

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 Lakes Area Police
Department that Certain Data about
Joseph Calhoun are Accurate and/or
Complete

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge Jeanne M. Cochran for an evidentiary hearing on August 6, 2015, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota, 55101. The record closed at the conclusion of the hearing.

Vincent Stevens, Miller & Stevens, P.A., appeared on behalf of the Lakes Area Police Department (LAPD). Appellant Joseph Calhoun appeared on his own behalf and without legal counsel.

STATEMENT OF ISSUE

Is the data challenged by Joseph Calhoun 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 Mr. Calhoun are inaccurate and incomplete within the meaning of the Minnesota Government Data Practices Act. The Administrative Law Judge therefore recommends that the LAPD amend its data as set forth in the Recommendations below. As to other challenged data, Mr. Calhoun has failed to carry his burden to show that the data are inaccurate or incomplete, and no modifications are necessary.

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

FINDINGS OF FACT

I. September 26, 2008 Police Call

1. On September 26, 2008, the LAPD received a 911 from a resident of Chisago City regarding a dispute between neighbors.¹

2. Three LAPD officers were dispatched to the scene. Those officers included Officer Cory Spencer, Officer Aaron Lee, and Officer Jim Varco.²

3. Upon arriving at the scene, Officers Lee and Varco spoke with the Complainant, Kristina Sue Paul. Officer Spencer arrived a short time later.³

4. The Complainant advised the officers that she had a “no contact order” against her neighbor, Joseph Daniel Calhoun, and that he had been harassing her and her children.⁴

5. The three officers then went across the street to the Calhoun residence to speak with Mr. Calhoun. Mr. Calhoun was in the third stall of his garage, which he uses as a pottery studio, when the officers arrived. In addition, Valerie Calhoun, Mr. Calhoun’s wife, and a neighbor, Rachelle Kaeser, were also at the home at the time.⁵

6. Officer Varco spoke with Mr. Calhoun about the allegations by the Complainant.⁶ Mr. Calhoun acknowledged he was aware of the no contact order, but denied violating the terms of the order.⁷ Officer Varco also spoke with Mrs. Calhoun and Rachelle Kaeser.⁸

7. The officers advised Mr. Calhoun and the Complainant to stay away from each other, and then left the scene.⁹

8. An LAPD incident report was prepared by Officer Spencer, the primary officer, regarding the police call described above. The incident report was created on the day of the call, September 26, 2008.¹⁰ Supplemental reports were added by Officers Spencer, Lee, and Varco describing in detail what each officer observed and heard during the police call that evening.¹¹ Officers Spencer and Lee made their supplemental reports the next day, September 27, 2008. Officer Varco made his supplemental report two days

¹ Ex. 101.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; Test. of Off. Spencer.

¹¹ *Id.*

later, September 28, 2008.¹² The complete report, including the three supplemental reports, is referred to as the “9/26/2008 Report.”

9. In the 9/26/2008 Report, the officers noted that Mr. Calhoun denied going over to the Complainant’s home that night, denied saying anything to the Complainant or her son, and denied harassing the Complainant.¹³ Officer Varco also noted that he spoke with Valerie Calhoun and Rachelle Kaeser. Both told Officer Varco that Mr. Calhoun “had been in the back yard with them, and had not gone out front at all during the evening.”¹⁴

10. In the 9/26/2008 Report, all three officers also noted Mr. Calhoun smelled of alcohol.¹⁵

11. Specifically, Officer Spencer reported that “[Calhoun’s] breath smelled like an alcoholic beverage.” Officer Spencer also stated that “Calhoun appeared to be intoxicated as he was slurring his speech.... His eyes were glassy and he was swaying back and forth while standing. He was also staggering while walking.”¹⁶

12. Similarly, Officer Lee noted that he “could smell the odor of an alcoholic beverage on Calhoun and he was talking very loudly, swaying while he stood, and stumbled while he walked.”¹⁷

