



Guardian ad Litem Board: Data Access Rules

Special Review

July 2023

Office of the Legislative Auditor
State of Minnesota



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July 2023

Members of the Legislative Audit Commission:

In early 2023, a private citizen contacted the Office of the Legislative Auditor (OLA) with a concern that their request for Guardian ad Litem (GAL) Board administrative data, and subsequent appeal, was improperly handled. Based on our preliminary assessment of the complaint, OLA initiated a special review of the GAL Board's data access rules.

This special review was conducted by Katherine Theisen (Special Reviews Director), Lucas Lockhart, and Nathan Shepherd. The GAL Board and State Court Administrator's Office cooperated fully with our review, and we thank them for their assistance.

Sincerely,



Judy Randall
Legislative Auditor



Katherine Theisen
Special Reviews Director



OLA



Summary

July 2023

Guardian ad Litem Board: Data Access Rules

Report Summary

While the GAL Board is part of the Judicial Branch, Minnesota statutes indicate that it is not subject to the administrative control of the judiciary. However, statutes also provide that public access to GAL Board records is subject to Judicial Branch rules. The rules give the public the ability to appeal a denial of data access to the State Court Administrator.

- In 2021, the GAL Board denied an individual's request for GAL Board data. The Chief Justice of the Minnesota Supreme Court and the State Court Administrator subsequently told the individual that the State Court Administrator's Office (SCAO) could not review the Board's responses to records requests. The Chief Justice and State Court Administrator referenced the Board's independence from the administrative control of the Judicial Branch and the scope of the Judicial Branch data access rules as the basis for their decision. This left a citizen unable to appeal the Board's decision. (p. 5)
- Contrary to state law, the GAL Board recently adopted its own data access rules. Minnesota law does not give the Board the authority to adopt its own rules controlling public access to GAL Board data. (p. 8)

Recommendation ► The Legislature should consider possible changes to state statutes regarding access to GAL Board data. (p. 11)

Background

When a child becomes involved in a court case, the court may appoint a guardian ad litem (GAL) to investigate the child's situation, prepare written reports about the child's best interests, and advocate for the child in judicial proceedings. Since 2010, the GAL Board has governed and administered a statewide GAL program.

In early 2023, a private citizen contacted OLA with a concern that their request for GAL Board administrative data, and subsequent appeal, was improperly handled. Based on our preliminary assessment of the complaint, OLA initiated this special review.

Summary of Responses

In a letter dated June 29, 2023, Tami Baker-Olson, Program Administrator for the GAL Board, said that "The GAL Board believes the OLA is correct that citizens should have a right to seek further review if a request for records is denied." Further, Ms. Baker-Olson stated the Board "believes that the best policy to follow with regard to public access and release of records in its control, is for the GAL program administrator to be directly involved in any review or appeal of a decision made by a GAL program official relating to public records decisions."

In a letter dated June 28, 2023, Jeffrey Shorba, State Court Administrator, said that based on SCAO's legal analysis, "it was SCAO's conclusion that the State Court Administrator should not make appeal determinations of a denial of access to Guardian ad Litem Board Program records." Mr. Shorba also indicated that the GAL Board has provided two proposals to the Minnesota Supreme Court to "address the issue of the Guardian ad Litem Program being an independent agency and the appeal of a denial for access to records" available under Judicial Branch rules.

The full special review report, *Guardian ad Litem Board: Data Access Rules*, is available at 651-296-4708 or: www.auditor.leg.state.mn.us/sreview/gal-board-data.pdf



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OLA

Introduction

When a child becomes involved in a court case (such as a custody dispute), the court may appoint a guardian ad litem (GAL). The GAL is generally tasked with investigating the child's situation, preparing written reports about the child's best interests, and advocating for the child in judicial proceedings. Since 2010, the GAL Board has governed and administered a statewide GAL program.¹

In early 2023, a private citizen contacted the Office of the Legislative Auditor (OLA) with a concern that their request for GAL Board administrative data, and subsequent appeal of the Board's response to that request, was improperly handled. Specifically, the individual questioned the legitimacy of the Board's newly adopted rules governing access to its data.

