

Minnesota Department of Administration Advisory Opinion:05-038

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2005). It is based on the facts and information available to the Commissioner as described below. All public data the Commissioner relied upon to issue this opinion are available for public inspection and copying at the office of the Information Policy Analysis Division (IPAD), unless the data have been disposed of in compliance with the state Records Management Act.

Facts and Procedural History:

On October 10, 2005, IPAD received a letter from Vicki Pellar Price, on behalf of Zero Expansion/talktrans. In Ms. Pellar Price's letter, she asked the Commissioner to issue an advisory opinion regarding her right to gain access to certain data that the Metropolitan Airport Commission (MAC) maintains.

IPAD, on behalf of the Commissioner, wrote to Thomas W. Anderson, General Counsel for MAC, in response to Ms. Pellar Price's request. The purposes of this letter, dated October 11, 2005, were to inform him of Ms. Pellar Price's request and to ask him to provide information or support for MAC's position. On October 20, 2005, IPAD received a response from Cameron Boyd, an attorney representing MAC.

Ms. Pellar Price related her efforts, in connection with Zero Expansion/talktrans, to gain access to data related to a runway/hangar expansion and takeoff weight limitation changes at Flying Cloud Airport (FCM.)

In a January 16, 2005, e-mail request to Bridget Rief, Airside Project Manager for MAC, Ms. Pellar Price requested the following:

Please provide all documents, data, correspondences, including all written correspondences, research, meeting minutes, memorandums of phone surveys, any materials upon which the FEIS [Final Environmental Impact Statement] is based as a Data Practices Request (as you requested in your last e-mail dated 1-7-2005), which would identify who the operators (names) are that would require such a [sic] expensive expansion at FCM? Have they all signed agreements to base out of FCM? Show why other facilities, other relievers and MSP, are unable to handle these additional operators.

In an e-mail dated January 28, 2005, Ms. Rief responded, "[r]eceipt of message acknowledged. MAC is working on a response." Ms. Pellar Price e-mailed Ms. Rief on June 12, 2005, and stated that she still had "not received a response." On June 14, 2005, Ms. Rief replied:

The Metropolitan Airports Commission has received your latest e-mail and letter regarding the proposed expansion at the Flying Cloud Airport. MAC continues to prepare the Final EIS document, which will include responses to comments made during the last public comment period. The questions you have posed since then will be answered in the Final EIS document within those responses to comments. Prior to that, the information is not considered public information. At the time the final document is released, you will receive a response to these questions.

While no specific date for completion is set, it is anticipated that the final EIS will be submitted to the FAA yet this year in 2005, possibly as early as the month of August.

In a June 15, 2005, e-mail to Ms. Rief, Ms. Pellar Price repeated her January 16, 2005, request, and in addition requested the following:

Please provide all documents, data, correspondences, including all written correspondences, research, meeting minutes, memorandums of phone surveys, any materials that will provide clear evidence that MAC will be able to uphold the 60,000 lb. pavement base weight limitation they committed to in the Final Agreement with the city of Eden Prairie.

Ms. Rief responded, in an e-mail dated July 1, 2005, regarding Ms. Pellar Price's January request:

The FEIS does not base the purpose and need for the project on specific operators who need the expansion. The purpose and need for the project is defined in Section II of the FEIS. . . .

MAC is interpreting the remaining portions of your First Request as questions, and to the extent they were asked in the public comment period, they will be addressed in the Final EIS and Record of Decision.

Regarding Ms. Pellar Price's June 15, 2005, request for data about weight limitations, Ms. Rief wrote:

The attached letter [dated June 10, 2005, to Scott H. Neal, City Manager for the City of Eden Prairie] indicating MAC's intent regarding the Final Agreement with Eden Prairie was sent to the City earlier this month. Please note that 'clear evidence' is not producible by MAC. The FAA's position regarding the weight based restriction will be addressed in the Final EIS and Record of Decision.

In an e-mail dated July 12, 2005, Laura L. Neuman, a Zero Expansion/talktrans associate of Ms. Pellar Price, wrote to Ms. Rief and reiterated Ms. Pellar Price's requests. Ms. Rief replied in a July 15, 2005, e-mail: "MAC has received your letter dated July 12, 2005 and is currently preparing a response. We hope to send it out by the end of next week."

Subsequently, Ms. Pellar Price and Ms. Neuman contacted IPAD staff. Throughout August, Laurie Beyer-Kropuenske, Director of IPAD, had multiple contacts with Mr. Boyd in an effort to assist MAC in responding to Ms. Pellar Price's requests.