13. Likewise, Officer Varco wrote that he “could smell a strong odor of alcoholic beverage on [Mr. Calhoun’s] person, [Mr. Calhoun] was stumbling while moving around, had glass eyes, and slurred speech.”¹⁸ Officer Varco also reported that he asked Mr. Calhoun if he had been drinking and Mr. Calhoun stated “well yeah.”¹⁹

14. In addition, in his supplemental report of September 28, 2008, Officer Varco noted that Mr. Calhoun was “enraged, and belligerent” when speaking with him. Similarly, Officer Spencer stated that Mr. Calhoun “was acting belligerent and was swearing at officers demanding to see a warrant.”²⁰

II. September 30, 2008 Police Call

15. On September 30, 2008, the LAPD received another call from the Complainant alleging that Mr. Calhoun was yelling at her in violation of the no contact order.²¹ Officer Mike Merchlewitz responded to the call for the LAPD.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

16. Officer Merchlewitz spoke separately with the Complainant and Mr. Calhoun. Officer Merchlewitz also spoke with Mrs. Calhoun.²²

17. An LAPD incident report was prepared for the September 30, 2008 call. On October 1, 2008, Officer Merchlewitz prepared a supplement report providing detail about the call.²³ The entire report, including the supplemental report, is referred to as the "9/30/2008 Report."

18. According to the 9/30/2008 Report, Officer Merchlewitz first spoke with the Complainant. He then spoke with Mr. Calhoun.

19. Officer Merchlewitz noted that Mr. Calhoun told him that "he had been in his garage area watching his favorite movie 'House'. He stated he didn't yell anything to his neighbor." Officer Merchlewitz also noted that he spoke with the neighbor west of Mr. Calhoun's house and he did not hear Mr. Calhoun yell anything.²⁴

20. After speaking with Mr. Calhoun, Officer Merchlewitz went back to the Complainant's home and spoke with her again. According to the 9/30/2008 Report, Officer Merchlewitz asked the Complainant to do a breathalyzer test and told her that he would ask Mr. Calhoun to do one as well. She provided a sample, which showed a result of 0.115.²⁵

21. Officer Merchlewitz then went back to Mr. Calhoun's residence. The 9/30/2008 Report states that Officer Merchlewitz spoke with Mr. Calhoun again and obtained "a sample which showed a result of .010." The 9/30/2008 Report further states that "[Mr. Calhoun] stated he had 4 beers while watching his favorite show. I then cleared."²⁶

III. Procedural Background to the Accuracy and Completeness Challenge of the LAPD Incident Reports by Mr. Calhoun

22. By a letter dated June 9, 2014 to Chief Stenson of the LAPD, Mr. Calhoun challenged the accuracy and completeness of the data relating to him in the 9/26/2008 and 9/30/2008 Reports.²⁷

23. In the letter, Mr. Calhoun explained that he first became aware of the 9/26/2008 and 9/30/2008 Reports when he was renewing his driver's license in August 2013. At the time, he had a restriction on his license stating that any use of alcohol or drugs would invalidate his license. The restriction was imposed in 2003. At the time he was renewing his license in 2013, the employee at the License Bureau asked him if he would like to apply to have the restriction removed because it had been more than 10

²² Test. of Off. Mike Merchlewitz; Test. of Valerie Calhoun.