In order to learn more about the GAL Board's new rules, OLA initiated a special review of the Board's data access rules. Specifically, we:

- Examined the GAL Board's data access policies and rules to determine their compliance with Minnesota statutes and Judicial Branch rules.
- Requested and reviewed information from GAL Board staff regarding data requests the Board had received, recent changes to the Board's data access policies and rules, and whether the Board had considered any data request appeals under its recently changed policies.²
- Requested and reviewed information from the State Court Administrator's Office (SCAO) regarding its interpretation of Minnesota statutes and Judicial Branch data access rules.

Both the GAL Board and SCAO cooperated fully with our review.

Background

The administration of the GAL program has changed significantly in the last two decades. Counties administered GAL services with no centralized direction until the late 1990s, when the state court system assumed responsibility for funding GAL services, and the Minnesota Supreme Court adopted rules standardizing some aspects of GAL services. In 2002, Judicial Branch officials began designing a GAL program funded and supervised by the state court system and administered by the state's ten judicial districts.

¹ *Laws of Minnesota* 2010, chapter 309, sec. 5, codified as *Minnesota Statutes* 2022, 480.35. For more information about the GAL Board, see Office of the Legislative Auditor, Program Evaluation Division, *Guardian ad Litem Program* (St. Paul, 2018).

² While we collected information on data requests received by the GAL Board, we did not review whether the Board's response to any specific request was complete and appropriate, or whether it correctly or incorrectly withheld any information. Our primary focus was on the appeal process, which occurs after the GAL Board denies access to its records.

In 2006, the Minnesota Judicial Council formed an advisory committee to “examine the long-term and systemic challenges facing the Guardian ad Litem Program,” and make recommendations.³ Informed by advisory committee recommendations, the Judicial Council determined that the GAL program should be moved out of the court system and be overseen by an independent board. In 2010, the Legislature established the GAL Board within the Judicial Branch to create and administer an independent GAL program in Minnesota.⁴ In 2015, another advisory committee described the transition to an independent GAL program as transferring the “administration and oversight of the qualifications, recruitment, screening, training, selection, supervision, and evaluation of guardians ad litem” from SCAO to the GAL Board.⁵

The GAL Board consists of seven members, three appointed by the Minnesota Supreme Court and four appointed by the governor, each of whom serves a four-year term. The Board appoints a program administrator, who serves at the Board’s pleasure, to carry out the administrative functions of the GAL program, implement standards and policies approved by the Board, recommend new policies to ensure efficient operations of the program, and oversee the operation of a small central office, among other things. In addition to a program administrator, the Board also employs a chief information officer, who is responsible for responding to public data requests.

The Guardian ad Litem Board is part of the Judicial Branch, but Minnesota statutes give the Board some independence from the judiciary.

While the GAL Board “is established in the judicial branch,” statutes state that “The board is not subject to the administrative control of the judiciary.”⁶ Statutes direct the Board to “establish guardian ad litem program standards, administrative policies, procedures, and rules” to guide GALs’ work.⁷ They also permit the Board to adopt additional “standards, policies, or procedures necessary to ensure quality advocacy for the best interests of children.”⁸

However, the GAL Board’s authority is limited. Statutes require that the Board’s standards, policies, procedures, and rules governing GALs’ work be “consistent with statute, rules of court, and laws that affect a volunteer or employee guardian ad litem’s work.”⁹ Further, the participation of GALs in court proceedings is subject to the

³ Guardian ad Litem Advisory Committee, *A Report to the Minnesota Judicial Council*, March 2008. The Judicial Council is the Minnesota Judicial Branch’s administrative policy-making body. It is composed of the Chief Justice of the Minnesota Supreme Court, the Chief Judge of the Court of Appeals, the Chief Judges of the ten judicial districts, the Minnesota District Judges Association president, the State Court Administrator, and 11 appointed members.

⁴ *Laws of Minnesota* 2010, chapter 309, sec. 5, codified as *Minnesota Statutes* 2022, 480.35.

⁵ *Order Promulgating Amendments to the Rules of Juvenile Protection, Adoption, and Guardian Ad Litem Procedure*, No. ADM10-8041, Memorandum at *89 (Minn. April 22, 2015).

⁶ *Minnesota Statutes* 2022, 480.35, subd. 1(a).

⁷ *Minnesota Statutes* 2022, 480.35, subd. 2(b)(3).

⁸ *Minnesota Statutes* 2022, 480.35, subd. 2(c)(1).

⁹ *Minnesota Statutes* 2022, 480.35, subd. 2(b)(3).

