acting for the government entity not to pursue the civil action;

(2) expiration of the time to file a complaint under the statute of limitations or agreement applicable to the civil action; or

(3) exhaustion of or expiration of rights of appeal by either party to the civil action.

Data determined to be inactive under clause (1) may become active if the government entity or its attorney decides to renew the civil action.

Respondent argues that because the 2009 Case has not reached a “final disposition,” because it is still an “active proceeding,” and because it is still a “pending civil action,” the data is “confidential” or “protected nonpublic” under the MGDPA.<sup>8</sup>

There appears to be no dispute that the 2009 Case remains a “pending civil action” and the Questioned Documents are not “inactive investigative data.” But, those are not the controlling determinations. The Questioned Documents are all data that were “presented as evidence in court or made part of a court record” as specified in Minn. Stat. § 13.39, subd. 3. The Supreme Court has held that this provision applies to administrative actions as well as court actions.<sup>9</sup> Thus, under Minn. Stat. § 13.39, subd. 3, the Questioned Documents had been not public, they became public when they became part of the 2009 Case record. Contrary to Respondent’s argument, the Questioned Documents are public data under Minn. Stat. § 13.39 and cannot be excluded from being used as evidence in this matter on that basis.

Moreover, even if the documents were not public, that would not preclude their admission into the record in this matter, if they are otherwise admissible. Under Minn. Stat. § 14.60, subd. 2, not public data may be admitted in contested cases. When the hearing record contains information that is not public, the administrative law judge may conduct a closed hearing, issue necessary protective orders, and seal all or part of the hearing record. The Administrative Law Judge would have to do so consistent with the MGDPA. Unlike data held by the courts, which are exempt from the MGDPA,<sup>10</sup> there is no exemption for data held by the Office of Administrative Hearings or the Department.

## **B. Licensing Data**

Respondent argues that the Questioned Documents are “confidential” under Minn. Stat. § 13.41, subd. 4. That argument is partially correct, as far as it goes. Minn. Stat. § 13.41 states, in relevant part:

### **Minn. Stat. § 13.41 LICENSING DATA.**

Subdivision 1. **Definition.** As used in this section "licensing agency" means any board, department or agency of this state which is

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<sup>8</sup> Respondent’s Memorandum at 5. “Confidential” and “protected nonpublic” data are two forms of “not public data” that may not be provided to the public or even to the subjects of the data. Minn. Stat. § 13.02, subd. 8a.

<sup>9</sup> *Westrom v. Minn. Dept. of Labor & Indus.*, 686 N.W.2d 27, 37 (Minn. 2004); *In the Matter of Glaxosmithkline PLC*, 732 N.W.2d 237, 266-67 (Minn. 2007).

<sup>10</sup> Minn. Stat. § 13.90.

given the statutory authority to issue professional or other types of licenses, except the various agencies primarily administered by the commissioner of human services. ...

Subd. 2. **Private data; designated addresses and telephone numbers.** (a) The following data collected, created or maintained by any licensing agency are classified as private, pursuant to section 13.02, subdivision 12: data, other than their names and designated addresses, submitted by applicants for licenses; the identity of complainants who have made reports concerning licensees or applicants which appear in inactive complaint data unless the complainant consents to the disclosure; the nature or content of unsubstantiated complaints when the information is not maintained in anticipation of legal action; the identity of patients whose medical records are received by any health licensing agency for purposes of review or in anticipation of a contested matter; inactive investigative data relating to violations of statutes or rules; and the record of any disciplinary proceeding except as limited by subdivision 5. ...

...

Subd. 4. **Confidential data.** The following data collected, created or maintained by any licensing agency are classified as confidential, pursuant to section 13.02, subdivision 3: active investigative data relating to the investigation of complaints against any licensee.

Subd. 5. **Public data.** Licensing agency minutes, application data on licensees except nondesignated addresses, orders for hearing, findings of fact, conclusions of law and specification of the final disciplinary action contained in the record of the disciplinary action are classified as public, pursuant to section 13.02, subdivision 15. The entire record concerning the disciplinary proceeding is public data pursuant to section 13.02, subdivision 15, in those instances where there is a public hearing concerning the disciplinary action. ...

