OAH 8-1000-33787

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition of the Property Casualty Insurers Association of America, Inc.

ORDER

This matter came before Administrative Law Judge Eric L. Lipman on October 28, 2016, for an oral argument.

On September 2, 2016, the Property Casualty Insurers Association of America, Incorporated, petitioned the Office of Administrative Hearings for an Order under Minn. Stat. § 14.381 (2016). It asks the tribunal to determine that the Minnesota Department of Commerce is enforcing a requirement that certain large insurers disclose sensitive recruitment, hiring and vendor detail, as though it were a duly adopted rule.

Michael J. Ahern, Dorsey & Whitney LLP, appeared on behalf of the Petitioner, Property Casualty Insurers Association of America, Inc. (PCI). Sarah L. Krans, Assistant Attorney General, appeared on behalf of Minnesota Department of Commerce (Department).

Based upon submissions of the parties and the hearing record, and for the reasons set out in the Memorandum below,

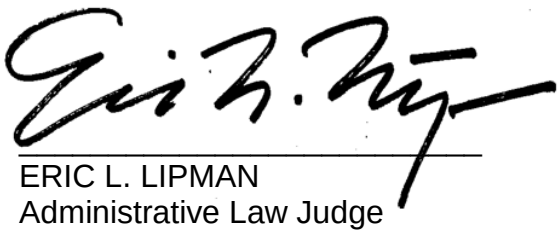
IT IS HEREBY ORDERED THAT:

1. Until such time as the Department is authorized by a statute or a rule to collect and disclose recruitment and contracting data, the Department may not require Minnesota insurers to respond to the Multistate Insurance Diversity Survey.

2. The Department shall publish this decision in the *State Register*.

3. The Department shall bear the costs of this proceeding.

Dated: December 7, 2016



ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It may be appealed to the Minnesota Court of Appeals under Minn. Stat. §§ 14.44-.45.

MEMORANDUM

Factual and Regulatory Background

In 2012, the California Legislature enacted new reporting requirements for insurers with written premiums of more than $100 million within the State of California.[1] These larger insurance companies were directed by statute to make disclosures regarding the companies' efforts to seek out, certify and contract with vendors that are owned by minorities, women or disabled veterans.[2] The reporting detail from each of these companies would then be hosted on the website of the California Department of Insurance.[3] The California law provided that if any covered company did not make the required reporting it could face a civil penalty. The statute authorized penalties of up to $5,000 for negligent failures to report and penalties of up to $10,000 for a willful failure to complete the reporting.[4]

Based upon the program's success, the California Department of Insurance was able to persuade insurance commissioners in four other states (Minnesota, New York, Oregon and Washington) and the District of Columbia, to work collaboratively on a still broader program of public disclosures.[5] The broader program would have both a wider geographic reach, covering the new jurisdictions, and would include detail on a wider array of corporate hiring and purchasing practices.[6]

On May 2, 2016, the Commissioner of the Minnesota Department of Commerce (Commissioner), Michael Rothman, jointly, with the Insurance Commissioners of the other collaborating jurisdictions, issued a letter relating to the new program. The program was denominated as the Multistate Insurance Diversity Survey (MIDS). The announcement letter instructed that all insurance companies with written national premiums of $300 million or more, and that are licensed in one of the six participating jurisdictions, were required to submit responses to the 2016 MIDS by September 1, 2016.[7] The reporting requirements were aimed at encouraging "increased procurement from the nation's diverse suppliers and greater diversity on insurer governing boards."[8] As the announcement letter explained:

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[1] *See* Cal. Ins. Code § 972.2 (2012).
[2] Cal. Ins. Code § 972.2(a) (2016).
[3] Cal. Ins. Code § 972.2(f) (2016).
[4] Cal. Ins. Code § 972.2(d) (2016).
[5] *See* Petition (Pet.), Exhibit (Ex.) Exhibit A.
[6] *Id*.
[7] *Id*.
[8] *Id*.