Minnesota Supreme Court's authority to prescribe rules of practice and procedure in state courts.¹⁰

If the GAL Board wants to operate the GAL program in a way that is not consistent with current law, it cannot implement changes unilaterally. Instead, statutes permit the Board to “*propose* statutory changes to the legislature and rule changes to the supreme court that are in the best interests of children and the operation of the guardian ad litem program” [emphasis added].¹¹

Minnesota statutes provide that public access to GAL Board records is subject to Judicial Branch rules.

Minnesota statutes state that “Access to records of the state guardian ad litem program is subject to the *Rules of Public Access for Records of the Judicial Branch*” [emphasis added].¹² These rules, promulgated by the Minnesota Supreme Court, control public access to the records of all courts and court administrators within the state’s Judicial Branch.¹³ The rules indicate that court records are open to any member of the public for inspection or copying unless the records fall into certain categories. Records not accessible to the public include: (1) judicial work products and drafts of decisions or orders; (2) domestic abuse and harassment records; (3) information identifying minor victims; and (4) court services records, such as psychological evaluations of individuals and recommendations regarding child custody decisions.

¹⁰ *Minnesota Statutes* 2022, 480.05; and 480.051. For example, according to rules promulgated by the Minnesota Supreme Court, a GAL’s appointment to a family court requires the recommendation of a district GAL manager or manager’s designee and a written order of the court that specifies the duration of the appointment to the extent appropriate, and the duties the GAL must perform (Minnesota General Rules of Practice for the District Courts, Title X, *Rules of Guardian ad Litem Procedure in Juvenile and Family Court*, Rules 903.01 and 903.03 (2015), 3 and 5). Courts may determine that the GAL recommended by a district GAL manager or manager’s designee is not appropriate, and then the GAL manager or designee must recommend another GAL for appointment (Minnesota General Rules of Practice for the District Courts, Title X, *Rules of Guardian ad Litem Procedure in Juvenile and Family Court*, Rule 903.01 (2015), 3).

¹¹ *Minnesota Statutes* 2022, 480.35, subd. 2(c)(2).

¹² *Minnesota Statutes* 2022, 480.35, subd. 6. For simplicity, we refer to the *Minnesota Rules of Public Access to Records of the Judicial Branch* in this report as the “Judicial Branch data access rules.” The Judicial Branch data access rules define “records” as “any recorded information that is collected, created, received, maintained, or disseminated by a court or court administrator, regardless of physical form”; “case records” as “all records of a particular case or controversy”; and “administrative records” as “all records pertaining to the administration of the courts or court system” (*Minnesota Rules of Public Access to Records of the Judicial Branch*, Rule 3, subd. 5 (2021), 4). In this report, we use the term “data” and “records” interchangeably.

¹³ By law, the Minnesota Supreme Court has “the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, including the probate courts, by rules promulgated by it from time to time” (*Minnesota Statutes* 2022, 480.051). The Judicial Branch data access rules define “court” to mean “the Supreme Court, the Court of Appeals, District Court, and any other court established as part of the judicial branch of the state,” and “court administrator” as “a person employed or appointed for the purpose of administering the operations of any court or court system, including the clerk of the appellate courts, state court administrator, judicial district administrator, and court administrator of district court” (*Minnesota Rules of Public Access to Records of the Judicial Branch*, Rule 3, subds. 3 and 4 (2021), 4).

The box below provides some key requirements concerning how a member of the public may request data and how the Judicial Branch must respond.



Key Judicial Branch Data Access Rules

- A member of the public must make a request to the custodian of the data.
- A “custodian” is the person responsible for the safekeeping of any records or data held by any court, court administrator, or clerk of court.
- If the amount of data requested is large or the request is complex, the custodian may only insist upon a written request in order to not jeopardize the efficiency and accuracy of the response.
- The custodian must respond to a request as promptly as practical.
- If the custodian cannot respond promptly, or at all, an explanation must be given to the requesting person as soon as possible.
- If a custodian denies a request, they must provide the requesting person at least the following information: the nature of any problem preventing access, and the specific statute, federal law, or court or administrative rule that is the basis of the denial.
- Data request denials can be appealed to the state court administrator who must promptly make a determination.

