

FILED

August 10, 2023

**OFFICE OF
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8009

ADM10-8050

**ORDER RE RULES GOVERNING ACCESS TO RECORDS
OF THE GUARDIAN AD LITEM PROGRAM**

Pursuant to Minn. Stat. § 480.35 (2022), the State Guardian Ad Litem Board “is not subject to the administrative control of the judiciary.” *Id.*, subd. 1(a). Instead, it is an agency independent and separate from the Judicial Branch and has operated as such since 2010 when § 480.35 became effective. The statute, however, provides by default that the records of the guardian ad litem program are “subject to the Rules of Public Access for Records of the Judicial Branch,” while permitting that “[t]he State Guardian Ad Litem Board may propose amendments for supreme court consideration.” Minn. Stat. § 480.35, subd. 6.

On June 14, 2023, the State Guardian Ad Litem Board submitted a petition asking the supreme court to approve independent rules governing access to the substantive and procedural records of the Guardian Ad Litem Board. These were submitted as the proposed Rules of Public Access to Records of the Guardian ad Litem Program.

The court has reviewed the proposed rules and approves them, consistent with Minn. Stat. § 480.35, subd. 6.

This approval of the Rules of Public Access to Records of the Guardian Ad Litem Program also resolves a potential conflict between Rule 9 of the Rules of Public Access to Records of the Judicial Branch as it related to the State Guardian Ad Litem Board that the court identified in an order issued on May 11, 2023. Order Clarifying Application of the Rules of Public Access to Records of the Judicial Branch to Data Access Requests Made to the Guardian Ad Litem Program, Nos. ADM10-8009, ADM10-8050, Order at 1–2 (Minn. Filed May 11, 2023). As explained in that order, under Access Rule 9, the State Court Administrator has the authority to hear appeals from certain record requests that are denied. Thus, to the extent that Access Rule 9 permits an appeal to the State Court Administrator from the denial of a request for access to records of the State Guardian Ad Litem Board or the guardian ad litem program, the rule and the statute could conflict because, consistent with Minn. Stat § 480.35, the State Court Administrator does not have control over the Guardian Ad Litem Board or guardian ad litem program records.

In light of that potential conflict, we had requested the Guardian Ad Litem Board to propose amendments to Access Rule 9 and had stayed that rule as applied to the Board in the interim. In light of our approval of the proposed Rules of Public Access to Records of the Guardian Ad Litem Program, we now lift the stay in the prior order, which is effectively rendered moot. We also amend Access Rule 1 and the corresponding Appendix to make clear that the State Guardian Ad Litem Board is governed by other rules rather than by the Rules of Public Access for Records of the Judicial Branch.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The attached Proposed Rules of Public Access to Records of the Guardian ad Litem Program, as submitted to the court by the State Guardian Ad Litem Board, are approved and promulgated as shown below, effective immediately.

2. The attached amendments to the Rules of Public Access to Records of the Judicial Branch are prescribed and promulgated as shown below. The amendments are effective immediately.

3. The stay imposed by order on May 11, 2023, pertaining to Rule 9 of the Rules of Public Access to Records of the Judicial Branch is lifted, effective immediately.

Dated: August 10, 2023

BY THE COURT:

A handwritten signature in black ink, appearing to read "Lorie S. Gildea", written in a cursive style.

Lorie S. Gildea
Chief Justice

AMENDMENTS TO MINNESOTA RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH

[Note: In the following amendments, deletions are indicated by a line drawn through the words and additions are indicated by a line drawn under the words.]

RULE 1. SCOPE OF RULES.