> The survey questions are focused on two diversity issues: supplier diversity and governing board diversity. The survey questions seek information about each company's supplier diversity program, outreach efforts, and procurement data with diverse suppliers, and are intended to facilitate supplier relationships between insurers and the nation's diverse businesses. Diverse businesses include: Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs), Disabled Veteran Business Enterprises (DVBEs), and LGBT Business Enterprises (LGBTBEs). The second part of the survey focuses on the demographics of each governing board, as well as the company's outreach efforts to diversify, in order to examine the state of leadership diversity within the insurance industry.[9]

Lastly, the announcement letter instructed that the replies to the survey's questions would be available (in some form) to the public on December 1, 2016.[10]

The survey questions cover a wide-range of operational matters, including:

(a) the mission statements of the company's board of directors and board committees on increasing the diversity of the board of directors;

(b) "all outreach and communication practices" to diversify the company's board of directors;

(c) how diversity "strategies and practices have been successful in establishing relationships with diverse candidates for board positions";

(d) a timeline and "any other details available at this time" relating to a supplier diversity program and efforts to implement supplier diversity policy statements of the company;

(e) "all company … outreach and communication strategies that are conducted specifically to diverse businesses";

(f) "any outreach and communication strategies and practices about supplier diversity conducted internally to company … employees";

(g) explanation of the company's efforts to encourage and track the procurements of the company's primary suppliers to subcontract with diverse businesses; and,

(h) detailed descriptions of the company progress and best practices "with regards to supplier diversity …."[11]

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[9] *Id*.
[10] *Id*.

Moreover, the survey likewise sought detail as to the dollar amounts of contracts that were routed from each insurance company in favor of Women-owned Business Enterprises, Minority-owned Business Enterprises, Disabled Veteran-owned Business Enterprises and Lesbian, Gay, Bisexual, Transgender-owned Business Enterprises.[12] The disclosures as to the dollar amount of the contracting opportunities awarded to each category of vendors was to be further segmented into one of 14 different reporting classifications:

Advertising / Marketing	Information Technology	Real Estate
Financial Services	Office Supplies	Travel / Entertainment
Claims Services	Print Services	Legal Services
Facilities	Professional Services	Other[13]
Human Resources	Telecommunications	

PCI has 359 members licensed to issue insurance in the State of Minnesota.[14] PCI is a trade association of nearly 1,000 insurance companies and advocates for its members' policy positions in the legislatures of all 50 states and in Washington, D.C.[15]

PCI asserts that its members will be harmed if they are required to complete the survey and have the substance of those replies placed into the public domain. First, it maintains that the staff time, resources and effort necessary to assemble accurate replies to the survey questions is considerable.[16] Second, it argues that the planned placement of these disclosures into the public domain makes valuable and confidential business information freely accessible to those who compete in the insurance market with its members.[17]

By way of a letter dated June 14, 2016, PCI and three other trade associations inquired as to the legal basis for insisting upon responses to the MIDS. In a letter dated August 10, 2016, the insurance commissioners from the six participating jurisdictions made a joint response. As to insurers licensed in Minnesota, the commissioners maintained that the statutory authority to "require insurers to respond to the survey" and

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[11] Pet., Ex. A, 2016 Multistate Insurance Diversity Survey.
[12] *Id*.
[13] *Id*.
[14] Affidavit (Aff.) of Paul C. Blume at ¶ 4 (Sept. 1, 2016).
[15] *Id.* at ¶ 3.
[16] *Id.* at ¶¶ 17-18.
[17] *See id.* at ¶¶ 9, 17.

for survey responses to be "shared among the participating states," was found in Minn. Stat. §§ 45.027, subd. 1a, 60A.03 (2016).[18]

Minn. Stat. § 45.027 (2016), reads in relevant part:

> Subdivision 1. **General powers.** In connection with the duties and responsibilities entrusted to the commissioner, and Laws 1993, chapter 361, section 2, the commissioner of commerce may:
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> (1) make public or private investigations within or without this state as the commissioner considers necessary to determine whether any person has violated or is about to violate any law, rule, or order related to the duties and responsibilities entrusted to the commissioner;
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> (2) require or permit any person to file a statement in writing, under oath or otherwise as the commissioner determines, as to all the facts and circumstances concerning the matter being investigated;
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> (3) hold hearings, upon reasonable notice, in respect to any matter arising out of the duties and responsibilities entrusted to the commissioner;
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> (4) conduct investigations and hold hearings for the purpose of compiling information related to the duties and responsibilities entrusted to the commissioner;
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> (5) examine the books, accounts, records, and files of every licensee, and of every person who is engaged in any activity regulated; the commissioner or a designated representative shall have free access during normal business hours to the offices and places of business of the person, and to all books, accounts, papers, records, files, safes, and vaults maintained in the place of business;
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> (6) publish information which is contained in any order issued by the commissioner;
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> (7) require any person subject to duties and responsibilities entrusted to the commissioner, to report all sales or transactions that are regulated. The reports must be made within ten days after the commissioner has ordered the report. The report is accessible only to the respondent and other governmental agencies unless otherwise ordered by a court of competent jurisdiction; and

[18] Pet., Ex. C at 3.

(8) assess a natural person or entity subject to the jurisdiction of the commissioner the necessary expenses of the investigation performed by the department when an investigation is made by order of the commissioner. The cost of the investigation shall be determined by the commissioner and is based on the salary cost of investigators or assistants and at an average rate per day or fraction thereof so as to provide for the total cost of the investigation. All money collected must be deposited into the general fund. A natural person or entity licensed under chapter 60K, 82, or 82B shall not be charged costs of an investigation if the investigation results in no finding of a violation. This clause does not apply to a natural person or entity already subject to the assessment provisions of sections 60A.03 and 60A.031.

Subd. 1a. **Response to department requests**. An applicant, registrant, certificate holder, licensee, or other person subject to the jurisdiction of the commissioner shall comply with requests for information, documents, or other requests from the department within the time specified in the request, or, if no time is specified, within 30 days of the mailing of the request by the department. Applicants, registrants, certificate holders, licensees, or other persons subject to the jurisdiction of the commissioner shall appear before the commissioner or the commissioner's representative when requested to do so and shall bring all documents or materials that the commissioner or the commissioner's representative has requested.

Minn. Stat. § 60A.03 reads in relevant part:

Subd. 2. **Powers of commissioner**. The commissioner shall have and exercise the power to enforce all the laws of this state relating to insurance, and shall enforce all the provisions of the laws of this state relating to insurance in the manner provided by the laws defining the powers and duties of the commissioner of commerce, or, in the absence of any law prescribing the procedure, by any reasonable procedure the commissioner prescribes

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Subd. 9. **Confidentiality of information**. The commissioner may not be required to divulge any information obtained in the course of the supervision of insurance companies, or the examination of insurance companies, including examination related correspondence and work papers, until the examination report is finally accepted and issued by the commissioner, and then only in the form of the final public report of examinations. Nothing contained in this subdivision prevents or shall be construed as prohibiting the commissioner from disclosing the content of this information to the insurance department of another state, the National

> Association of Insurance Commissioners, the National Association of Securities Dealers, or any national securities association registered under the Securities Exchange Act of 1934, if the recipient of the information agrees in writing to hold it as nonpublic data as defined in section 13.02, in a manner consistent with this subdivision. This subdivision does not apply to the extent the commissioner is required or permitted by law, or ordered by a court of law to testify or produce evidence in a civil or criminal proceeding. For purposes of this subdivision, a subpoena is not an order of a court of law.