²³ Ex. 102.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Notice and Order for Hearing at ¶ 3 (June 23, 2015).

years and the restriction only lasted 10 years. The employee provided Mr. Calhoun with a form to request removal of the restriction. Mr. Calhoun completed the form, which was then processed by the Minnesota Department of Public Safety (DPS). In September 2013, the DPS denied his request stating “[a] background check conducted upon receiving your application revealed consumption of a drink or product containing alcohol ... occurred on 09/26/2008 AND 09/30/2008 reported by the Lakes Area Police Department.”²⁸

24. After learning about the DPS denial, Mr. Calhoun requested copies of the 9/26/2008 and 9/30/2008 Reports from the LAPD. He then submitted a letter to Chief Stenson challenging the accuracy of the 9/26/2008 and 9/30/2008 Incident Reports. Mr. Calhoun maintained that the references in the Reports to him appearing intoxicated and having used alcohol in 2008 are inaccurate because he has not consumed any alcohol since 2003 when he underwent chemical dependency treatment.²⁹

25. On June 23, 2014, Chief Stenson denied Mr. Calhoun’s challenge. In a letter to Mr. Calhoun, Chief Stenson stated that “any perceived errors listed in your documentation are inconsequential to the facts of the report. Your request is denied.”³⁰

26. On August 19, 2014, the Department of Administration received a letter from Mr. Calhoun in which he asked to appeal Chief Stenson’s determination and requested an administrative hearing pursuant to Minn. Stat. § 13.04 (2014).³¹

27. In a letter dated October 6, 2014, the Information and Policy Analysis Division (IPAD) of the Department of Administration notified Mr. Calhoun that IPAD needed additional information from Mr. Calhoun before it could accept his appeal. Specifically, pursuant to Minn. R. 1205.1600 (2015), Mr. Calhoun needed to provide a concise description of what his preferred outcome would be if he is successful on appeal.³²

28. On October 17, 2014, IPAD received a letter from Mr. Calhoun stating that he would like the LAPD to remove the 9/26/2008 and 9/30/2008 Reports from the public record and destroy the data in question if his appeal is successful.³³

29. In letters dated December 8, 2014 and January 28, 2015 to Mr. Calhoun and the LAPD, the Commissioner of Administration offered the services of IPAD in an attempt to resolve the matter informally.³⁴

²⁸ June 9, 2014 Letter from Joseph Daniel Calhoun to Chief Stenson, LAPD (attached to the Notice and Order for Hearing).

²⁹ *Id.*

³⁰ Notice and Order for Hearing at ¶ 4 and attached June 23, 2014 letter.

³¹ Notice and Order for Hearing at ¶ 5.

³² October 6, 2014 Letter from Laurie Beyer-Kropuenske, IPAD, to Joseph D. Calhoun (attached to the Notice and Order for Hearing).

³³ October 11, 2014 Letter from Joseph Calhoun to IPAD (attached to the Notice and Order for Hearing).

³⁴ Notice and Order for Hearing at paragraph 8; see also Minn. Stat. 13.04, subd. 4(a).

30. After receipt of the letters, the parties agreed to attempt informal dispute resolution with IPAD. The efforts by IPAD were unsuccessful.³⁵

31. As a result, the Department of Administrative issued the Notice and Order for Hearing dated June 25, 2015. The Notice and Order for Hearing set the contested case hearing for August 6, 2015.

IV. Data Challenged at the Contested Case Hearing

32. At the hearing on August 6, 2015, Mr. Calhoun raised challenges to the accuracy and completeness of certain data in the 09/26/2008 and the 09/30/2008 Reports.

A. Challenges to the 9/26/2008 Report

33. With regard to the 09/26/2008 Report, Mr. Calhoun challenged four aspects of the report at the hearing.

34. First, Mr. Calhoun challenged the accuracy of the following notation by Officer Varco: "I did ask Joseph if he had been drinking. He stated 'well yeah.'"