* * *

Subd. 2. Exclusions. These rules do not govern access to records of the Tax Court, the Workers' Compensation Court of Appeals, ~~or the Office of Administrative Hearings, or the State Guardian ad Litem Board,~~ which are part of the executive branch of the state, except to the extent that such records are submitted in an appeal or proceeding in a judicial branch court. In addition, these rules do not govern access to the substantive and procedural records of the various Boards or Commissions of the Supreme Court as they are governed by independent rules promulgated or approved by the Supreme Court. A partial list of Boards and Commissions is set forth in Appendix A. Finally, except as provided in Rule 4, subd. 1(b), with respect to case records, these rules do not govern access to records of judicial branch court services departments or probation authorities. Access to these records is governed by MINN. STAT. § 13.84 or any successor statute, and other applicable court rules and statutes.

* * *

APPENDIX A

Boards and Commissions that are governed by independent rules promulgated by the Supreme Court include, but are not limited to, the following:

- Lawyers Professional Responsibility Board
- Lawyer Trust Account Board
- Client Security Fund Board
- State Board of Legal Certification
- Board of Continuing Education
- State Board of Law Examiners
- State Bar Advisory Council
- Board on Judicial Standards
- Standing Committee on No Fault Arbitration
- Legal Services Advisory Committee
- State Guardian ad Litem Board

Proposed Rules of Public Access to Records of the Guardian ad Litem Program

Rule 1. Scope

This policy governs the collection, use, dissemination, and retention of data by the Guardian ad Litem Board.

Rule 2. Related Laws and Rules: Applicability and Inapplicability

As a judicial branch agency, the Guardian ad Litem Board pursuant to M.S. §13.90 is exempt from the provisions of Minnesota's Government Data Practices Act.

Notwithstanding any provision of this policy to the contrary, the collection, use, access, storage, and dissemination of data by a Guardian ad Litem shall be governed by the Minnesota Rules of Guardian ad Litem Procedure, Minn. Stat. 260C and the Rules of Juvenile Protection Procedure.

Rule 3. General Policy

Records of the Guardian ad Litem Board are presumed to be accessible by any member of the public for inspection or copying upon request during the regular office hours of the custodian of the records. Some records, however, are not accessible to the public without a court order. Certain records including, but not limited to, medical information, financial account information, and information whose disclosure would be likely to risk the security of information, individuals, or property against theft, improper use, trespass, or injury, may not be made available to the public.

Rule 4. Definitions

a. Records

"Records" means any information that is collected, created, received, maintained, or disseminated by an employee, volunteer or Board member in the course of employment by or service with the Board. The Guardian ad Litem case file and work product related to a case file are not "Records." Case files and work product are separately governed by state and federal statutes and rules.

b. Custodian

The custodian is the person responsible for the safekeeping of any records held by the Guardian Litem Board. In the absence of the person usually responsible, the person who is temporarily responsible for the records is the custodian. The Chief Information Officer shall be the custodian for records that are maintained in computer systems administered by the state program administrator.

Rule 5. Accessibility to Administrative Records

Administrative records involving the finance and operations of the Board are presumed to be accessible by the public, except the following:

Subd. 1 Personnel Records.

Records on individuals collected because the individual is or was an employee of, performs services on a voluntary basis for, or acts as an independent contractor with the Board, provided, however, that the

following information is accessible to the public: name; actual gross salary; salary range; contract fees; actual gross pension; the value and nature of employer-paid fringe benefits; the basis for and the amount of any added remuneration, including expense reimbursement, in addition to salary; job title and bargaining unit; job description; education and training background; previous work experience; date of first and last employment; the status of any complaints or charges against the employee, whether or not the complaint or charge resulted in a disciplinary action; the terms of any agreement settling any dispute arising out of an employment relationship; work location; a work telephone number; honors and awards received; payroll time sheets or other comparable data, that are only used to account for employee's work time for payroll purposes, to the extent that they do not reveal the employee's reasons for the use of sick or other medical leave or other information that is not public; and county of residence; the final disposition of any disciplinary action and supporting documentation, excluding information that would identify confidential sources who are employees of the Board.