On September 2, 2016, PCI petitioned for an order under Minn. Stat. § 14.381. PCI asks this tribunal to direct the Department to cease enforcement of the requirement that the covered insurers complete the MIDS.[19] PCI maintains that the requirement that these insurers complete the MIDS is not based upon any Minnesota statute or rule, and is beyond the Commissioner's authority under Minn. Stat. §§ 45.027 and 60A.03. It insists that the directive to complete the survey amounts to an unpromulgated rule, in violation of the Minnesota Administrative Procedure Act.

On September 16, 2016, the Department filed a response to PCI's petition. The Department maintained that PCI did not have standing to request any relief under Minn. Stat. § 14.381; the relief requested by PCI could not be granted; and the Commissioner's request for information about the hiring and contracting practices of Minnesota insurers was not a "rule," as that term is used in the Minnesota Administrative Procedure Act.[20] It requested dismissal of PCI's petition.[21]

On October 28, 2016, counsel for PCI and the Department participated in an oral argument on the claims made in the petition and the Department's response.[22] During the argument, the Department maintained that while it was likely that there was a limit on the Commissioner's authority to demand information from Minnesota insurers, it could not identify any particular data that the Commissioner could not demand.[23]

On November 21, 2016, by way of a letter from counsel, the Department asserted that it "will not take any enforcement action against insurers for not responding to the 2016 Multistate Insurance Diversity Survey."[24] Because the Department maintains that this declaration moots the dispute between the parties, it requested both that PCI withdraw its petition, and that the Administrative Law Judge refrain from acting upon PCI's claims until, at the earliest, PCI could submit a response to the November 21 letter. The Department also argued that to the extent that PCI did not voluntarily withdraw its petition, PCI's claims should be dismissed on the grounds of mootness.[25]

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[19] Pet. at 1-2; Minn. Stat. § 14.381, subd. 1(a).
[20] Department's Response at 1 (Sept. 16, 2016).
[21] *Id.* at 3.
[22] *See* Second Prehearing Order (Sept. 27, 2016).
[23] Digital Recording (Sept. 16, 2016) (on file with the Minn. Office Admin. Hearings).
[24] Letter from Counsel (Nov. 21, 2016).
[25] *Id*.

PCI asserts that, notwithstanding the November 21 declaration, it has active and viable claims for relief.[26]

Analysis

1. Are PCI's Claims Moot?

PCI maintains that the Department's pledge to refrain from any enforcement action against insurers for not responding to the 2016 survey leaves unanswered the question of whether the Commissioner still claims the authority to require the disclosure of insurer hiring and vendor data and the power to penalize any future failure to make these disclosures. PCI argues that if the Department can insist upon dismissal of the petition at this stage of the proceedings, its claims are "capable of repetition, yet evade review."[27]

The Administrative Law Judge agrees. In the case of *Kahn v. Griffin*,[28] the Minnesota Supreme Court detailed the legal standards for applying the mootness doctrine. As Justice Paul H. Anderson explained:

> The [United States] Supreme Court has determined that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine is 'limited to the situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.' Additionally, we will not deem a case moot, and thus will retain jurisdiction, if the case is 'functionally justiciable' and is an important public issue "of statewide significance that should be decided immediately.'[29]

In the view of the Administrative Law Judge, all three factors cited by the *Kahn* court weigh in favor of resolving PCI claims. After development of the hearing record and the submission of detailed arguments, this case is "functionally justiciable." Further, given the multi-year nature of the survey program, and the express goal of the commissioners to "build upon" the successes obtained by California between 2012 and 2015, there is a reasonable expectation that the insurers would be subjected to similar actions in future years.[30] Lastly, the breadth of the commissioner's authority to demand detailed business information from insurers is an important public issue, of statewide significance, that should be decided immediately. PCI's claims for relief are not moot.

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[26] Letter from Counsel (Nov. 23, 2016).
[27] *Id*. at 2-3.
[28] *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005).
[29] *Kahn*, 701 N.W.2d at 821-22 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) and *State v. Brooks*, 604 N.W.2d 345, 347-48 (Minn.2000)).
[30] Pet., Ex. A at 1.

