# To Release or Not Release – *Burks* and Other Developments

**Amber G. Eisenschenk**
League of Minnesota Cities
Saint Paul

**Cheri M. Sisk**
Saint Paul City Attorneys Office
Saint Paul

**Margaret Luger-Nikolai**
Education Minnesota
Saint Paul

# Minnesota CLE's Copyright Policy

Minnesota Continuing Legal Education wants practitioners to make the best use of these written materials but must also protect its copyright. If you wish to copy and use our CLE materials, you must first obtain permission from Minnesota CLE. Call us at 800-759-8840 or 651-227-8266 for more information. If you have any questions about our policy or want permission to make copies, do not hesitate to contact Minnesota CLE.

All authorized copies must reflect Minnesota CLE's notice of copyright.

MINNESOTA CLE is Self-Supporting

A not for profit 501(c)3 corporation, Minnesota CLE is entirely self-supporting. It receives no subsidy from State Bar dues or from any other source. The only source of support is revenue from enrollment fees that registrants pay to attend Minnesota CLE programs and from amounts paid for Minnesota CLE books, supplements and digital products.

---



---

**Table of Contents**

***Harlow v. Dep't of Human Services*, 883 N.W.2d 561 (Minn. 2016).**

In this case, the Minnesota Supreme Court held that data remains classified as public even if it is duplicative of data stored elsewhere that is classified as private or confidential. The Court also held that the absolute immunity privilege applies to a deputy commissioner but not to other lower ranking government officials.

Harlow was employed as a psychiatrist at the Minnesota Security Hospital. His employment was terminated after an incident in which a vulnerable adult patient who became violently uncooperative was restrained in his room without his personal items and mattress, and in the nude. After the incident, the hospital conducted an internal investigation that resulted in Harlow's termination, and the Department of Human Services (DHS) licensing division conducted a separate maltreatment investigation. After the internal investigation was complete but while the maltreatment investigation was ongoing, the hospital administrator and a DHS deputy commissioner were interviewed for a news report on Minnesota Public Radio (MPR) and commented on the decision to terminate Harlow's employment, and the hospital administrator sent a staff memo commenting on the situation. A second MPR report with additional comments was aired after the maltreatment investigation was complete.

Harlow sued DHS for defamation and violations of the Minnesota Government Data Practices Act. The agency sought summary judgment, arguing that the data was classified as public data under the personnel data statute, Minn. Stat. § 13.43, and that the DHS employees were protected from the defamation claim by absolute or qualified privilege. The district court denied summary judgment in favor of the agency, but the Court of Appeals reversed, concluding that data classified as public under Minn. Stat. § 13.43, subd. 2(a)(5), remain public even if simultaneously classified as confidential investigative data under Minn. Stat. § 13.46, subd. 3.

The Supreme Court held that the employment investigation data initially was classified as private data but that it was reclassified as public data under Minn. Stat. § 13.43, subd. 2(a)(5), after Harlow's termination. The Court noted that the investigation documented specific reasons for the termination and was the basis for Harlow's termination, and that the termination was the final disposition of the employee investigation.

The Court further held that data classified as public data under Minn. Stat. § 13.43, subd. 2(a)(5), remains classified as public data even though the data is duplicative of data in a maltreatment investigation that is classified as confidential under another statute. The Court noted that the Data Practices Act, which starts with the presumption that data is public unless classified otherwise, provides the framework for this conclusion. According to the Court, this conclusion gives effect to both statutes: Final disposition personnel data is classified as public under § 13.43 and ongoing maltreatment investigation data is classified as confidential under § 13.46.

Harlow argued that some of the facts in the public statements came from the confidential maltreatment report, not the final employee investigation, but the Court found that Harlow did not provide evidence

support this argument, and observed that the statements could have been personal opinions or impressions, which are not subject to the Data Practices Act because they are not government data.