- A) For purposes of this Subdivision 1, a final disposition occurs when the person or group that is authorized to take the disciplinary action makes its final decision about the disciplinary action, regardless of the possibility of any later court proceedings or other proceedings. In the case of arbitration proceedings arising under a collective bargaining agreement, a final disposition occurs at the conclusion of the arbitration proceeding, or upon the failure of the employee to elect arbitration within the time provided by the collective bargaining agreement. Final disposition includes a resignation by an individual when the resignation occurs after the final decision of the person, group, or arbitrator that is authorized to take disciplinary action.
- B) Notwithstanding contrary provisions in these rules, a photograph of a current or former employee may be displayed to a prospective witness as part of an investigation of any complaint or charge against the employee.
- C) Notwithstanding contrary provisions in these rules, if an employee resigns or is terminated from employment while the complaint or charge is pending, all information relating to the complaint or charge is public, unless access to the information would jeopardize an active investigation or reveal confidential sources.
- D) Records under Subdivision 1 may be disseminated to a law enforcement agency for the purpose of reporting a crime or alleged crime committed by an employee, volunteer or independent contractor, or for the purpose of assisting law enforcement in the investigation of a crime committed or allegedly committed by an employee, volunteer, or independent contractor.
- E) Records under Subdivision 1 must be disclosed to the Department of Employment and Economic Development for the purpose of administration of an unemployment benefits program under state law including without limitation the investigation, prosecution, settlement or defense of a claim related thereto.
- F) Records under Subdivision 1 must be disclosed to the Department of Employee Relations and the Department of Labor and Industry for the purpose of administering workers compensation programs including without limitation the investigation, prosecution, settlement or defense of a claim related thereto.
- G) Records under Subdivision 1 may be disseminated to labor organizations to the extent that the custodian determines that the dissemination is necessary to conduct elections, notify employees of fair share fee assessments, and implement the provisions of M.S. §§ 179 and 179A. Records under subdivision A shall be disseminated to labor organizations and to the Bureau of Mediation Services to the extent the dissemination is ordered or authorized by the Commissioner of the Bureau of Mediation Services.

- H) If the custodian determines that the release of records under Subdivision 1 is necessary to protect an employee, volunteer or independent contractor from harm to self or to protect another person who may be harmed by the employee, volunteer, or independent contractor, records that are relevant to the concerns for safety may be released to: the person who may be harmed and to that person's attorney when the records are relevant to obtaining a restraining order; to a prepetition screening team conducting an investigation under M.S. §253B.07, subdivision A; or to a court, law enforcement agency, or prosecuting authority. If the person who may be harmed or that person's attorney receives records under this subdivision, the records may be used or released further only to the extent necessary to protect that person from harm.

Subd. 2. Personnel—Related Records

A) Collective Bargaining Planning Records

Management positions on economic and noneconomic labor relations items that have not been presented during the collective bargaining process or interest arbitration, including information specifically collected or created to prepare the management position.

B) Applicant Records

Records on individuals collected because the individual is or was an applicant for employment with the Board, provided, however, that the following information is accessible to the public: veteran status; relevant test scores; rank on eligible lists; job history; education and training; work availability; and, after the applicant has been certified by the appointing authority to be a finalist for a position in public employment, the name of the applicant

Subd. 3. Security Records

Records in the possession or custody of the Board that may substantially jeopardize the security of information, possessions, individuals, or property if subject to theft, tampering, improper use, illegal disclosure, trespass, or physical injury, such as security plans or codes, checks and checking account numbers submitted as part of a transaction with the courts, and;

Audit Trail Records. Guardian ad Litem Board audit trail records that link a user with any activity performed by the user on technology systems or applications (including but not limited to Minnesota Government Access, Minnesota Public Access Courthouse, Electronic File and Serve, and the Guardian ad Litem Case Management System) are not accessible to the public, except to the extent that such records, when they indicate improper use of a technology tool, are disclosed within a final audit report. Audit trail records may also be disclosed as provided in Rule 5, subdivision 13(e) or (f), of these Rules.