— Minnesota Rules of Public Access to Records of the Judicial Branch

In addition to the courts and the GAL Board, the State Competency Attainment Board is also required by law to comply with the Judicial Branch data access rules.¹⁴ In contrast, the substantive and procedural records of other Judicial Branch entities, such as the Lawyers Professional Responsibility Board, State Bar Advisory Council, and State Board of Law Examiners, are governed by independent data access rules promulgated or approved by the Minnesota Supreme Court.¹⁵

Other entities that work closely with the courts are subject to data access requirements created by the Legislature, rather than the Minnesota Supreme Court. For example, some probation authorities, court services departments, and the Tax Court are subject to applicable provisions of *Minnesota Statutes*, Chapter 13, otherwise known as the Minnesota Government Data Practices Act.¹⁶ The Act regulates the collection, creation, storage, maintenance, dissemination, and access to government data held by Executive Branch agencies, boards, and commissions, as well as other state and local government entities.¹⁷ Similar to the Judicial Branch data access rules, the Minnesota Government Data Practices Act provides

requirements and limitations for access to records held by government entities, and outlets for reconsideration or appeal of record access decisions.¹⁸

¹⁴ *Minnesota Statutes* 2022, 611.56, subd. 7. The 2023 Legislature changed the name of this board from the State Competency Restoration Board to the State Competency Attainment Board (*Laws of Minnesota* 2023, chapter 14, sec. 32).

¹⁵ *Minnesota Rules of Public Access to Records of the Judicial Branch*, Rule 1, subd. 2 (2021), 2.

¹⁶ In 53 counties, the Minnesota Department of Corrections, an Executive Branch agency, supervises probation authorities. Court services departments are in the Judicial Branch. The Tax Court is part of the Executive Branch.

¹⁷ *Minnesota Statutes* 2022, 13.02, subd. 7, defines “government data” as all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media, or conditions of use. The Act creates a presumption that government data are accessible to the public (*Minnesota Statutes* 2022, 13.01, subd. 3). The Act excludes the Judicial Branch and townships located outside of the seven-county metro area from its scope (*Minnesota Statutes* 2022, 13.90; 13.01, subd. 3; and 13.02, subds. 7a and 11).

¹⁸ For example, the Minnesota Government Data Practices Act sets out the access rights of individual data subjects (*Minnesota Statutes* 2022, 13.04). The Act also provides options for individual data subjects to contest the accuracy or completeness of data about them and to compel compliance with the requirements of the Act (*Minnesota Statutes* 2022, 13.04, subd. 4; 13.08, subd. 4; and 13.085).

Guardian ad Litem Board Statutes and Data Access Rules

A citizen was recently left without the ability to appeal the GAL Board's denial of their data request.

In 2021, the GAL Board told an individual requesting access to GAL Board data that if the individual did not believe the Board responded properly to their request, they should make an appeal to the State Court Administrator. The Board explained that this remedy was available in the Judicial Branch data access rules.

The Chief Justice of the Minnesota Supreme Court and State Court Administrator subsequently told the individual that SCAO could not review the GAL Board's responses to records requests. The Chief Justice and State Court Administrator referenced the Board's independence from the administrative control of the Judicial Branch and the scope of the Judicial Branch data access rules as the basis for their decision. According to the Board, prior to 2021, it was unaware that SCAO believed that it did not have the authority to consider data access appeals related to the Board.

We asked the GAL Board about the effect of SCAO's interpretation. According to the Board's Chief Information Officer,

The State Court Administrator and Chief Justice advised the person in writing that the State Court Administrator cannot consider any appeal from a denial of a public data request of the Guardian ad Litem Board because the Guardian ad Litem Board is not subject to the administrative control of the judiciary. *The Board considered that the net effect was to leave the public without a way to appeal.*¹⁹ [Emphasis added.]

Appeals of denials of access to GAL Board data are very rare. In fact, for more than ten years after the current Board was established, there were no appeals related to the Board's response to a data request. However, we find it concerning that a citizen was left without a way to appeal a denial of their data request. Below, we describe SCAO's interpretation of state law and Judicial Branch data access rules and the GAL Board's actions in response to SCAO's interpretation.

State Court Administrator's Office's Interpretation

As we explained previously, Minnesota statutes contain both of the following provisions:

- “The [GAL] board is not subject to the administrative control of the judiciary.”²⁰

¹⁹ Alex Miller, Chief Information Officer, State Guardian ad Litem Board, e-mail to Lucas Lockhart, Senior Special Reviews Auditor, Office of the Legislative Auditor, *RE: Follow-up Questions*, March 20, 2023.