35. According to Mr. Calhoun, Officer Varco never asked him if he had been drinking.³⁶ Officer Varco,³⁷ however, maintained at the hearing that his report is accurate and complete.³⁸ Officer Varco stated that he did ask Mr. Calhoun whether he had been drinking and properly reported Mr. Calhoun's answer.³⁹

36. Second, Mr. Calhoun disputed Officer Spencer's description of him as intoxicated, as well as Officer Spencer's statement that Mr. Calhoun "smelt like an alcoholic beverage." Similarly, he disputed Officer Lee's statement that he could smell "the odor of an alcoholic beverage on Calhoun," and Officer Varco's statement that he "could smell a strong odor of alcoholic beverage on Joseph's person...."⁴⁰

37. At the hearing, Mr. Calhoun stated that he had used hand sanitizer shortly before the officers arrived on September 26, 2008 and it was the hand sanitizer that the officers smelled on his body. He explained that he uses hand sanitizer when he is working in his pottery studio so that the glaze from one pot does not get on another pot prior to the pots being fired. He stated that he had not been drinking alcohol, and none of the officers asked him about the smell of alcohol on his body. He stated that if he had been asked about the alcohol smell, he would have explained that it was hand sanitizer.⁴¹

³⁵ *Id.* at ¶ 9.

³⁶ Test. of J. Calhoun.

³⁷ Officer James Varco is now a Sargent with the LAPD. Test. of Sgt. Varco.

³⁸ Test. of Sgt. Varco.

³⁹ *Id.*

⁴⁰ Test. of J. Calhoun; Ex. 101.

⁴¹ Test. of J. Calhoun.

38. Officer Spencer maintained that his description of Mr. Calhoun as intoxicated and as smelling like an alcoholic beverage on September 26, 2008 is accurate.⁴² Officer Spencer noted that as of September 2008, he had received three trainings on alcohol and identifying intoxicated individuals.⁴³

39. Similarly, Officer Varco stated that his supplemental report is accurate, and that Mr. Calhoun smelled like alcohol at the time of his discussion with him on September 26, 2008.⁴⁴ Like Officer Spencer, Officer Varco had been trained prior to September 26, 2008 in identifying individuals who are under the influence of alcohol and the characteristics those individuals exhibit.⁴⁵

40. Third, Mr. Calhoun challenged Officer Varco's description of him as "enraged, and belligerent." Mr. Calhoun maintains that "pugnacious" would be a better description of his behavior.⁴⁶

41. Fourth, Mr. Calhoun claimed that Officer Varco's statement in the Report that Valerie Calhoun and Rachelle Kaeser "both advised [Mr. Calhoun] had been in the back yard with them..." is not accurate. Mr. Calhoun claimed they did not make such a statement because he was not in the backyard that evening. Mr. Calhoun maintained that he was in his pottery studio in the third stall of his garage during the time in question. The third stall of the garage faces out towards the street.⁴⁷

42. In addition, in a statement dated October 10, 2008, Rachelle Kaeser stated that on the night of September 26, 2008, she and Valerie Calhoun were watching a movie and had the windows open. They could hear their kids playing in the backyard, and could hear and see Mr. Calhoun talking with a neighbor, John. She stated that Mr. Calhoun and John were "talking in the front. Not once did we see or hear [Mr. Calhoun] go anywhere besides the back yard and John's house. We were all minding our own business when the police arrived."⁴⁸

B. Challenges to the 9/30/2008 Report

43. At the hearing, Mr. Calhoun challenged three aspects of the 9/30/2008 Report.

44. First, he challenged the accuracy of Officer Merchlewitz's characterization of "House" as a movie. Mr. Calhoun stated that "House" is a television series, not a

⁴² Test. of Off. Spencer.

⁴³ *Id.*

⁴⁴ Test. of Sgt. Varco.

⁴⁵ *Id.*

⁴⁶ Test. of J. Calhoun.