Respondent cites four Minnesota Supreme Court cases as finding that Minn. Stat. § 13.41, subd. 4, applies to all state licensing agencies.<sup>11</sup> That is not an issue here. Clearly, under subdivision 1, all of Minn. Stat. § 13.41, including subdivision 4, applies to all state licensing agencies, except the Department of Human Services.

The Department is a “licensing agency.” The Questioned Documents likely are still active investigative data at this point. Therefore, Minn. Stat. § 13.41, subd. 4, does

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<sup>11</sup> Respondent’s Memorandum at 5-6.

apply in this case.<sup>12</sup> But, that provision must be read in concert with other provisions of the MGDPA, and other statutes such as Minn. Stat. § 14.60, subd. 2.

As stated above, under Minn. Stat. § 13.39, subd. 3, the Questioned Documents, if they ever were not public, became public when they became part of the 2009 Case record. The same result is required by the provision in Minn. Stat. § 13.41, subd. 5, which makes the entire record concerning a disciplinary proceeding is public data in those instances where there is a public hearing concerning the disciplinary action. The statutes complement each other. The Questioned Documents are now public data under both statutes. In fact, under Minn. Stat. § 13.41, subd. 5, some of the Questioned Documents were public data from the start.

Respondent asserts that Minn. Stat. § 13.41, subd.5, does not apply because the 2009 Case “hearing was to be closed under Minn. Stat. § 13D.01, subd. 2(2) and the matter has not reached final disposition.”<sup>13</sup>

Minn. Stat. ch. 13D is the Open Meeting Law. Minn. Stat. § 13D.01, subd. 1, states the all meetings of state agencies, boards, commissions, and departments, must be open to the public, as must meetings of the governing body of all political subdivisions and other public bodies. Minn. Stat. § 13D.01, subd. 2, states:

**Exceptions.** This chapter does not apply

- (1) to meetings of the commissioner of corrections;
- (2) to a state agency, board, or commission when it is exercising quasi-judicial functions involving disciplinary proceedings; or
- (3) as otherwise expressly provided by statute.

Respondent argues that the Department was exercising quasi-judicial functions involving disciplinary proceedings in the 2009 Case. That is likely correct. For purposes of what is now Minn. Stat. § 13D.01, subd. 2(2), “disciplinary proceedings” include licensing disciplinary proceedings.<sup>14</sup> But contrary to Respondent’s further argument, the result is that not that the hearing must be closed. Rather it is that the Open Meeting Law did not apply to the 2009 Case hearing.

There is an additional reason that the Open Meeting Law does not apply. By its express terms, this language applies only when the decision-maker is a board or other

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<sup>12</sup> As the Department points out, under the MGDPA, “confidential” and “private” are labels that only apply to data on individuals and not to what the MGDPA calls “data not on individuals.” That distinction is not important for purposes of this motion. Some of the Questioned Documents contain information about Verdean LeMaster.

<sup>13</sup> Respondent’s Memorandum at 6 and 13-14.

<sup>14</sup> *In the Matter of the Occupational License of Kathy Hutchinson*, 435 N.W.2d 171, 175-176 (Minn. App. 1989).

multi-member decision-making body. When the decision-maker is one person, there is no meeting that takes place.

That is not to say that privacy interests of licensees are not protected. They must be protected as required by the provisions of the MGDPA, contested case statutes and rules, and the applicable licensing statutes and rules.

### **C. Personnel Data**

Respondent argues that the Questioned Documents are “personnel data” under Minn. Stat. § 13.43 and therefore subject to that section.<sup>15</sup> Minn. Stat. § 13.43, subd. 1, states, in relevant part:

As used in this section, "personnel data" means data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity.

LeMaster Restoration and Verdean LeMaster were not employees or applicants for employment with any government entity.