Subd. 4. State Owned or Licensed Trade Secrets

Records revealing a common law trade secret or a trade secret as defined in MINN. STAT. § 325C.01 that is owned or licensed by the state and is maintained by the Guardian ad Litem Board; provided, that the

following are accessible to the public: the existence of any contract, the parties to the contract, and the material terms of the contract, including price, projected term, and scope of work.

Subd. 5. Copyrighted Material

Computer programs and related records, including but not limited to technical and user manuals, for which the Guardian ad Litem Board has acquired or is in the process of acquiring, a patent or copyright, or a license to use the same; provided, that the following are accessible to the public: the existence of any contract, the parties to the contract, and the material terms of the contract, including price, projected term, and scope of work.

Subd. 6. Competitive Bidding Records

A) Sealed Bids.

Sealed bids and responses to judicial branch bid or procurement requests or solicitations, including the number of bids or responses received, before the opening of the bids or responses at the time specified in the judicial branch request or solicitation.

B) Submission of Trade Secret.

Except as provided in subparagraph (c) of this subdivision, a common law trade secret or a trade secret as defined in MINN. STAT. § 325C.01 that is required to be submitted in accordance with a judicial branch bid or procurement request provided that:

(1) the submitting party marks the document(s) containing the trade secret "CONFIDENTIAL;"

(2) the submitting party submits as part of the bid or response a written request to maintain confidentiality; and 24

(3) the trade secret information is not publicly available, already in the possession of the judicial branch, or known to or ascertainable by the judicial branch from third parties.

(C) Contract.

The existence of any resulting contract, the parties to the contract, and the material terms of the contract, including price, projected term, and scope of work, shall be accessible to the public.

Subd. 7. Attorney Work Product

The work product of any attorney or volunteer or contractor employed by or representing the Guardian ad Litem Board that is produced in the regular course of business or representation of the Guardian ad Litem Board, its employees or volunteers.

Subd. 8. Board Internal Audit Records.

Information, notes, and preliminary drafts of reports relating to an audit or investigation, created, collected, and maintained by the internal auditor or audit committee of the Board, or persons performing audits for the Board; provided that upon the release of a final audit report by the Board auditor or if the audit or investigation is no longer being pursued actively, such audit records shall be accessible to the public except as otherwise provided by applicable law or rule.

A) Auditor access; personnel records.

This subdivision does not limit in any way disclosures required under M.S. §§ 609.456 or 3.978.

B) Confidential sources.

Records on an individual who supplies information for an audit or investigation, that could reasonably be used to determine the individual's identity, are not accessible to the public if the information supplied was needed for an audit or investigation and would not have been provided to the internal auditor or person performing audits without an assurance to the individual that the individual's identity would remain not accessible to the public.

C) Access to records by audit committee members.

Members of an audit committee have access to records that are collected or used by the Board auditor and that have been classified as not accessible to the public only as authorized by resolution of the committee or the Board.

D) Unreleased records.

Records related to an audit but not released in a final audit report and that the Board auditor reasonably believes will be used in litigation are not accessible to the public until the litigation has been completed or is no longer being actively pursued.

E) Review of Records.

If, before releasing a final audit report, the Board auditor provides a person with records relating to the audit for the purpose of review and verification of the records, that person shall not disclose the records to anyone else unless and until the information becomes accessible to the public under these rules.

F) Duties Concerning Misuse of Public Money or Other Resources.

If the Board auditor's examination discloses misuse of public money or other public resources, the Board auditor may disclose records relating to the examination to the attorney general to assist in the recovery of money and other resources and to the appropriate prosecuting authority to assist in the prosecution of criminal proceedings as the evidence may warrant.

Subd. 9. Other- Matters that are made inaccessible to the public under

- A) state statute, other than M.S. Chapter 13 or
- B) federal law

Rule 6. Access to Records; Procedure

Subd. 1 Request

A person seeking publicly accessible records ("requester") shall make the request in writing or by email to the Chief Information Officer or by using the electronic form on the Guardian ad Litem Board's Public Website.