2. Does PCI Have Standing to Seek Relief?

Under Minn. Stat. § 14.381, subd. 1(a), a person may petition the Office of Administrative Hearings seeking an order of an administrative law judge determining that "an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule."[31]

The Department argues that PCI does not have the requisite legal standing to request a declaratory order, because the Commissioner has not sought any disclosures from PCI. PCI counters that on this, and other regulatory matters, its corporate purpose is to advocate on behalf of its member-companies.

In the case of *Warth v. Seldin*,[32] the U.S. Supreme Court addressed the circumstances in which an association may have standing in court to seek relief on behalf of its members. In that case, the Home Builders Association challenged a township's zoning practices on the grounds that those practices prevented their members from building lower-cost housing and earning additional profit. The township countered that the association did not suffer injury-in-fact from the zoning rules. As Justice Powell explained:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.
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> ….
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> [W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all

[31] Minn. Stat. § 14.381, subd. 1(a).
[32] *Warth v. Seldin*, 422 U.S. 490 (1975).

> cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.[33]

In this case, PCI has alleged that developing complete responses to the survey questions will require some of its member-insurance companies to incur substantial expenses and make public valuable business information that is now kept confidential.[34]

Applying the factors from *Warth v. Seldin* in this case, it is clear that: PCI's member companies would have standing to sue in their own right; the regulatory and competitive interests that PCI seeks to protect are germane to the trade association's purpose; and, neither the claim that is asserted, nor the relief that is requested, requires the participation of any specific member covered by the disclosure requirements. PCI has standing to challenge the directive on behalf of its members.[35]

3. Does the Commissioner's Disclosure Directive Qualify as a Rule?

The Minnesota Administrative Procedure Act (MAPA) defines a "rule" as:

> every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.[36]

Further, interpretations of existing rules which "make specific the law enforced or administered by the agency," and are not either long-standing positions of the agency or within the plain meaning of the statute, are deemed to be "interpretative rules."[37]

With limited exceptions, that are not applicable in this case, an agency's interpretative rules are valid only if they are promulgated in accordance with MAPA.[38]

The Department's statement that the covered insurers are required to "respond to the survey" and that "[p]articipating Commissioners have the discretion to require any

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[33] *Warth,* 422 U.S. at 511, 515 (citations omitted); *see also, Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012).

[34] *See* Blume Aff. at ¶¶ 17-18.

[35] *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977); *accord, Builders Ass'n of Minnesota v. City of St. Paul*, 819 N.W.2d 172, 176–77 (Minn. Ct. App. 2012); *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532–33 (Minn. Ct. App. 2004).

[36] Minn. Stat. § 14.02, subd. 4 (2016).

[37] *See, e.g., Mapleton Community Home, Inc. v. Minnesota Dep't of Human Services,* 391 N.W.2d 798, 801 (Minn. 1986) ("[a]n agency interpretation that 'make[s] specific the law enforced or administered by the agency' is an interpretive rule that is valid only if promulgated in accordance with the [Minnesota Administrative Procedures Act]") (quoting *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1979)).

[38] *See* Minn. Stat. § 14.03, subd. 3(b) (2016); *In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. Ct. App.), *review denied* (Minn. 1993) (citing *Mapleton Community Home,* and *Minnesota-Dakotas Retail Hardware Ass'n, supra*).

licensed insurer, even those that collect less than $300 million in written national premiums, to complete the survey," are "statements of general applicability."[39] Moreover, as to insurers with $300 million in written national premiums, the declaration makes clear that no policy will be developed later, on an individualized, case-by-case basis. Every Minnesota insurer that exceeds this sales threshold must make the disclosures.[40]

The Department's May 2, 2016 directive that "[t]he deadline to submit the survey is September 1, 2016" was also a "statement of future effect."[41]

For these reasons, unless some exception to the requirement to promulgate an interpretative rule applies, the disclosure directive is an administrative "rule."