⁴⁷ *Id.*

⁴⁸ Ex. 6 at 50.

movie.⁴⁹ In response, counsel for the LAPD stipulated that “House” is a television show, not a movie.⁵⁰

45. Second, Mr. Calhoun challenged the accuracy of the results of his breathalyzer test, as well as the completeness of his discussion with Officer Merchlewitz regarding the request for a breathalyzer test.⁵¹ Mr. Calhoun stated that the result of the test was actually .001, not .010. In addition, Mr. Calhoun asserted that Officer Merchlewitz left out a number of important facts regarding their discussion before and after the breathalyzer test. According to Mr. Calhoun, when Officer Merchlewitz returned to his house to request that he take a breathalyzer test, he was in the shower. He stated that the officer spoke with his wife until he was done with his shower. When he came down, the officer asked if he would take a breathalyzer test. He stated that he told the officer he was hesitant because he had just brushed his teeth and used mouthwash, but he agreed to do it. He also asserted that Officer Merchlewitz showed him a result of .001, and then the officer stated that this was just the type of result that he would expect from someone who has just brushed their teeth.⁵²

46. Valerie Calhoun also testified at the hearing about the events of September 30, 2008.⁵³ Mrs. Calhoun confirmed that Mr. Calhoun was in the shower when Officer Merchlewitz arrived back at their house. When her husband came down from his shower, Officer Merchlewitz asked Mr. Calhoun if he would take a breath test. According to Mrs. Calhoun, Mr. Calhoun responded “sure.”⁵⁴ As far as she could recall, the result was .001, but she was not positive because it was a long time ago.⁵⁵

47. Mr. Calhoun’s third challenge to the 9/30/2008 Report is whether he told Officer Merchlewitz that “he had 4 beers while watching his favorite show.” Mr. Calhoun maintains that he did not say he had four beers that evening. Rather, he told Officer Merchlewitz that he did not drink any more, but when he used to drink, he would have two or two and one-half beers while he would watch a show.⁵⁶

48. Officer Merchlewitz defended the accuracy of his report. He maintained that Mr. Calhoun did tell him that he had four beers while watching his favorite show that night. Officer Merchlewitz also stated that he had no reason to falsely report what Mr. Calhoun told him on that day.⁵⁷

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

⁴⁹ Test. of J. Calhoun.

⁵⁰ Oral stipulation of Vince Stevens, Esq., counsel for LAPD.

⁵¹ Test. of J. Calhoun.

⁵² *Id.*

⁵³ Test. of V. Calhoun.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Test. of J. Calhoun.

⁵⁷ Test. of M. Merchlewitz.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Administration have jurisdiction in this matter.⁵⁸

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 Mr. Calhoun within the police reports constitute government data within the meaning of the Minnesota Government Data Practices Act (Act).⁵⁹

5. The Lakes Area Police Department is a government entity, subject to the provisions of the Act.⁶⁰

6. Mr. Calhoun is the subject of data on individuals that is maintained by the Lakes Area Police Department.⁶¹

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.⁶²

8. A person who is the subject of data may challenge the accuracy not only of the facts, but also conclusions contained in that data.⁶³

9. A person may challenge subjective opinions maintained by a state agency to the extent that those opinions rest on statements that are objectively verifiable and thus, falsifiable.⁶⁴

10. “[M]ere dissatisfaction with a subjective judgment or opinion cannot support a challenge under the Data Practices Act.”⁶⁵

11. Evidence presented during the contested case proceeding pursuant to Minn. Stat. ch. 14 (2014), for a challenge to the accuracy and completeness of data under

⁵⁸ Minn. Stat. §§ 13.04, subd. 4, 14.50 (2014); Minn. R. 1205.1600.

⁵⁹ See Minn. Stat. § 13.02, subd. 5 (2014).

⁶⁰ Minn. Stat. §§ 13.01, .02, subd. 7a (2014).

⁶¹ Minn. Stat. § 13.02, subds. 5, 7.

⁶² Minn. Stat. § 13.04, subd. 4.

⁶³ *Hennepin County Community Services Dept. v. Hale*, 470 N.W.2d 159, 164 (Minn. Ct. App. 1991).

⁶⁴ See *Schwanke v. Department of Administration*, 851 N.W.2d 591, 594 (Minn. 2014); see also Minn. Stat. § 13.04, subd. 4(a).

