



**Report on the Office of Administrative Hearings
Expedited Hearing Process
Under the Minnesota Government Data Practices Act**

Fiscal Year 2015

Report to the Legislature

As Required By

2010 Minnesota Laws, Chapter 297, Section 3

<p>CHIEF ADMINISTRATIVE LAW JUDGE:</p> <p>Tammy L. Pust</p>	<p>Report on the Office of Administrative Hearings Expedited Hearing Process Under the Minnesota Government Data Practices Act</p> <p>September 9, 2015</p> <p>FY 2015 Report to the Legislature</p> <p>As required by 2010 Minnesota Laws, Chapter 297, Section 3</p>
<p>FOR MORE INFORMATION CONTACT:</p> <p>Tammy L. Pust Chief Administrative Law Judge Office of Administrative Hearings 651-361-7830 tammy.pust@state.mn.us</p>	
<p>Office of Administrative Hearings 600 North Robert Street PO Box 64620 St. Paul, Minnesota 55164 TDD: 651-361-7878</p> <p>Upon request, this report can be made available in alternative formats.</p>	

Cost of Report Preparation

The total cost for the Minnesota Office of Administrative Hearings to prepare this report was approximately \$100. These costs involved staff time in compiling and analyzing data, and preparing the written report.

Estimated costs are provided in accordance with Minnesota Statutes section 3.197, which requires that the cost of preparing a required report must be provided at the beginning of all reports to the legislature.

Executive Summary

In 2010, the Minnesota Legislature authorized the Office of Administrative Hearings to provide an expedited hearing to any complainant seeking an order to compel a government agency to comply with the Minnesota Government Data Practices Act (MGDPA or Data Practices Act). Five years of experience with this program has revealed the following:

- Contrary to the expectations of the original proponents of the legislation, most cases heard in the expedited process do not arise from overly protective and legally baseless decisions of government officials; most arise from complicated sets of facts upon which no clear legal precedent is apparent. The Office of Administrative Hearings decisions in these matters have created clarity in the law, which has reduced the necessity of future litigation.
- The statutory funding scheme is inadequate to support the program as legislatively designed. The \$1000 filing fee has proved insufficient to cover the Office of Administrative Hearings' costs in all but one matter filed, such that the program has run a statutory operating deficit in all five years of its existence.

The Office of Administrative Hearings worked with the 2015 Legislature to obtain deficiency funding for the program. Until structural changes are made to the funding formula, additional deficiency requests will need to be made annually.

Program Background

Minn. Stat. § 13.085 allows persons seeking an order compelling a state or local government agency to comply with the Minnesota Government Data Practices Act to request an expedited hearing before an Administrative Law Judge at the Office of Administrative Hearings. Strict and short statutory timeframes apply to these claims: hearings are held within 30 days of the filing of the complaint and response; decisions are due within 10 days following the close of the hearing record. In these cases, Administrative Law Judge determinations are final agency decisions appealable to the Minnesota Court of Appeals.

The Office of Administrative Hearings has developed a detailed set of procedures and templates for use in these hearings, all of which are available electronically via the Office of Administrative Hearings website at <http://mn.gov/oah/administrative-law/filing/data/index.jsp>. The agency absorbed all of the costs associated with the development of these resources in Fiscal Year 2013.

Complexity of Cases

When enacting Minn. Stat. § 13.085, legislators assumed that the disputes that would be presented to the Office of Administrative Hearings would, most often, involve clear-cut cases of intransigence by government officials refusing to provide to the public legally producible data. Directly contrary to this expectation, the filings have instead involved complex and fact-intensive questions of first impression. Among the legal issues presented were the following:

- 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?
- Are a government lawyer’s litigation notes, as to a case that has been dismissed, exempt from disclosure as “attorney work-product?”
- Is a citizen entitled to an evidentiary hearing as a matter of right to determine whether certain government records exist?
- How much of otherwise public data may be redacted from agency documents in order to safeguard non-public data from disclosure?
- Whether a utility's assembly of data from various public sources into a single, convenient compilation may be protected as a trade secret?

None of these questions admits an easy or quick answer. Accordingly, their resolution involved significant factual disputes and required extensive legal research and analysis.

