



Department of Commerce: Data Practice Allegations

Special Review
August 18, 2017

OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

**State of Minnesota
Office of the Legislative Auditor**

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OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA • James Nobles, Legislative Auditor

August 18, 2017

Members of the Legislative Audit Commission:

We conducted this special review in response to a legislative request. The legislator asked the Office of the Legislative Auditor (OLA) to examine the Department of Commerce's (department) procedures for handling government data and responding to public data requests under the Minnesota Government Data Practices Act.

The legislator made the request in response to allegations from Timothy Vande Hey, former deputy commissioner of the department's Insurance Division. In a lawsuit against the department, Mr. Vande Hey claimed that a department official told staff members they should destroy certain documents, which Mr. Vande Hey considered a violation of the Data Practices Act.

The Department of Commerce cooperated with our review; Mr. Vande Hey, who is no longer a state employee, did not.

Sincerely,

A handwritten signature in black ink that reads "Jim Nobles".

James Nobles
Legislative Auditor

A handwritten signature in black ink that reads "Elizabeth Stawicki".

Elizabeth Stawicki
Legal Counsel



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INTRODUCTION

Timothy Vande Hey served as assistant commissioner of the Insurance Division in the Minnesota Department of Commerce (department) from April 2012 through December 2012. He served as deputy commissioner of the division from January 2013 through August 2015, when he resigned.

In April 2016, Mr. Vande Hey filed a lawsuit against the department. Among other allegations, he claimed that a department official directed him to illegally destroy department documents. He also alleged that the department was not responsive to data access requests under the Minnesota Government Data Practices Act. Mr. Vande Hey withdrew his lawsuit in June 2016.

In response to a legislative request, the Office of the Legislative Auditor (OLA) agreed to review Mr. Vande Hey's allegations concerning document destruction and data access requests. We conducted a limited review. Specifically:

- We examined Mr. Vande Hey's allegation that a department official directed staff to destroy documents in violation of state law.
- We examined whether the department responded appropriately to requests for access to department data and documents in 2016.

The Department of Commerce cooperated fully with our review.

FINDINGS

Finding 1. We did not find evidence to substantiate Mr. Vande Hey's allegation that an official at the Department of Commerce directed staff to unlawfully destroy documents.

Mr. Vande Hey's Allegation

The complaint Mr. Vande Hey filed in Ramsey County court on April 7, 2016, alleged the following:

In the first part of 2015, ...[an acting deputy commissioner] conducted a meeting with staff members, including those employed within the division where Plaintiff [Mr. Vande Hey] worked. During that meeting, she [the acting deputy commissioner] suggested that certain documents containing internal department communications be destroyed, which was in direct violation of the law.¹

¹ Complaint at 3-4, *Vande Hey v. State of Minnesota*, No. 62-CV-16-2011 (2nd Dist. Ramsey County, April 7, 2016). Mr. Vande Hey withdrew his complaint on June 2, 2016.

In an effort to obtain more detailed information, we contacted Mr. Vande Hey by telephone, but he declined to discuss his allegations or lawsuit.²

As a result, we do not know exactly when “[i]n the first part of 2015” the meeting occurred. We were also unable to determine who attended the meeting or its purpose. Of central importance, we were unable to determine what documents Mr. Vande Hey referenced in his complaint. His complaint said only that “she [an acting deputy commissioner] suggested that certain documents containing internal department communications be destroyed.” To make any legal judgment about such an alleged directive, we would need detailed information about the documents involved. Again, Mr. Vande Hey did not provide that information either in his lawsuit or telephone conversation with OLA.

Interview with Deputy Commissioner Anne O’Connor

As part of our review, we interviewed Deputy Commissioner Anne O’Connor, the person who allegedly directed department staff to unlawfully destroy documents. We questioned Ms. O’Connor under oath.

Ms. O’Connor told us it was possible that Mr. Vande Hey was referring to a meeting in which she told staff that the department needed to do a better job managing its records and IT resources. In her interview with OLA, Ms. O’Connor said:

[The Office of MNIT Services] did an analysis of, you know, the divisions—what divisions had the most storage. How much in total we had. You know, how much had been accessed in the last three years, five years, ten years. Some hadn’t been accessed since 1992. How many large documents were stored in multiple places across our network. So we had a conversation, you know, about basically about data hygiene in that meeting to say, look, if you have stuff that you don’t need any more, take a look at it. You know, if you have multiple drafts, take a look, see what we can get rid of. And that, kind of just to let people know that we’re gonna start a process in, you know, in the future, which hopefully this year we’ll be able to do, to, you know, label the material, transfer it to a new architectural foundation, more like, you’d hire someone like a librarian to classify it so you’d know, you know, what is, what can everybody see, what should only some people see, et cetera; and to clean up our whole filing system. So I did talk about that in a meeting. And I’m sure the words “delete” came out of my mouth, but it was in regards to that particular project.³

Ms. O’Connor answered all of our questions and, as noted, she answered under oath. In addition, we did not find any evidence that made us doubt the truthfulness of her responses. More specifically, we confirmed with the Office of MNIT Services that the Department of Commerce had concerns about the large volume of documents it had in electronic storage,

² Timothy Vande Hey, telephone conversation with Elizabeth Stawicki, Legal Counsel, Office of the Legislative Auditor, June 16, 2017. Because he is no longer a state employee, Mr. Vande Hey is not required to cooperate with OLA.

³ Anne O’Connor, Deputy Commissioner, Minnesota Department of Commerce, interview with James Nobles, Legislative Auditor, and Elizabeth Stawicki, Legal Counsel, Office of the Legislative Auditor, July 5, 2017.

especially because they included a significant number of duplicate documents and documents staff had not accessed in many years. According to MNIT, the department's goal was to delete documents that were no longer needed, reduce storage costs, organize files consistent with the department's business functions, and improve the department's ability to respond to data access requests.