Citing *In the Matter of the Occupational License of Kathy Hutchinson*, 435 N.W.2d 171, 175-176 (Minn. App. 1989), Respondent argues that the Questioned Documents should be considered to be “personnel data” because “Minnesota courts have not distinguished between disciplinary proceedings involving employees and those involving licenses.<sup>16</sup> *Hutchinson* provided a definition for the undefined term “disciplinary proceedings” under the Open Meeting Law. It applies only to the Open Meeting Law. The term “personnel data” is specifically and clearly defined in Minn. Stat. § 13.43, subd. 1. There is no authority to broaden it meaning.

The Questioned Documents are not “personnel data.”

### **D. Attorney General Data**

Respondent argues that Minn. Stat. § 13.65 also requires that the Questioned Documents remain not public until final disposition of the 2009 Case. It is doubtful that the statute applies to this matter, because the data belong to the Department, not to the Office of Attorney General. But assuming that the statute does apply, it essentially mirrors the requirements imposed upon the Department and upon the hearing in this matter by the MGDPA. No additional requirements are imposed. Moreover, the Questioned Documents are also public because there was a public hearing. Under Minn. Stat. § 13.65, subd. 1:

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<sup>15</sup> Respondent’s Memorandum at 6-7.

<sup>16</sup> Respondent’s Memorandum at 7.

The following data created, collected and maintained by the Office of the Attorney General are classified as private data on individuals: (a) the record, including but not limited to, the transcript and exhibits of all disciplinary proceedings held by a state agency, board or commission, except in those instances where there is a public hearing;

Again, the entire record is public because there was a public hearing.

**E. Respondent Cannot Use Estoppel To Exclude The Data:**

The Department previously had a statement on its web site that read:

Findings of Fact, Licensing Orders, and Administrative Orders do not become public until all appeals have been exhausted.

At the start of the May 24, 2010, hearing, Respondent stated its intention to rely on that language in its arguments. Based upon its counsel's advise, the statement was removed the next day from the Department's website. Respondent now argues that the prior statement is consistent with its arguments and must be applied so that the Questioned Documents must be excluded. No additional argument is given to support that position.<sup>17</sup>

If Respondent's theory is equitable estoppel, it fails for several reasons. Principally, the Department did not know that its statement was false and LeMaster Restoration, Verdean LeMaster, and Respondent never relied upon the statement.<sup>18</sup>

**F. Prior Opinions by the Department of Administration**

Respondent attached several Advisory Opinions from the Department of Administration. None of them were on point with this matter. They involved either personnel data or data in licensing that had not been introduced in the record in an administrative hearing.

**The Data Is Relevant To The Order At Issue:**

Respondent argues that Questioned Documents are irrelevant because the Judge Sheehy's Recommendation is not final and that the Department is intending to imply that the Recommendation is settled law.<sup>19</sup>

Admissible evidence includes "all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs."<sup>20</sup>

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<sup>17</sup> Respondent's Memorandum at 8-9.

<sup>18</sup> See *REM-Canby, Inc. v. Minn. Dept. of Human Services*, 494 N.W.2d 71, 74 (Minn. Ct. App. 1993), *rev. denied* (Minn. 1993).

<sup>19</sup> Respondent's Memorandum at 12.

The Department argues that the Questioned Documents are relevant because the data relates to the relationship between Respondent and a former licensee, whose license was summarily suspended one month before Respondent was incorporated. Indeed, aside from sharing the same business address and similar names, these entities shared the identical website address, including pictures, descriptions of services, and purported awards and certificates. Further, according to the Department, the 2010 Administrative Order alleged a connection between Respondent and LRI, and that relationship is relevant to the \$5,000 monetary penalty at issue in this case.<sup>21</sup>

The Administrative Law Judge believes that the most of the Questioned Documents are relevant, but some of them appear to be repetitive. They will be reviewed and ruled on at the hearing.

S.M.M.

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(Footnote Continued From Previous Page)

<sup>20</sup> Minn. Rule 1400.7300, subp. 1 (2009).

<sup>21</sup> Department Memorandum at 10.