MINNESOTA
OAH
OFFICE OF ADMINISTRATIVE HEARINGS

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TO: Senator Mike Parry
Senator Charles Wiger
Senator Warren Limmer
Senator Ron Latz

Representative Morrie Lanning
Representative Phyllis Kahn
Representative Joyce Peppin
Representative Michael Nelson
Representative Torrey Westrom
Representative John Lesch

FROM: Raymond R. Krause
Chief Administrative Law Judge

DATE: August 29, 2012

RE: OAH Report on Receipts and Expenditures Relating to the Data Practices Act

The Office of Administrative Hearings (OAH) was directed by the 2010 Session Laws of Minnesota, Chapter 297, Section 3, to make an annual report to the "chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the office on receipt and expenditure of money under [Minn. Stat. § 13.085] in the preceding fiscal year."

Program Background:

Beginning July 1, 2010, persons seeking an order compelling a state or local government agency to comply with the Minnesota Government Data Practices Act (MGDPA or Data Practices Act) could request an expedited hearing with the OAH. The Legislature codified the new process in Minn. Stat. § 13.085.

Following the enactment of this legislation, the OAH developed a detailed set of procedures, forms and public notices for use in these hearings. Additionally, the OAH web site was updated so as to provide the public with information on filing a complaint. The site is accessible at: http://mn.gov/oah/administrative-law/filing/data/index.jsp. The costs associated with completing these activities were absorbed by the agency.

The Administrative Law Judges (ALJs) who are assigned these matters work under strict statutory timeframes for assessing the claims, undertaking a hearing and issuing decisions. ALJ determinations are final agency decisions appealable to the Minnesota Court of Appeals.

Fiscal Year 11 and 12 Cost Experience for the Expedited Hearing Process:

The following is a summary of receipts and expenditures for FY 2011:

Matter	Docket Number	Filing Fees	OAH Staff Hours to Resolve Matter	Total Cost	Program Shortfall
Schmid, Mike	0305-21608	$1,000.00	52.0	$5,752.00	
KSTP-TV	0305-21754	$1,000.00	76.75	$9,248.00	
Stengrim, Jim	0305-21900	$1,000.00	26.45	$2,792.00	
Four Crown, Inc.	0305-21960	$1,000.00	48.80	$5,944.00	
Totals:		**$4,000.00**	**204.00**	**$23,736.00**	**-$19,736.00**

The following is a summary of receipts and expenditures for FY 2012:

Matter	Docket Number	Filing Fee	OAH Staff Hours	Total Cost	Program Shortfall
Four Crown, Inc.	0305-21960	Paid in FY 11	34.60	$5,692.58	
Sherburne, Daniel	0305-22121	$1,000.00	13.45	$2,159.75	
Helmberger, Marshall	0305-22159	$1,000.00	72.20	$9,798.00	
Citizens Information Associate	0305-22638	$1,000.00	19.00	$2,004.50	
FY 2012 Totals:		**$3,000.00**	**139.25**	**$19,654.83**	**-$16,654.83**
Program Totals:		**$7,000.00**	**343.25**	**$43,390.83**	**-$36,390.83**

While the 2010 Legislature intended that a special $1,000 filing fee would be sufficient to cover the costs of resolving any of such dispute, as the chart reflects, OAH's actual cost experience has been very different than legislators originally projected. The cost-recovery mechanism in Minn. Stat. § 13.085, subdivision 6, is not sufficient to cover the costs actually incurred by the OAH.

Moreover, while legislators assumed that the data practice disputes presented to OAH would involve clear-cut cases of intransigence by government officials, the filings have involved complex and fact-intensive questions of first impression. For example, among the questions presented to OAH in Fiscal Year 11 and 12 were:

- How detailed must a written release authorizing the disclosure of private data be before it is effective?

- Under what circumstances, if any, may a written release for the disclosure of private data be revoked?

- Is the name of a felon from whom a DNA sample has been drawn a "related record" to the analysis performed on the sample?

- Is appraisal information obtained by a Watershed District during settlement talks with a landowner, subject to disclosure, on the grounds that the appraisal was obtained "for the purpose of acquiring land through purchase or condemnation"?