Finally, the Court held that the deputy commissioner was entitled to the protection of absolute privilege within the scope of their statutory job duties, but that the administrator of a state hospital was not entitled to the same protection. According to the Court, the deputy commissioner "functions as a top-level cabinet-equivalent official within the meaning of our case law." The administrator, however, was not a cabinet-level executive official and therefore was not protected by any statutory authority. The Court remanded the question of the deputy commissioner's qualified immunity claim.

***KSTP-TV v. Metropolitan Council*, 884 N.W.2d 342 (Minn. 2016)**

The Minnesota Supreme Court held that video recordings from public buses are private personnel data only if the videos are maintained exclusively for the purpose of monitoring or evaluating government employees. The Court also held that that the timing of a data request can determine the data's proper classification.

In this case, KSTP-TV requested video recordings of two separate incidents that occurred on Metro Transit buses. Metropolitan Council determined that the recordings were private personnel data and denied the requests. An administrative law judge (ALJ) ruled that KSTP was entitled to the videos as public data. The Minnesota Court of Appeals affirmed.

The Supreme Court was asked to determine whether the video recordings of the two incidents were private personnel data or disclosable public data. The Metropolitan Council argued the recordings were maintained for a variety of reasons, including public safety and management purposes as well as personnel purposes "because the videos contain the recorded images and voices of the two bus operators who were employees." It argued that because some of the reasons the data were created or maintained required the data to be classified as private, the data should be classified as private. KSTP argued that because the government entity had multiple reasons to create or maintain the data, some of which were not related to private personnel matters, the data is not created or maintained for a single purpose—because the individual is an employee of the government entity—and should be classified as public. The Court called this a "single-purpose reading" of the Data Practices Act and held that the single-purpose reading is the better interpretation because it supports the Data Practices Act's underlying purpose of promoting public access and transparency. The single-purpose reading also avoids conflict among various provisions of the Data Practices Act.

KSTP next argued that if the recordings were initially created for multiple reasons, some of which were public, the recordings should be classified as public regardless of whether Metro Transit later tried to maintain the recordings solely for private personnel reasons. The Court disagreed and instead focused on why Metro Transit maintained the data, not why the data was initially created or collected. Metro Transit

buses are each equipped with digital-recording systems that automatically record and store video recordings on a hard drive on the bus. The system automatically begins to record over the video recordings when there is no more room on the hard drive, so if Metro Transit needs to retain a video recording of a specific occurrence on a bus for a longer period, it must download the recording from the hard drive on the bus and place it onto a DVD before the system erases it.

The Court's analysis honed in on when the recordings were requested. The Court reasoned that during the period that the records were initially maintained by Metro Transit on the bus's hard drive, the records were maintained for public safety reasons. When the videos were transferred to DVDs to be maintained for other reasons, if they were maintained solely for personnel purposes, then the video recordings were properly classified as private personnel data. Therefore, the Minnesota Supreme Court reversed and remanded the case back to the ALJ for further proceedings to determine "whether the recording . . . was 'maintained' by Metro Transit exclusively for a personnel purpose at the time KSTP made its request to access the data."

***Burks v. Metropolitan Council*, 884 N.W. 2d 338 (Minn. 2016)**

This case also involved a video recording made on a Metro Transit bus. Robert Burks was a Metro Transit passenger when he had an altercation with a bus driver while he was trying to board the bus. The digital recording system on the bus recorded the encounter. As with other Metro Transit recording systems, the system records and holds up to 330 hours of video on the bus hard drive before the system automatically records over the data. To retain a specific recording for a longer period, a Metro Transit employee must download the recording from the hard drive on the bus and place it onto a DVD before the system erases it.

Burks called Metro Transit's complaint line the same day regarding the bus driver's actions; Metro Transit did not respond to Burks's complaint. Through his attorney, Burks later requested a copy of the video recording of the incident. Metro Transit responded that it would not release the video recording without a court order because it considered the recording to be private personnel data on the driver. The district court determined that the video recording was public data and the Court of Appeals affirmed.

Before the Supreme Court, the Metropolitan Council argued again that the data was classified private personnel data on the bus driver and therefore could not be released. Burks argued that he was entitled to access the video recording under Minn. Stat. § 13.04, subd. 3, because he was an individual subject of the data.