⁶⁵ *Schwanke*, 851 N.W.2d at 595.

the Act may include evidence not previously presented to the responsible authority for the data or the Commissioner of Administration.⁶⁶

12. The burden of proof in this proceeding is on Mr. Calhoun to prove by a preponderance of the evidence that the data in question is not accurate and/or complete.⁶⁷

13. Mr. Calhoun has demonstrated by a preponderance of the evidence that some, but not all, of the data maintained by the Lakes Area Police Department in which Mr. Calhoun is a subject is inaccurate and incomplete. Specifically, Mr. Calhoun has demonstrated that the 9/30/2008 Report is inaccurate when it refers to "House" as a movie. "House" is a television show, not a movie.

14. In addition, Mr. Calhoun has demonstrated by a preponderance of the evidence that the 9/30/2008 Report is incomplete in that it fails to reflect that Mr. Calhoun had showered and used mouthwash just prior to taking the breathalyzer test on that date.

15. Except as specified above in paragraphs 16 and 17, Mr. Calhoun has failed to demonstrate by a preponderance of the evidence that the 9/26/2008 Report and 9/30/2008 Report are inaccurate or incomplete.

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

RECOMMENDATIONS

1. The Administrative Law Judge recommends that the 9/30/2008 Report (Incident Report 08004033) be **AMENDED** as follows:

On page 2, the first sentence of fourth full paragraph should be amended by deleting the word "movie" and replacing it with "show" to read as follows:

I spoke to the subject who stated that he had been in his garage area watching his favorite ~~movie~~show "House."

2. The Administrative Law Judge recommends that the 9/30/2008 Report (Incident Report 08004033) be **AMENDED** as follows:

On page 2, the seventh full paragraph should be amended by adding the underlined language to read as follows:

I then spoke to this suspect again. He indicated he had just taken a shower, brushed his teeth, and used mouthwash. I obtained a sample which showed a

⁶⁶ *Id.* at 596.

⁶⁷ Minn. R. 1400.7300, subp. 5 (2013).

result of .010. He stated he had 4 beers while watching his favorite show. I then cleared.

3. The Administrative Law Judge recommends that all other data challenges be **DISMISSED**.

Dated: September 4, 2015

s/Jeanne M. Cochran

JEANNE M. COCHRAN
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, 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. 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, 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

The Act defines “data on individuals” as “all government data in which any individual is or can be identified as the subject of that data.”⁶⁸ Under the Data Practices Act, “[a]n individual subject of the data may contest the accuracy or completeness of public or private data.”⁶⁹ Because Mr. Calhoun is a “subject of the data” in the 9/26/2008 and 9/30/2008 Reports prepared by the LAPD, Mr. Calhoun “may contest the accuracy or completeness” of that data.⁷⁰

In order to prevail in his challenge, Mr. Calhoun is required to show by a preponderance of the evidence that the challenged data are inaccurate or incomplete.⁷¹ “Accurate” means that the data in question is reasonably correct and free from error.⁷² “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.⁷³ A preponderance of the evidence means that it must be established by a greater weight of the evidence.⁷⁴ “It must be of a greater or more convincing effect and ... lead you to believe that it is more likely that the claim...is true than...not true.”⁷⁵

After carefully considering the record as a whole, the Administrative Law Judge concludes that Mr. Calhoun has failed to demonstrate by a preponderance of the evidence that the challenged data in the 9/26/2008 and 9/30/2008 Reports are inaccurate or incomplete, with two exceptions involving the 9/30/2008 Report. The challenges to each report are discussed separately below.

I. Challenges Relating to the 9/26/2008 Report

A. Challenge to the Description of Mr. Calhoun on 9/26/2008 as Smelling of Alcohol and the Use of Alcohol

Mr. Calhoun claims that he has not had any alcohol to drink since 2003 when he went through chemical dependency treatment. Therefore, he argues the notations by each of the officers (Calhoun, Lee, and Varco) in the 9/26/2008 Report that they smelled the odor of alcoholic beverage on Mr. Calhoun are inaccurate. Mr. Calhoun maintains the smell was hand sanitizer. In addition, he maintains that he did not tell Officer Varco that he had been drinking on that date and did not appear intoxicated.⁷⁶ Other than his own testimony, Mr. Calhoun offers no evidence in support of his position.