Subd. 2 Response

The Chief Information Officer shall respond to the requester in writing or by email as soon as reasonably possible. The response shall contain a description of any cost to the requester of obtaining copies of or remote access to those records.

Subd. 3 Copies of or Electronic Access to Records

The Chief Information Officer shall provide copies of the records according to the terms of this policy. If the requester requests copies of or electronic access to or transmittal of the records, the Chief Information Officer may require the requester to pay the actual costs of searching for and retrieving records, including the cost of employee time, and for making, certifying, and electronically transmitting the copies of the records, but may not charge for separating public from not public data. However, if paper copies are requested, actual costs shall not be used, and instead, the Board may charge no more than 25 cents for each page copied.

Subd. 4. Inspection of Records

For purposes of this section, "inspection" includes, but is not limited to, the inspection of paper and similar types of government data. Upon request to a custodian, a person shall be allowed to inspect records that are accessible to the public in the place where such records are normally kept, during regular working hours. However, copies, electronic copies, edited copies, reasonable facsimiles or other appropriate formats may be produced for inspection if access to the original records would: result in disclosure of information to which access is not permitted; require unreasonable effort or expense; provide remote or bulk access that is not permitted under this rule; jeopardize the security of the records; or prove otherwise impractical. Unless expressly allowed by the custodian, records shall not be removed from the area where they are normally kept. The custodian may not assess a charge or require the requesting person to pay a fee to inspect data. The custodian, at its option, may provide an electronic copy of the requested data in lieu of copies or inspection.

Subd. 5. Appeal from Denial of Request

If the Chief Information Officer denies a request to inspect records or for production of copies of records, the denial may be appealed in writing to the Guardian ad Litem Program Administrator. The Guardian ad Litem Program Administrator shall make a written determination within 30 days. This remedy need not be exhausted before other relief is sought.

Rule 7. Contracting with Vendors for Information Technology Services.

When the Board contracts with a vendor to perform information technology-related services for the Board, the following provisions shall apply:

- A) "records" shall include all recorded information collected, created, received, maintained or disseminated by the vendor in the performance of such services, regardless of physical form or method of storage, excluding any vendor-owned or third-party-licensed intellectual property (trade secrets or copyrighted or patented materials) expressly identified as such in the contract;
- B) the vendor shall not, unless expressly authorized in the contract, disclose to any third-party records that are inaccessible to the public under these rules;
- C) unless assigned in the contract to the vendor in whole or in part, the Board shall remain the custodian of all court records for the purpose of providing public access to publicly accessible records in accordance with these rules, and the vendor shall provide the Board with access to such records for the purpose of complying with the public access requirements of these rules.
- D) Where the service involves coding, designing, or developing software or managing a software development project for the Board, the Board would typically retain all record custodian

responsibilities under these rules and the contract would, among other things: (a) require the vendor to immediately notify the Board if the vendor receives a request for release of, or access to, records; (b) prohibit the disclosure of records that are inaccessible to the public under these rules; (c) specify the uses the vendor may make of the records; (d) require the vendor to take all reasonable steps to ensure the confidentiality of the records that are not accessible to the public, including advising all vendor employees who are permitted access to the records of the limitations on use and disclosure; (e) require the vendor, other than a state agency, to indemnify and hold the Board, and its agents harmless from all violations of the contract; (f) provide the Board with an explicit right to injunctive relief without the necessity of showing actual harm for any violation or threatened violation of the contract; (g) be governed by Minnesota law, without giving effect to Minnesota's choice of law provisions; (h) include the consent of the vendor to the personal jurisdiction of the state and federal courts within Minnesota; and (i) require all disputes to be venued in a state or federal court situated within the state of Minnesota.

Rule 8. Immunity

Absent willful or malicious conduct, the custodian, Chief Information Officer and Program Administrator of a record shall be immune from civil liability for conduct relating to the execution of their duties under these rules.