- Is the report of a valuation expert in a condemnation proceeding protected against disclosure as "civil investigative data" or "attorney work product"?

- Following the award of a government contract to a vendor, does all of the data created by lower tier subcontractors become publicly accessible?

None of these questions admits an easy or quick answer.

Likewise noteworthy, in three of the four cases presented in Fiscal Year 11, the complaining party had undertaken, or planned to undertake, other litigation with the respondent government on claims related to the requested data. This is also true of the first data practice case filed in Fiscal Year 12.

This fact thus raises an important policy question: Are those who are using the expedited hearing process turning to OAH so that they can better understand the workings of government,[1] or rather because they can obtain litigation-related documents from OAH earlier than they could through the usual discovery processes in the state courts?

Why a Program Shortfall is an Important Concern:

The Administrative Law Division of the OAH operates as an Enterprise Fund within state government. The cost of hearing services are billed to the client agencies that use our services. The receipts from such charges are then deposited into an Enterprise (Revolving Fund) Account and appropriated back to OAH for payment of employee

[1] *Compare,* Minn. Stat. § 13.03, subd. 2 (c) ("Full convenience and comprehensive accessibility shall be allowed to researchers including historians, genealogists and other scholars to carry out extensive research and complete copying of all records containing government data except as otherwise expressly provided by law").

salaries, benefits and enterprise-related expenses. *See,* Minn. Stat. §§ 14.53, 14.54.

Also important, the Office of the Legislative Auditor (OLA) has interpreted the phrase "the chief administrative law judge ... shall assess agencies the cost of services rendered to them," in Minn. Stat. § 14.53, as a strict prohibition on cross-subsidization. To implement this statutory restriction, and avoid a negative audit finding from OLA in the future, OAH does not charge one set of government agencies higher rates so that it can underwrite the services that it provides to other clients.

Accordingly, if few, or none, of the data practice act cases presented to OAH can be resolved for the $1,000 filing fee – any shortfalls will deplete the Enterprise Account and make it more difficult for OAH to efficiently operate.

Even if these disputes could be resolved within a few of hours, it is still not clear that the program can operate as originally structured. At least one government agency that did not prevail during a hearing before OAH, and was taxed with reimbursing OAH for $1,000 in hearing costs (*see,* Minn. Stat. § 13.085, subdivision 6 (c)), refused to remit the required sums. OAH does not have a ready mechanism for collecting reimbursements from local governments that do not respond to an Order taxing costs.

Options for the Legislature to Consider:

The Legislature has four reform options: It could recalibrate the cost-recovery mechanism of section 13.085 in one of several different ways or it could repeal the statute.

(a) Modifying the current statute: As noted above, the law now provides that when a respondent government agency does not prevail it can be taxed with paying $1,000 in OAH hearing costs and up to $5,000 in attorneys fees. One simple change to the statute would be to reverse this apportionment – covering up to $5,000 in OAH hearing costs and reducing to $1,000 the amount of attorneys fees that could be recovered by petitioners. Such a change would permit OAH to reduce some of the program shortfalls and it would place a disincentive on attorneys extending the length of litigation.

(b) Enacting "loser-pay" rules: The Legislature could provide that the non-prevailing party bear the hearing costs or that these costs be apportioned among the parties based upon the results achieved in the case.

(c) Appropriating sums for hearing costs: The Legislature could make an appropriation to the Department of Administration (a current client of the OAH) sufficient to cover anticipated hearing costs and the OAH could bill the Department as it does in other types of administrative law matters.

(d) Repealing the current statute: It is also conceivable that the Legislature could conclude that the expedited process has satisfied its original purpose, or that the costs associated with such a procedure do not justify the expenditures, or both, and repeal

section 13.085.

OAH is glad to have the chance to share with you the detail on its receipt and expenditure of money under Minn. Stat. § 13.085, during Fiscal Years 11 and 12.

If I can provide any further detail, please do not hesitate to contact me at: ray.krause@state.mn.us or (651) 361-7900.