⁶⁸ Minn. Stat. § 13.02, subd. 5.

⁶⁹ Minn. Stat. § 13.04, subd. 4(a).

⁷⁰ Minn. Stat. § 13.04, subd. 4(a); *Schwanke*, 851 N.W.2d at 593.

⁷¹ Minn. R. 1400.7300, subp. 5 (2015).

⁷² Minn. R. 1205.1500, subp. 2A (2015).

⁷³ *Id.*, subp. 2B (2013).

⁷⁴ 4 Minnesota Practice, CIV JIG 14.15 (2014).

⁷⁵ *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

⁷⁶ Test. of J. Calhoun.

Officers Spencer and Varco both testified at the hearing that their reports of the events of 9/26/2008 are accurate. Both officers also testified that, at the time of the incident, they had both been through training to identify intoxicated individuals. In addition, both officers made their supplemental reports within two days of the police call. Moreover, Officer Aaron Lee also filed a supplemental report on 9/27/2008 stating that he smelled “the odor of alcoholic beverage on Calhoun and he was talking very loudly, swaying while he stood, and stumbled when he walked.”⁷⁷

Because there is no evidence that any of the three officers had any reason to falsely report any information about Mr. Calhoun and the three officers’ supplemental reports were made close in time to the September 26, 2008 incident, the Administrative Law Judge concludes that Mr. Calhoun has failed to demonstrate by a preponderance of the evidence that data specified above relating to alcohol in the 9/26/2008 Report are inaccurate or incomplete.

B. Challenge to the Description of Mr. Calhoun on 9/26/2008 as “enraged, and belligerent”

Mr. Calhoun challenges Officer Varco’s description of him as “enraged, and belligerent” on September 26, 2008. He maintains that “pugnacious” would be a more accurate description. In *Schwanke*, the Minnesota Supreme Court held that “mere dissatisfaction with a subjective judgment or opinion cannot support a challenge under the Data Practices Act.”⁷⁸ Because Officer Varco’s description of Mr. Calhoun as “enraged, and belligerent” is a subjective opinion and the description is not based on facts that are objectively verifiable, the Administrative Law Judge concludes that this description is not properly subject to a challenge under the Act.

C. Challenge to the Location of Mr. Calhoun on 9/26/2008

Mr. Calhoun also challenges the statement in Officer Varco’s supplemental report that “Valerie Calhoun and Rachelle Kaeser both advised Joseph had been in the back yard with them....” Mr. Calhoun maintains that this statement is inaccurate because he was not in the backyard on the evening in question. Valerie Calhoun testified at the hearing, but she did not testify about the events of September 26, 2008. She only testified about the events of September 30, 2008.

Mr. Calhoun also introduced, as an exhibit, a written statement by Rachelle Kaeser dated October 10, 2008. In that statement, Ms. Kaeser notes that Mr. Calhoun was in the backyard for a period of time on that evening.⁷⁹

The Administrative Law Judge concludes that Mr. Calhoun has failed to demonstrate by a preponderance of the evidence that Officer Varco’s notation of what he was told by Ms. Kaeser and Mrs. Calhoun regarding Mr. Calhoun’s whereabouts is

⁷⁷ Ex. 101.

⁷⁸ 851 N.W.2d at 595.

⁷⁹ Ex. 6 at 50.

inaccurate. In fact, Officer Varco's supplemental report prepared on September 28, 2008 is consistent with the written statement of Rachelle Kaeser dated October 10, 2008.