The chart below details the Office of Administrative Hearings’ cost experience for the expedited hearing process in fiscal years 2011 through 2015.

Matter	Docket Number	Filing Fees (Total Revenue to OAH)	OAH Hours Required to Resolve	Total Cost to OAH
In Re: Schmid	0305-21608	\$1,000.00	52.0	\$5,752.00
In Re: KSTP-TV	0305-21754	\$1,000.00	76.75	\$9,248.00
In Re: Stengrim	0305-21900	\$1,000.00	26.45	\$2,792.00
In Re: Four Crown, Inc.	0305-21960	\$1,000.00	48.80	\$5,944.00
FY 11 Totals		\$4,000.00	204.00	\$23,736.00
In Re: Four Crown, Inc.	0305-21960	Paid in FY11	34.60	\$5,692.58
In Re: Sherburne	0305-22121	\$1,000.00	13.45	\$2,159.75
In Re: Helmberger	0305-22159	\$1,000.00	72.20	\$9,798.00
In Re: Citizens Info.	0305-22638	\$1,000.00	19.00	\$2,004.50
FY12 Totals		\$3,000.00	139.25	\$19,654.83
In Re: Prall	0305-30225	\$217.50	2.4	\$217.50
In Re: Utes	0305-30394	\$1,000.00	7.3	\$1,119.50
In Re: Beedle	0305-30450	\$1,000.00	14.9	\$1,812.50
In Re: Gibson	0305-30695	\$1,000.00	1.8	\$297.00
FY13 Totals		\$3,217.50	26.4	\$3,446.50
In Re: Beedle	0305-30450	Paid in FY13	.8	\$64.00
In Re: Gibson	0305-30695	Paid in FY13	9.90	\$1,633.50
In Re: MAPE	0305-30914	\$195.50	1.70	\$195.50
In Re: ND Pipeline	0305-31410	\$1,000.00	32.10	\$5,261.50
In Re: Hurlbert	0305-31500	\$305.00	1.70	\$305.00
FY14 Totals		\$1,505.00	46.20	\$7,459.50
In Re: KSTP TV	0305-31782	\$1000.00	19.0	\$3,109.50
In Re: Rockville	0305-31990	\$1000.00	22.20	\$2,476.50
FY15 Totals		\$2000.00	41.20	\$5,586.00

Program Funding Deficiency

With regard to most all other types of work except the data practices expedited hearing program, the Administrative Law Division of the Office of Administrative Hearings 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 the Office of Administrative Hearings for payment of employee salaries, benefits and enterprise-related expenses. See, Minn. Stat. §§ 14.53, 14.54 (2014).

The MGDPA expedited hearing program is an exception to this general procedure. The Office of Administrative Hearings has no ability to charge any client agency to recover its costs attributable to the program, and receives no general fund appropriation in support

of the program. Instead, the 2010 Legislature intended that the special¹ \$1,000 filing fee would be sufficient to cover the costs of resolving any dispute in the expedited data practices process. As the information above and the chart below reflect, the Office of Administrative Hearings' actual cost experience has been much different than was anticipated.

Receipts and Expenditures for FYs 2011 – 2015

Fiscal Year	Filing Fees or Income	Total Billed Hours	Total Cost	Program Shortfall
FY 2011 Totals:	\$4,000.00	204.00	\$23,736.00	-\$19,736.00
Shortfall as of FY2013				-\$19,736.00
FY 2012 Totals:	\$3,000.00	139.25	\$19,654.83	-\$16,654.83
Shortfall as of FY2012				-\$36,390.83
FY 2013 Deficiency Appropriation				+\$36,000.00
Shortfall after Appropriation				-\$390.83
FY 2013 Totals:	\$3,217.50	26.4	\$3,446.50	-\$ 229.00
Shortfall as of FY2013				-\$619.83
FY2014 Totals:	\$1,505.00	46.2	\$7,459.50	-\$5,954.50
Shortfall as of FY 2014				-6,574.33
FY2015 Totals:	\$2,000.00	41.20	\$5,586.00	-\$3,586.00
Shortfall as of FY 2015				-10,160.33
FY 2015 Deficiency Appropriation				+12,000.00

It appears that the program's funding mechanism is statutorily structured in such a way that the program will never be self-sustaining. In those instances when less than \$1,000 in costs is incurred, the Office of Administrative Hearings is obliged to return the unused portion of the filing fee to the complainant. See, Minn. Stat. § 13.085, subd. 6(c) (2014). In those instances when more than \$1,000 in costs is incurred, a deficiency occurs and the agency has no source of revenue to make up the shortfall.