The Supreme Court held that the Data Practices Act creates an explicit right of access in favor of the individual subject of the data. The Court also held that the privacy rights of the bus driver did not override Burks's right to access data in which he was also the data subject. It found the question of whether the data was classified as public data or as private personnel data on the driver irrelevant

because the right of access granted to Burks as an individual subject of the data extends to both public and private data in the underlying data.

To reach its conclusion, the Court discussed whether the phrase "*the* individual subject of the data" (emphasis added) limits application of the right when there is more than one individual data subject, but held that it does not because the right itself is to access stored private or public data on individuals." According to the Court, "the right extends to 'the individual subject'—that is, the identifiable individual—even if the data in question identifies other individuals."

**Advisory Opinion 17-001 ISD 2860 (Blue Earth Area Schools) (March 22, 2017)**

A local blogger had independent knowledge that a teacher was charged with misdemeanor domestic assault on May 15, 2016. The blogger made a data request to the School District asking whether the teacher was allowed to teach following the May 15 incident or was placed on leave. The Superintendent responded only that the School District was aware of a complaint related to the teacher and an investigation was being conducted.

After several other data requests, the blogger made a request for "time card information or any other data pertaining to payroll from the time period of May 16 through the end of the school year." The School District timely responded to the blogger and informed him that the data was classified as private personnel data under Minnesota Statues Section 13.43 and, therefore is not accessible to him.

Minnesota Statues Section 13.43, subd. 2(a)(8) provides,

> Payroll time sheets, or other comparable data used only to account for an employee's work time for payroll purposes, are public except to the extent that release of time sheet data would reveal the employee's reasons for the use of sick or other medical leave or other not public data.

The School District's position was that the teacher's payroll status that paralleled the period of time that the requestor knew a complaint has been received and an investigation was pending was private personnel data within the exception in Subdivision 2(a)(8) of "other not public data."

The Commissioner concluded that the requestor should have access to the data, stating;

> The data requester had knowledge of public information from the court record. His admitted goal was to determine whether the subject of the court case was related to the complaint at the school and whether either had a bearing on the work schedule/payment of the teacher. However, when asked directly, the District repeatedly – and appropriately – declined to connect any existing complaints against the teacher with the subject of the court case. Consequently, [the requestor] was unable to link the subject of the court case directly to the subject of the complaint

at the District. Thus, had the District simply provided [the requestor] access to public timesheet data, it would not have been impermissibly disclosing private complaint data.

**Advisory Opinion 16-006 ISD 625 (St. Paul)**

The School District requested IPAD to provide guidance about the application of the Open Meeting Law (OML) to a series of facilitated conversations involving many members of the school community, including employee unions, school board members, parents, and students. The District asked specifically whether the presence of a quorum of school board members meeting privately with a facilitator for relationship-building work among board members constituted "official business." Secondly, the District asked if the presence of union leadership in similar meetings subjected the meetings to the requirements of the OML.

The Commissioner first noted that "meeting" is not defined in Chapter 13D, and that the Minnesota Supreme Court has defined meeting as:

> [G]atherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.

*Moberg v. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983). Relying on an earlier opinion by the Minnesota Attorney General, the Commissioner found that meetings regarding strength building and communication could be conducted in private because they did not involve specific issues before the school board. The Commissioner cautioned that:

> [T]he Board should avoid any issues specific to its official business during the sessions, as incidental discussions of public business would constitute a meeting subject to the OML.

The Commissioner found that, in light of his analysis of the first question, the presence of union leaders in the second meeting did not change his view about the application of the OML.

**Advisory Opinion 16-004 ISD 706 (Virginia) (June 29, 2016)**

The district asked the Commissioner for an opinion concerning whether paraprofessionals in the school district could continue to rely on language in their collective bargaining agreement that permits them to bid on assignments by teacher. In the district's framing of the question, it asserted that the paraprofessionals actually bid on individual students, as well. The Commissioner's summary of facts did not include the relevant contract language.