II. Challenges Relating to the 9/30/2008 Report

A. Challenge to the description of "House" as a movie

Mr. Calhoun challenged Officer Merchlewitz's statement in the 9/30/2008 Report that Mr. Calhoun was "watching his favorite movie 'House.'"⁸⁰ He maintains "House" is a television show. At the hearing on August 6, 2015, counsel for the LAPD stipulated to change the description of "House" from "movie" to "show," resolving the issue.

B. Challenge to the accuracy and completeness of the breathalyzer results and use of alcohol

Mr. Calhoun also challenged the accuracy and completeness of Officer Merchlewitz's description of his request that Mr. Calhoun take a breathalyzer test and the results. With regard to this request, the report states that: "I then spoke to the suspect again. I obtained a sample which showed a result of .010. He stated he had 4 beers while watching his favorite show. I then cleared."

At the hearing, Mr. Calhoun noted that the 9/30/2008 Report fails to reflect that Mr. Calhoun had just taken a shower, brushed his teeth, and rinsed with mouthwash prior to Officer Merchlewitz asking him to take the breathalyzer test. Mr. Calhoun also maintains that the result was .001, not .010 as reported. In addition, he claims that Officer Merchlewitz told him after the test that the .001 result is "just what you would expect" from someone who had just brushed his teeth. Finally, he disputes that he told Officer Merchlewitz that he drank four beers. Rather, he claims that he said he used to have 2-2.5 beers when he would watch a television show.

In response, the LAPD maintains that Officer Merchlewitz's report was made close in time to the police call, and therefore, is more likely to be accurate than Mr. Calhoun's memory. In addition, the LAPD argues that both .010 and .001 are well below the legal limit, and therefore any inaccuracy is not of significance. The LAPD also notes that there is no evidence that Officer Merchlewitz had any reason to falsely report the breathalyzer test result or what Mr. Calhoun told him about drinking on September 30, 2008. Finally, the LAPD asserts that the September 30, 2008 Report is complete.

In the view of the Administrative Law Judge, Officer Merchlewitz's description of his request for Mr. Calhoun to take a breathalyzer test on September 30, 2008 is not complete because it fails to include facts that are relevant to the test result – namely, that Mr. Calhoun had brushed his teeth and used mouthwash just prior to taking the test.

⁸⁰ While Officer Merchlewitz refers to House as a "movie" in one spot in the 9/30/2008 Report, in another place, he refers to it as a "show." In that instance he wrote, Mr. Calhoun "stated he had 4 beers while watching his favorite show." Ex. 102.

Accordingly, the Administrative Law Judge recommends that the 9/30/2008 Report be amended to reflect these facts.

There is not sufficient evidence, however, to show by a preponderance of the evidence that the result of the breathalyzer test was .001, not .010, as Mr. Calhoun claims. Given that almost seven years have passed since the test, it is more likely that Officer Merchlewitz's report dated October 1, 2008 is accurate than Mr. Calhoun's memory. In addition, while Mrs. Calhoun testified that she thought the result was .001, she also stated that she was not sure given the amount of time that has passed. Therefore, Mr. Calhoun has failed to show by the greater weight of the evidence that the breathalyzer test result of .010 as noted in the 9/30/2008 Report is inaccurate.

Finally, the Administrative Law Judge concludes that Mr. Calhoun has failed to demonstrate that Officer Merchlewitz inaccurately reported that Mr. Calhoun "stated he had 4 beers while watching his favorite show" on September 30, 2008. While Mr. Calhoun maintains he was not drinking on that night, he presented no reason why Officer Merchlewitz would have falsely reported that Mr. Calhoun said he had four beers that night. In addition, Mr. Calhoun called his wife to testify about the events of September 30, 2008, but he did not ask her if he had been drinking that night. Given that the only facts in the record are Officer Merchlewitz's contemporaneous report and Mr. Calhoun's statements many years later, Mr. Calhoun has failed to demonstrate by a preponderance of the evidence that this statement in the report is inaccurate.

J. M. C.