4. Does the Agency's Pronouncement Follow Directly from the Plain Meaning of the Statute?

The Department does not point to any administrative rule obliging disclosure of data to the MIDS program. Instead, the Department asserts that the demand for data is part of the Commissioner's powers to conduct investigations under Minn. Stat. §§ 45.027 and 60A.03.

It is important to note that when an agency's interpretation of the law directly follows from the plain meaning of a statute, the agency is not deemed to have engaged in rulemaking.[42] Here, however, the Department's disclosure directive does not result from a plain reading of either statute.

It cannot be that the Commissioner is carrying out a statutory duty to make these inquiries, because none of the key words of the MIDS program appear in the underlying statutes. The terms "supplier," "veteran," "lesbian," "gay," "bisexual," "transgender" or "minority" do not appear in either Chapters 45 or 60A (2016) of Minnesota Statutes. The word "procurement" does appear twice in Chapter 60A, but in a very different context – the unlawful sale of insurance;[43] not the kind of third-party vendor and subcontracting arrangements scrutinized by the survey.

In fact, to the extent that MIDS initiative obliges confidential business data to be disclosed to the public, it contravenes the protections in these same statutes. Minn. Stat. § 45.027, subd. 9, makes clear that confidential business information collected by

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[39] Pet., Ex. C. at 3.

[40] *Compare Reserve Life Insurance Co. v. Commissioner of Commerce,* 402 N.W.2d 631 (Minn. Ct. App.) *review denied* (Minn. 1987) (it was reasonable for the Commissioner to assess the validity of insurance policy provisions on a case-by-case basis where it would be "nearly impossible" to state in advance all of the possible applications of the statutory terms "unfair, inequitable, misleading (and) deceptive").

[41] Pet., Ex. A at 1.

[42] *See, e.g., Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) ("Generally, if the agency's interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a long-standing one, the agency is not deemed to have promulgated a new rule").

[43] *See* Minn. Stat. § 60A.209, subds. 2, 6.

the Department is ordinarily disclosed only to an "appropriate person or agency" following a determination that the disclosures will "aid the law enforcement process, promote public health or safety, or dispel widespread rumor or unrest."[44] Even in those rare circumstances, the planned disclosure must be first approved by the Attorney General with a notice sent to the "chairs of the senate and house of representatives judiciary committees" describing "the disclosure and the basis for it."[45]

Similarly, Minn. Stat. § 60A.031 provides that the Commissioner's inquiries under Chapter 60A follow from a formal examination process that is "related to the enforcement of the insurance laws, or to ensure that companies are being operated in a safe and sound manner …."[46] In those circumstances, the Commissioner issues a written order "stating the scope of the examination and designating the person responsible for conducting the examination";[47] which culminates in the production of a formal report that is verified by the examiner;[48] and the adoption of written findings and conclusions by the Commissioner.[49] Moreover, the "working papers, recorded information, documents and copies thereof produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination," are to be maintained as confidential records and shielded from public disclosure.[50] Yet, none of these statutory protections are afforded to Minnesota insurers under the MIDS initiative.

For these reasons, the disclosures sought by the Commissioner do not implement a particular statutory directive.

5. Does the Directive to Disclose Exceed the Commissioner's Authority Under Minn. Stat. § 45.027, subd. 1a?

Minn. Stat. § 45.027, subd. 1(1), provides that "in connection with the duties and responsibilities entrusted to the commissioner," the Commissioner of Commerce may:

> make public or private investigations within or without this state as the commissioner considers necessary to determine whether any person has violated or is about to violate any law, rule, or order related to the duties and responsibilities entrusted to the commissioner;
>
> ….
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> examine the books, accounts, records, and files of every licensee, and of every person who is engaged in any activity regulated; the commissioner or a designated representative shall have free access during normal business hours to the offices and places of business of the person, and to