Relying on the district's claims, the Commissioner found that paraprofessionals did not have a legitimate educational interest in data about students with whom they did not, or were not going to, work. The Commissioner also relied on the district's own categorization of staff who had a legitimate educational interest in particular data, and concluded that disclosure in the course of the bidding process would be improper. However, a *nota bene* subsequently added to the opinion states as follows:

> The commissioner was not aware, prior to accepting and issuing this advisory opinion, that a district court determined the data at issue were not education data. (Court File Number 69VI-CV-15-794, March 14, 2016.) Because the court order is binding on the parties and an advisory opinion is not, the opinion requester school district may not rely on this advisory opinion.

In an opinion that more thoroughly addressed the facts of the case, and notably, in which the union actually participated, Judge Pagliacetti came to a completely opposite conclusion. The district had filed a declaratory judgment action in attempt to have a court invalidate the language governing the assignment bidding process. The Court dismissed the case, and the district filed a motion for reconsideration after receiving the Commissioner's opinion.

The contract language at issue stated:

> Paraprofessionals will have one choice each year prior to the start of the school year as to which paraprofessional assignment they will choose by seniority. Seniority Section G applies to paraprofessionals. The job posting will state the title, building, scheduled time, days of work, hours per week, grade level, and case manager. Job postings for choice shall be made available to all paraprofessionals no fewer than five working days prior to the scheduled choice day.

Judge Pagliacetti found that the language didn't require the disclosure of any educational data at all, making unnecessary an analysis of whether the paraprofessionals had a legitimate educational interest in the information. He further determined that even if compliance with the contract language *did* necessitate disclosure of educational data, the district was in a position to make lawful such disclosures. Judge Pagliacetti stated:

> At the hearing, Plaintiff's counsel conceded that it could take action to make the disclosures proper under Minnesota Statutes §13.32 but choose not to do so because it wanted to make the paraprofessional assignments itself without resorting to the language in the collective bargaining agreement. A party cannot take unilateral action to make carrying out its obligations under the contract illegal and then claim it should be relived of its obligations under the contract because of that action. Since Plaintiff can at any time take actions which would allow disclosure of individual private data to the paraprofessionals, it cannot claim its failure to take such action as grounds for voiding its contract.

The district's motion for reconsideration was, as a result, denied.

**State of Minnesota**

**HOUSE OF REPRESENTATIVES**

NINETIETH SESSION H. F. No. 1306

02/16/2017 Authored by Franson

The bill was read for the first time and referred to the Committee on Health and Human Services Reform.

A bill for an act

relating to human services; expanding child care assistance to certain foster care parents; amending Minnesota Statutes 2016, section 119B.09, subdivision 9.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2016, section 119B.09, subdivision 9, is amended to read:

Subd. 9. **Licensed and legal nonlicensed family child care providers; assistance.** (a)

This subdivision applies to any provider providing care in a setting other than a child care

center. Licensed and legal nonlicensed family child care providers and their employees are

not eligible to receive child care assistance subsidies under this chapter for their own children

or children in their family during the hours they are providing child care or being paid to

provide child care. Child care providers and their employees are eligible to receive child

care assistance subsidies for their children when they are engaged in other activities that

meet the requirements of this chapter and for which child care assistance can be paid. The

hours for which the provider or their employee receives a child care subsidy for their own

children must not overlap with the hours the provider provides child care services.

(b) Notwithstanding any other provision and if all other eligibility requirements under this chapter are satisfied, a licensed or legal nonlicensed family child care provider who is also a foster care parent, as defined in Minnesota Rules, part 2960.3010, subpart 25, is eligible to receive child care assistance subsidies for a foster child, as defined in Minnesota Rules, part 2960.3010, subpart 21, of the provider during the hours the provider is providing child care or being paid to provide child care to the foster child. Child care assistance under this paragraph shall be administered according to this chapter.

**EFFECTIVE DATE.** This section is effective upon any necessary federal approval. The commissioner of human services shall notify the revisor of statutes when federal approval is obtained or if federal approval is not required.