



THE SUPREME COURT OF MINNESOTA
MINNESOTA JUDICIAL CENTER
25 REV. DR. MARTIN LUTHER KING JR. BLVD.
ST. PAUL, MINNESOTA 55155

SUE K. DOSAL
STATE COURT ADMINISTRATOR

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September 17, 2007

Fred Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King, Jr. Blvd.
Suite 305
St. Paul, MN 55155

RE: **PROPOSED AMENDMENTS TO THE RULES OF PUBLIC ACCESS TO
RECORDS OF THE JUDICIAL BRANCH, C4-85-1848**

Dear Mr. Grittner:

Enclosed for filing please find twelve copies of comments related to the September 11, 2007, Final Report of the Advisory Committee on the Rules of Public Access to Records of the Judicial Branch. My comments comprise a proposed rule amendment and drafting comments regarding audit records. This issue arose after the advisory committee completed its report and I ask that you post the proposed rule change on the Court website alongside the advisory committee report so that others may have an opportunity to comment on it. Thank you.

I am not requesting to make an oral presentation at the hearing.

I have also transmitted to you under separate cover the electronic Word version of the attached proposal.

Sincerely yours,

A handwritten signature in cursive script that reads "Sue K. Dosal".

Sue K. Dosal

Enc.

CC: Hon. Paul H. Anderson

State Court Administrator's Office proposed Rule modification for Access Rule 5, subd. 13, related to disclosure of misuse of money or resources (new language is indicated by underlined text).

Subd. 13. Judicial Branch 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 judicial branch, or persons performing audits for the judicial branch; provided that upon the release of a final audit report by the judicial branch 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 MINN. STAT. §§ 609.456 or 3.978, or public access to records classified as accessible to the public by Rule 5, subd. 1.
- (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 judicial branch auditor and that have been classified as not accessible to the public only as authorized by resolution of the committee.
- (d) *Unreleased records.* Records related to an audit but not released in a final audit report and that the judicial branch 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 judicial branch 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 judicial branch auditor's examination discloses misuse of public money or other public resources, the judicial branch 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.

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Advisory Committee Comment-2007

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The 2005 addition of Rule 5, subd. 13, is based on policy applicable to executive branch audit records. *See* MINN. STAT. §§ 3.979, 13.392 (2004). An internal audit function is being implemented by the judicial branch as part of the transition to state funding of district court administrative costs. The scope of the audit function is currently limited to financial audits but program audits could be added later. Subdivision 13 encompasses both types of audits.

Subdivision 13 is not intended to provide a safe harbor to deny public access to records that would otherwise be accessible to the public. If an audit involves personnel records, for example, to the extent that those personnel records are accessible to the public in the hands of a supervisor or human resources office, they will continue to be accessible only from that source and would not be accessible from the auditor until a final audit report is released. Conversely, to the extent that any personnel records are not accessible to the public from the supervisor or human resources office, the records would remain off limits to the public even after the auditor releases a final report. Subdivision 13, clause (a) includes an express reference to personnel records under Rule 5, subd. 1, as audits often involve personnel records.

Implementation of the audit function includes establishment of an audit committee to provide oversight and advice to the auditor. Although the structure of that committee has not yet been finalized, subdivision 13(c) assumes that such a committee would exist and would have some access to the auditor's records via formal resolutions adopted by the committee. The requirement of a resolution prevents individual audit committee members from independently obtaining access to the auditor's records and places consistent limitations on re-disclosure to the extent that audit committee members obtain such records.

A confidential source clause is included under subd. 13(b) to protect individuals who want to cooperate with an audit or investigation. Subdivision 13(d) addresses unreleased records when litigation is a concern. Subdivision 13(e) allows the auditor to control the distribution of draft reports or record summaries to a specified “person.” This process allows for verification of facts before the release of the final audit report.

The 2008 addition of subd. 13(f) is based on policy applicable to records of the legislative auditor. See MINN. STAT. §§ 3.975 (2007) (legislative auditor). To the extent that misuse is uncovered as part of a personnel investigation, Access Rule 5, subd. 1(d), authorizes disclosure of the pertinent personnel records to law enforcement. Subd. 13(f) extends the same authority to the judicial branch auditor, who may be in a better position to report and assist law enforcement, particularly when misuse occurs in a court office that does not have the staff or technical ability to thoroughly investigate and report on the matter.