[44] Minn. Stat. § 45.027, subd. 7(b)(f).
[45] *Id*.
[46] Minn. Stat. § 60A.031, subd. 1.
[47] Minn. Stat. § 60A.031, subd. 2a.
[48] Minn. Stat. § 60A.031, subd. 4(a).
[49] Minn. Stat. § 60A.031, subd. 4(d)(1).
[50] Minn. Stat. § 60A.031, subd. 4(f); *see also,* Minn. Stat. § 60A.03, subd. 9.

> all books, accounts, papers, records, files, safes, and vaults maintained in the place of business ….[51]

Further, Minn. Stat. § 45.027, subd. 2, provides:

> For the purpose of any investigation, hearing, proceeding, or inquiry related to the duties and responsibilities entrusted to the commissioner, the commissioner or a designated representative may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records that the commissioner considers relevant or material to the inquiry.[52]

The dispute in this case centers on the meaning of the phrase "related to the duties and responsibilities entrusted to the commissioner" – which is repeated three times in the statutes above. PCI argues that the recruiting and vendor selection practices of its members have nothing to do with the sale of insurance products in Minnesota. It maintains that the Commissioner's inquiries are not "related to the duties and responsibilities entrusted to the commissioner." The Department disagrees. It asserts that to the extent a company holds an insurance license, any activity that the company later engages in is "related to the duties and responsibilities entrusted to the commissioner."

In the view of the Administrative Law Judge, the suggestion that an insurance company does not undertake any activity that is beyond the reach of the Commissioner to inquire upon, as much as the Commissioner wishes, and as often as he wishes, is very troubling. It inverts the entire statutory scheme. Particular *duties* are entrusted to the Commissioner; not particular companies.

Moreover, to the extent that any connection is drawn between Minnesota's regulatory standards for insurance sales, and the requested data, that connection is disclaimed by the commissioners themselves. They wrote: "In response to your concern about 'financial data,' we would like to clarify – *we are not collecting data that is central to an insurer's level of solvency*; instead the survey looks only at data that reflects the procurement practices of the insurer as it relates to supplier diversity."[53]

Without a clear linkage to either a duty or a responsibility that has been entrusted to the Commissioner, by a law, the Commissioner's demand for survey responses exceeds his authority under Minn. Stat. § 45.027.

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[51] Minn. Stat. § 45.027, subd. 1(1), (5).
[52] Minn. Stat. § 45.027, subd. 2.
[53] Pet., Ex. C at 2 (emphasis added).

6. Does the Directive to Disclose Exceed the Commissioner's Authority Under Minn. Stat. § 60A.03?

Minn. Stat. § 60A.03, subd. 2, provides that the Commissioner of Commerce:

> shall have and exercise the power to enforce all the laws of this state relating to insurance, and shall enforce all the provisions of the laws of this state relating to insurance in the manner provided by the laws defining the powers and duties of the commissioner of commerce ….[54]

As it was with section 45.027, cited above, to say that the Commissioner has the power to enforce all state laws relating to insurance, does not permit the Commissioner to make any demand he wishes from those who sell insurance. The authority to act, under Minn. Stat. § 60A.03, comes first from some other required standard for insurers.

Yet, the Department does not point to any requirement in state law requiring insurers to pursue particular diversity or contracting goals. Undertaking such programs, or reporting on their progress, is not required by "the laws of this state relating to insurance …."[55] Without a clear linkage to the enforcement of a law "relating to insurance," the Commissioner's demand for survey responses exceeds his authority under Minn. Stat. § 60A.03.

For all of these reasons, PCI is entitled to a determination that the Department is unlawfully enforcing, or attempting to enforce a policy or similar pronouncement as though it were a duly adopted rule.

E. L. L.

[54] Minn. Stat. § 60A.03, subd. 2.
[55] *Id*.