In a September 7, 2005, e-mail, Ms. Pellar Price submitted a "clarifying request" to MAC in which she requested the following:

1. Survey questions and all responses to the April 1997 survey of FCM Fixed Base Operators conducted by/or for MAC.
2. All data related to contact between Larry Dallam or other MAC employees/contractors in January 2004 with Elliott Aviation, Executive Aviation and any other aviation provider on their use of Flying Cloud Airport.
3. All data documenting verbal, e-mail or written contact on the issue of operator needs at Flying Cloud Airport that has been conducted by MAC with operators since 1997.
4. All data related to Ordinance 97 of December 17, 2002 and the issue of changing the takeoff weight limit from 20,000 lbs to less than 60,000.
5. Draft copies and all data related to the drafting of the FEIS.
6. Emails, correspondence, public comments submitted, on Flying Cloud expansion and alteration of the 60,000 takeoff weight limitations.
7. All data that has been created, gathered or maintained in relation to preparation of the FEIS for Flying Cloud Airport.

Mr. Boyd responded in a letter dated September 21, 2005, in which he asked Ms. Pellar Price for clarification of some of the data, and otherwise stated that MAC was "currently working to assemble this data" and that, for various reasons, "it may take some time."

Issues:

Based on Ms. Pellar Price's opinion request, the Commissioner agreed to address the following issues:

1. Did MAC comply with Minnesota Statutes, Chapter 13, with regard to a January 16, 2005, request for access to data?
2. Did MAC comply with Minnesota Statutes, Chapter 13, with regard to a June 15, 2005, request for access to data?
3. Did MAC comply with Minnesota Statutes, Chapter 13, with regard to a September 7, 2005, request for access to data?

Discussion

Issue 1: Did MAC comply with Minnesota Statutes, Chapter 13, with regard to a January 16, 2005, request for access to data?

Pursuant to Minnesota Statutes, section 13.03, subdivision 3, when a government entity receives a data request from an individual who is not the subject of the data, the entity is required to respond in an appropriate and prompt manner, and within a reasonable time. (See section 13.03, subdivision 2(a), and Minnesota Rules, part 1205.0300.) Subdivision 1 of section 13.03 provides that government entities shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use.

As earlier opinions have advised, when responding to data requests, government entities should provide prompt access to the data, advise that the data are classified such as to deny the requesting person access, or inform the requestor that the data do not exist.

In her June response to Ms. Pellar Price's January request, Ms. Rief stated that Ms. Pellar Price's questions "will be answered in the Final EIS document within those responses to comments. Prior to that, the information is not considered public information. At the time the final document is released, you will receive a response to these questions."

However, in his comments to the Commissioner, Mr. Boyd wrote:

MAC interpreted this [January 16, 2005] request to seek only materials upon which the FEIS is based. Within that universe of documents, Ms. Pellar Price requested documents that would identify which operators at Flying Cloud Airport (FCM) would 'require such an expensive expansion.' MAC is not able to determine which operators would 'require' a specific plan, much less for which operators a less expensive expansion would not suffice. MAC has not collected, created, received, maintained or disseminated any documents that indicate which, if any, operators would require such an expensive expansion. Furthermore, any request that would force MAC to make guesses as to such determinations, and then provide a list thereof, is not a valid request under the Act.

Additionally, the second sentence of the request is not a proper request under the Act because it does not identify any documents to be produced.

Mr. Boyd made substantially similar comments in a letter to Ms. Neuman dated October 6, 2005. Thus, MAC did not state clearly that it did not have data responsive to part of Ms. Pellar Price's January 16, 2005 request, and that it did not consider another part of her request to be valid under Chapter 13 until October, 2005. MAC ought to have so informed Ms. Pellar Price promptly, upon receipt of her request.

In addition, MAC's position that it has no data that are responsive to Ms. Pellar Price's is puzzling, given that in other public documents, MAC has described responses it received to surveys and described conducting additional telephone surveys in relation to this issue. Under section 15.17, subdivision 1, government entities have a duty to create records documenting their official activities.

Furthermore, MAC denied Ms. Pellar Price access to a draft version of the EIS. Advisory Opinion 02-026 advises that draft versions of public data are public; Ms. Pellar Price raised that issue with MAC in July 2005.

Issue 2: Did MAC comply with Minnesota Statutes, Chapter 13, with regard to a June 15, 2005, request for access to data?