Legal Requirements

Several state laws regulate government records but they do not clearly define what records must be retained. For example, one provision in the state's "Official Records" law requires public officials to "make and preserve all records necessary to a full and accurate knowledge of their official activities."⁴ It does not, however, define what constitutes "official activities."

Some of the most significant provisions in state law that control the administration of government records are in *Minnesota Statutes* 2016, Chapter 138, related to the authority and responsibilities of the Minnesota Historical Society. In fact, in one section, the Legislature declares that Chapter 138 exclusively controls the preservation and disposal of government records.⁵

Again, however, the provisions in Chapter 138 that are relevant to our review do not provide clear guidance. For example, a provision says, "[T]he term 'records' excludes data and information that does not become part of an official transaction..." but does not define "official transaction."⁶

We asked the department how it determines whether a document is an "official government record."⁷ In a written response, the department said it follows *Minnesota Statutes* 2016, 15.17 and 138.17, as well as guidance offered by the Minnesota Historical Society's publication *Preserving and Disposing of Government Records*, May 2008.⁸ We have already noted the ambiguity in the laws the department cited and, unfortunately, the Historical Society's publication does not add any clarity. It simply repeats the laws, including the provision that data and information that does not become part of an official transaction is not a government record.

In assessing Mr. Vande Hey's allegation, we also had to consider the fact that state law allows agencies to destroy documents—including those that an agency determines are part of an official transaction or official activities—if the agency follows a process set forth in Chapter 138.⁹ More

⁴ *Minnesota Statutes* 2016, 15.17, subd. 1.

⁵ *Minnesota Statutes* 2016, 138.163. In a policy, the Department of Commerce says it follows the Minnesota Historical Society's *Preserving and Disposing of Government Records*.

⁶ *Minnesota Statutes* 2016, 138.17, subd. 1(b)(4).

⁷ Judy Randall, Deputy Legislative Auditor, Office of the Legislative Auditor, letter to Mike Rothman, Commissioner, Department of Commerce, February 3, 2017.

⁸ Tamar Gronvall, General Counsel, Department of Commerce, letter to Judy Randall, Deputy Legislative Auditor, Office of the Legislative Auditor, February 15, 2017.

⁹ *Minnesota Statutes* 2016, 138.17, subd. 1.

specifically, state law requires agencies to submit records retention and disposal schedules to the state's Records Disposition Panel for approval.¹⁰ When the panel approves a schedule, the law says,

[T]he head of the governmental unit or agency having custody of the records may dispose of the type of records listed in the schedule at a time and in a manner prescribed in the schedule for particular records which were created after the approval.¹¹

We reviewed the department's approved records retention and disposal schedules. Given the size and complexity of the department's responsibilities, the schedules cover a large number and wide variety of documents. In addition, the destruction time frames vary widely (from months to years). Without more detailed information about the documents Mr. Vande Hey referenced in his allegation, we do not know where they fit within the department's records retention and disposal schedules.

In summary, we were unable to determine the validity of Mr. Vande Hey's allegation without more information about the directive he alleged occurred.

Finding 2. We concluded that the Department of Commerce's responses to public data requests in 2016 appeared to be reasonable.

To get a sense of the department's responses to data requests, we asked the department to provide us with key information for all data requests from January 1, 2016, through December 31, 2016. This amounted to nearly 150 requests. This information included:

- The dates of the requests.
- A description of the data requested.
- The data provided (explanations, not the actual data).
- The department's explanations for why certain data were omitted/redacted.
- The dates by which the department responded to the requests.

In cases where the department omitted or redacted data, the department cited the specific legal provisions underlying its decisions. For example, it could not provide data in several cases because the information requested was private licensing data under *Minnesota Statutes* 2016, 13.41, subd. 2(a).

OLA questioned six data responses that appeared to take an inordinate amount of time for the department to complete, and we asked the department for explanations. For example, on July 28,

¹⁰ *Minnesota Statutes* 2016, 138.17, subd. 7. According to *Minnesota Statutes* 2016, 138.17, subd. 1, the Records Disposition Panel is composed of the Attorney General, Legislative Auditor (in the case of state government records) or State Auditor (in the case of local government records), and Director of the Minnesota Historical Society.

¹¹ *Minnesota Statutes* 2016, 138.17, subd. 7.

2016, a person asked for the volume of data practice requests sent to the department and the department's responses. The department did not provide the data until December 9, 2016. We asked why the response would take more than four months to complete. The department told us that during 2015-2016, data practice record-keeping responsibilities shifted between several staff members because of a job transfer and several staff changes within the department. Consequently, there was no central logging of the requests. In order to respond to the July 28 request, the department installed a new record-keeping system and updated it to include all of the data practice requests. We think these explanations seem plausible, and the department's responses to nearly 150 requests seem reasonable overall.



August 16, 2017

James R. Nobles
Legislative Auditor
Office of the Legislative Auditor
658 Cedar Street, Suite 140
St. Paul, MN 55155

Dear Mr. Nobles,

Thank you for the opportunity to comment on the Legislative Auditor's report regarding the Department of Commerce's procedures for handling government data and responding to requests under the Minnesota Government Data Practices Act. Commerce concurs with the report's conclusions. Commerce has been committed to the MGDPA's principles of maintaining accountability and transparency, while protecting the privacy rights of individual citizens and business entities who are the subjects of government data.

I also would like to express my appreciation for the work of your agency and staff on this matter.

Sincerely,



Mike Rothman
Commerce Commissioner



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