²⁰ *Minnesota Statutes* 2022, 480.35, subd. 1.

- “Access to records of the state guardian ad litem program is subject to the Rules of Public Access for Records of the Judicial Branch. The State Guardian Ad Litem Board may propose amendments for supreme court consideration.”²¹

Further, as explained above, the Judicial Branch data access rules state:

- “If the custodian, other than a judge, denies a request to inspect records, the denial may be appealed in writing to the state court administrator.”²²

SCAO interprets “administrative control” to include matters related to accessing GAL Board data. As a result, SCAO interprets the statutes that limit the judiciary’s administrative control over the GAL Board as limiting SCAO’s role regarding data access appeals. Further, SCAO believes that records held by the Board are outside of the scope of the Judicial Branch data access rules, and that SCAO cannot access not-public records held by the Board. Taken together, SCAO believes that these factors require it to decline to consider appeals of the Board’s data access decisions. In a letter responding to our questions, SCAO stated:

Minn. Stat. § 480.35, subds. 1(a) and 2, provides that the Guardian ad Litem Board is ‘not subject to the administrative control of the judiciary,’ and that the Board shall create an ‘*independent* guardian ad litem program.’ *Id.*, subd. 2(a) [emphasis added]. Since 2010, when Minn. Stat. § 480.35 became effective, the Guardian ad Litem Program has been an independent agency that is separate from the judiciary. The State Court Administrator does not have oversight or other authority over the Guardian ad Litem Board Program.

While Minn. Stat. § 480.35, subd. 6, provides that access to Guardian ad Litem Program records is subject to the Access Rules, the Access rules focus on the records of the courts, not the Guardian ad Litem Program. The scope of the Access Rules applies to court records and to court administration.... The Access Rules only mention ‘guardian ad litem’ in one instance (describing access to guardian ad litem reports in juvenile protection proceedings). Under Access Rule 9, the State Court Administrator may hear an appeal of a denial of access to records by a ‘custodian.’ Access Rule 3, subd. 1, defines ‘custodian’ as ‘the person responsible for the safekeeping of any records held by any court, court administrator, or clerk of court.’ This definition does not include records held by the Guardian ad Litem Board Program.²³

²¹ *Minnesota Statutes* 2022, 480.35, subd. 6.

²² *Minnesota Rules of Public Access to Records of the Judicial Branch*, Rule 9 (2021), 41.

²³ Jeffrey Shorba, State Court Administrator, letter to Judy Randall, Legislative Auditor, and Katherine Theisen, Director of Special Reviews, Office of the Legislative Auditor, May 16, 2023. While the letter states that “the Guardian ad Litem Program has been an independent agency that is separate from the judiciary,” we note that statutes provide that the GAL Board “is established in the judicial branch” (*Minnesota Statutes* 2022, 480.35, subd. 1(a)).

Our interpretation of the GAL Board's statutes differs from SCAO's interpretation. As we read the relevant statutes, the Legislature used plain and unambiguous language to require that the Board be subject to the Judicial Branch data access rules.²⁴ While the statute also states that the Board is not subject to the administrative control of the judiciary, we believe the plain meaning of the term "administrative control" refers to the day-to-day management and operation of the Board rather than the narrower issue of data access.²⁵

Further, the Legislature simultaneously enacted the "administrative control" and data access provisions of the GAL Board's statutes, and state law encourages us to read statutes with the presumption that the Legislature "intends the entire statute to be effective and certain."²⁶ According to the Court, statutes that "were enacted at the same time and address the same subject" should be read together.²⁷ As a result, we believe that one should interpret the administrative control provision to be consistent with the provision that requires compliance with the Judicial Branch data access rules.²⁸

The Court also directs us to interpret statutes under the presumption that the Legislature is aware of relevant law at the time it adopts a statute on any given topic.²⁹ When the Legislature enacted the law applying the Judicial Branch data access rules to the GAL Board, those rules already directed appeals of denials of access to the State Court

²⁴ We believe this is consistent with the Minnesota Supreme Court's interpretation of statutes: "[i]f the statutory language is plain and unambiguous," that language should be applied as written (*State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020)).