In his comments to the Commissioner Mr. Boyd wrote:

MAC believes this is not a proper request under the Act. By phrasing the request in the manner she chose, Ms. Pellar Price has demanded that MAC provide a characterization of any produced data as "clear evidence" that MAC will be able to uphold the 60,000 lb. weight limitation. This determination would involve subjective interpretation and is therefore inappropriate and, furthermore, not within the scope of the Act. Aside from the practical difficulties in ascertaining which documents might be responsive to this subjective request, there are also policy reasons why it should be held invalid. While it is beyond dispute that the Act exists, in part, to allow citizens to acquire evidence against government action, the Act should not be used as a tool to force government

entities to simultaneously provide characterizations of the strength of such evidence.

Contrary to Ms. Pellar Price's subsequent assertions, this request does not ask MAC to produce all documentation related to this restriction. However, her subsequent assertions serve to exemplify Ms. Pellar Price's imprecision and confusion about what she has requested.

Mr. Boyd made substantially similar comments in his October 6, 2005, letter to Ms. Neuman. The analysis of MAC's responses related to Issue 1 also applies to this request.

The Commissioner has an additional comment. Ms. Pellar Price phrased her requests in a manner that allows them to be challenged, as Mr. Boyd did, as technically outside the scope of Chapter 13. However, from the record available to the Commissioner, it appears that MAC did not so inform Ms. Pellar Price until October 6, 2005 (in a letter to Ms. Neuman), after numerous contacts over many months. MAC reasonably could have worked with Ms. Pellar Price to clarify and identify the data she sought. MAC is unreasonable in asserting that the entire problem is the result of her "phrasing, imprecision and confusion." MAC's Responsible Authority or Data Practices Compliance Official should have taken steps to resolve this conflict early in the process.

Issue 3: *Did MAC comply with Minnesota Statutes, Chapter 13, with regard to a September 7, 2005, request for access to data?*

In his comments to the Commissioner, Mr. Boyd wrote:

Based on conversations with the Department of Administration and Ms. Pellar Price's apparent confusion over earlier requests, MAC decided to follow-up with Ms. Pellar Price to ensure that MAC accurately understood each of the requests, and to maximize efficiency. . . .

*MAC is currently working to gather the hundreds, if not thousands, of documents Ms. Pellar Price has requested. This process has been delayed somewhat due to plaintiffs' discovery requests in the class action *Wiencke et. al v. Metropolitan Airports Comm'n*, Court File No. 05-012976, before Judge Aldrich of the Minnesota State District Court, Hennepin County. I would be happy to provide a copy of the document requests from that action, if you wish. The document requests have required hundreds of hours of MAC employee time, and many of those employees are the same ones who must gather the documents for Ms. Pellar Price. Also adding to MAC's response time is the fact that, Mark Ryan, the former Airport Planner, who kept many of the documents Ms. Pellar Price seeks, passed away and another employee must search through his materials for responsive documents.*

In short, MAC has acted, and continues to act, in a reasonably timely manner with respect to this data request.

As of October 10, 2005, MAC had not yet provided Ms. Pellar Price with any of the data she requested. Instead, in response to her September 7, 2005, request, MAC sought further clarification of some of the data she requested, and otherwise informed her that MAC was working to fulfill her request and would provide her with access "as soon as possible." That approach does not meet the statutory mandate for a "prompt" response. MAC has been on notice since January 2005 that Ms. Pellar Price was seeking data. If MAC has not yet provided Ms. Pellar Price with access to all data responsive to her request then MAC should do so promptly.

The Commissioner reminds her readers that pursuant to Minnesota Statutes, section 15.17, subdivision 1, "[a]ll officers and agencies of [government entities]... shall make and preserve all records necessary to a full and accurate knowledge of their official activities." Section 15.17, subdivision 4, states, "[a]ccess to records containing government data is governed by sections 13.03 and 138.17." Accordingly, section 15.17, read in concert with section 13.03, imposes an obligation upon government entities to make and preserve a record of their actions so that the data in those records will be available pursuant to the provisions of Chapter 13.

As noted above, section 13.03 obligates government entities to keep records in such an arrangement so they are easily accessible for convenient use. To comply with this provision and to respond to data practices requests, entities need to have a general knowledge of what types of data they maintain and where those data are located. The Commissioner encourages MAC to work to correct related issues so MAC is able to respond appropriately to future data practices requests. As a final note, the Commissioner also encourages both data requestors and government entities to work cooperatively in cases like this.

Opinion:

Based on the facts and information provided, my opinion on the issues that Ms. Pellar Price raised is as follows:

1. MAC did not comply with Minnesota Statutes, Chapter 13, with regard to a January 16, 2005, request for access to data.

2. MAC did not comply with Minnesota Statutes, Chapter 13, with regard to a June 15, 2005, request for access to data.

3. MAC did not comply with Minnesota Statutes, Chapter 13, with regard to a September 7, 2005, request for access to data.