Importantly, the Office of the Legislative Auditor has interpreted the phrase "the chief administrative law judge...shall assess agencies the cost of services rendered to them"

¹ The Office of Administrative Hearings' general filing fee is \$50 for all other matters.

in Minn. Stat. § 14.53 as a strict prohibition on cross-subsidization. To comply with this statutory restriction, the Office of Administrative Hearings cannot charge government agencies higher rates so that it can underwrite the services that it provides to MGDPA complainants. Accordingly, if few or none of the MGDPA cases presented to the Office of Administrative Hearings can be resolved for the \$1,000 filing fee, continuing shortfalls will deplete the Enterprise Account and make it more difficult for the Office of Administrative Hearings to efficiently operate within existing resources.

It was for this reason that the 2013 Legislature necessarily appropriated \$36,000 to the Office of Administrative Hearings in order to cure deficiencies in the program account for that fiscal year, and it was for this same reason that the 2015 Legislature appropriated another \$12,000 to the program account for the next biennium. Without statutory changes to the program's funding scheme, similar deficiency appropriations will be necessary on a biennial basis.

Fixing the Funding Deficiency: Options for Legislative Consideration

To avoid the necessity of constant deficiency appropriations, the Legislature should consider statutory reform options to recalibrate the cost-recovery mechanism of Minn. Stat. § 13.085. Four options are outlined below.

- (a) Reverse the Cost/Fee Apportionment: The law currently provides that a non-prevailing respondent government agency can be taxed with paying \$1,000 in the Office of Administrative Hearings' hearing costs and ordered to pay up to \$5,000 in attorney fees to the complainant. One simple change to the statute would be to reverse the apportionment – requiring non-prevailing agencies to cover up to \$5,000 in the Office of Administrative Hearings' hearing costs and limiting the amount of attorney fees that could be recovered by complainants to \$1,000. The current gross average of the Office of Administrative Hearings' per case costs is \$3,326.82, suggesting that this change would permit the Office of Administrative Hearings to reduce a significant amount of the program shortfalls and also serve as a disincentive for attorneys to unnecessarily extend the length of litigation. As required by statute, any unused portion would be returned to the complainant.
- (b) Appropriate Funds: The Legislature could directly appropriate funds to the Office of Administrative Hearings sufficient to cover anticipated hearing costs. If it prefers to maintain the Enterprise Fund model in these matters, the appropriation could be directed to the Department of Administration with the direction that the Office of Administrative Hearings bill that Department to recover all Office of Administrative Hearings' costs, as the agency currently does in other types of administrative law matters.
- (c) Apportion Between Parties: The Legislature could direct that the costs of these proceedings be apportioned between the parties by the Administrative Law Judge on an equitable basis, in the same manner as the Office of Administrative Hearings

currently apportions necessary costs in municipal boundary adjustment matters pursuant to Minn. Stat. § 414.12, subd. 3 (2014). This solution would allow the assigned Administrative Law Judge to determine on a case-by-case basis what apportionment is just and reasonable.

- (d) Certify Costs: The Legislature could direct that the costs of these proceedings be certified to the Commissioner of Minnesota Management and Budget (MMB) on a quarterly basis. Upon certification, MMB could deposit the certified amount from the General Fund into the Office of Administrative Hearings' Enterprise Fund.
- (e) Repeal the Statute: If the Legislature concludes that the expedited process has satisfied its original purpose or that the costs associated with the process do not justify the continued expenditure of public funds, the Legislature could repeal Minn. Stat. § 13.085.

Conclusion

The Office of Administrative Hearings appreciates the opportunity to submit this report in an effort to provide the legislature with objective data necessary to inform its continuing policy and funding discussions related to this important program. If any further information would be helpful, please do not hesitate to contact Chief Judge Tammy L. Pust at tammy.pust@state.mn.us or (651) 361-7831.