²⁵ 2015 Minnesota Supreme Court advisory committee comments explaining changes to Guardian Ad Litem procedures supports our understanding of the word "administrative." The committee described the GAL Board's "administrative and oversight procedures" as including "the qualifications, recruitment, screening, training, selection, supervision, and evaluation of guardians ad litem"; data access is not discussed (*Order Promulgating Amendments to the Rules of Juvenile Protection, Adoption, and Guardian Ad Litem Procedure*, No. ADM10-8041, Memorandum at *89 (Minn. April 22, 2015)). When determining the meaning of a statute, the objective "is to ascertain and effectuate the intent of the Legislature" (*Helmberger v. Johnson Controls, Inc.*, 839 N.W.2d 527, 531 (Minn. 2013)).

²⁶ *Minnesota Statutes* 2022, 645.17(2); and *Laws of Minnesota* 2010, chapter 309, sec. 5, codified as *Minnesota Statutes* 2022, 480.35, subds. 1 and 6. The Minnesota Supreme Court has also stated that a statute "should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant" (*American Family Insurance v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)). More recently, the Minnesota Supreme Court reiterated that courts "do not read a statute in isolation; rather, we read all parts of a statute together as a whole" (*State v. Galvan-Contreras*, 980 N.W.2d 578, 584 (Minn. 2022)).

²⁷ *State v. Fugalli*, 967 N.W.2d 74, 80 (Minn. 2021). See also *State v. Prigge*, 907 N.W.2d 635, 640 (Minn. 2018); and *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015).

²⁸ If a general provision of law conflicts with a special provision in the same or other state law, statute requires that "the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision" (*Minnesota Statutes* 2022, 645.26, subd. 1). The subdivision stating that the GAL Board "is subject to the Rules of Public Access for Records of the Judicial Branch" deals with one narrow issue: the accessibility of records of the Board (*Minnesota Statutes* 2022, 480.35, subd. 6). The provision that the Board "is not subject to the administrative control of the judiciary" addresses the overall management and operation of the entity (*Minnesota Statutes* 2022, 480.35, subd. 1). Comparing the relative scope of these two provisions, the language addressing the Judicial Branch data access rules is more specific in application. Therefore, even if the two provisions are seen as being in conflict, we believe that the language requiring the application of the Judicial Branch data access rules prevails.

²⁹ *Comm'r of Revenue v. Dahmes Stainless, Inc.*, 884 N.W.2d 648, 656 (Minn. 2016).

Administrator. This suggests that the Legislature intended for appeals of denials of access to GAL Board records to go to the State Court Administrator for consideration.

Finally, we do not believe that SCAO's consideration of an appeal of the GAL Board's denial of access to its records equates to the judiciary exercising administrative control over the Board. Within Minnesota, directing appeals related to data access to an entity without administrative control is not unusual. For example, under the Minnesota Government Data Practices Act, the Commissioner of Administration has the authority to consider appeals of whether data provided by entities subject to the Act is accurate and complete.³⁰ Similarly, if a person is denied access to data to which they believe they have a right, the Act permits the person to bring a complaint to the Office of Administrative Hearings.³¹ However, these authorities do not place all entities subject to the Act under the administrative control of the Department of Administration or the Office of Administrative Hearings. Rather, state agencies subject to the Act, such as the Minnesota Department of Health or Minnesota Department of Transportation, remain under the administrative control of their commissioners.

Guardian ad Litem Board's Response

According to the GAL Board, after SCAO declined in 2021 to review the Board's response to a citizen's data request, the Board discussed the issue internally. However, it did not immediately take steps to give the public an alternative means to appeal denials of data access. It took two years for the Board to act, but the action it chose was outside its authority.

Contrary to state law, the Guardian ad Litem Board recently adopted its own data access rules.

In response to SCAO's decision not to consider appeals of data access denials, GAL Board staff told us that the Board stopped following the Judicial Branch data access rules in February 2023. Rather, the Board adopted its own data access rules on February 21, 2023, and, as of March 8, 2023, had responded to three data requests under the new rules.

Although similar in many respects, the two sets of rules have some differences. Most notably, as shown in the boxes on the following page, the GAL Board's data access rules reassign the authority to consider appeals of data access denials from the State Court Administrator to the GAL Program Administrator.

³⁰ *Minnesota Statutes* 2022, 13.04, subd. 4.

³¹ *Minnesota Statutes* 2022, 13.085, subd. 2. The Office of Administrative Hearings is a quasi-judicial agency of the Executive Branch.

Judicial Branch Data Access Rules: Appeal Procedure

If the custodian, other than a judge, denies a request to inspect records, the denial may be appealed in writing to the **state court administrator**. The state court administrator shall promptly make a determination and forward it in writing to the interested parties as soon as possible.... [Emphasis added.]

— *Minnesota Rules of Public Access to Records of the Judicial Branch*, Rule 9 (2021), 41

GAL Board Data Access Rules: Appeal Procedure

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.... [Emphasis added.]

— *Rules of Public Access to Records of the Guardian ad Litem Program*, Rule 6, subd. 5 (2023), 6

In March 2023, when responding to a citizen seeking an appeal of a denial of data access, the GAL Board’s Program Administrator provided an appeal decision under the Board’s new rules:

Acting on your appeal, I have reviewed the final response and have determined that the search for responsive records was adequately performed.... Therefore, your appeal is denied. This is the final agency decision, as set forth in the Guardian ad Litem Program policy.³²

Later, the GAL Board’s Program Administrator explained why they considered the appeal, rather than the State Court Administrator:

The Judicial Branch rules of public access to records of the Judicial Branch no longer govern your right to request GAL board data. The Supreme Court’s rules are replaced by the GAL Board’s adoption of its own set of rules. As you know, the State Court Administrator has twice responded to your Rule 9 Appeal by stating that the provision does not apply and that the State Court Administrator has no administrative control over the Guardian ad Litem Program, including Public Data Requests.³³

Minnesota law does not give the GAL Board the authority to adopt its own rules controlling public access to GAL Board data. Instead, statutes apply the *Rules of Public Access to Records of the Judicial Branch* and permit the Board to “propose amendments [to the rules] for supreme court consideration.”³⁴ In other words, the Board must follow the Judicial Branch process of rule proposal, consideration, and adoption that typically includes the Minnesota Supreme Court appointing an advisory committee, the distribution of the proposed rules to district and appellate courts, and a public comment period or hearing.

³² Tami Baker-Olson, Guardian ad Litem Program Administrator, e-mail to individual requesting data, March 2, 2023.

³³ *Ibid.*, March 9, 2023.

³⁴ *Minnesota Statutes* 2022, 480.35, subd. 6.

In light of SCAO's decision not to consider data access appeals related to the GAL Board, we appreciate the Board's efforts to give citizens an appeal option when their data access requests are denied. However, the Board is not authorized to simply adopt its own data access rules, and proposed amendments should not guide the Board's data practices process until they are approved by the Minnesota Supreme Court. As a result, when the Board's Program Administrator recently rejected a citizen's appeal of a denial of data access under the Board's new data access rules, the Program Administrator exercised authority the Board did not have under state statutes or the Judicial Branch data access rules.

Recommendation

On May 11, 2023, the Minnesota Supreme Court issued an order that acknowledged a potential conflict between the GAL Board's independence from the Judicial Branch and the Board being subject to the Judicial Branch data access rules, including the rule giving the State Court administrator the authority to consider appeals of the Board's denials of data access. The Court's order directed the Board to

propose amendments to Rule 9 [Appeal from Denial of Access] of the Rules of Public Access to Records of the Judicial Branch for the supreme court's consideration. The court requests that the Guardian Ad Litem Board file any proposed amendments, or otherwise respond to this order, by June 30, 2023.³⁵

On June 5, 2023, we shared a draft of our special review report with the GAL Board. In the draft report, we recommended that the Board immediately propose amendments to the Judicial Branch data access rules, in compliance with the order of the Minnesota Supreme Court. On June 14, 2023, the Board submitted a petition to the Court to either (1) approve the *Rules of Public Access to Records of the Guardian ad Litem Program* the Board recently adopted; or (2) amend Rule 9 of the Judicial Branch data access rule so that the GAL Board Program Administrator has the authority to consider appeals of the Board's denials of data access. On June 20, 2023, the Board suspended implementation of its own data access rules and returned to following the Judicial Branch data access rules.

We commend the GAL Board for responding to the Minnesota Supreme Court's order. However, the Court's May 11, 2023, order also stayed the Judicial Branch data access rule concerning appeals of denials of data access so that it has "no effect as to the appeal of any records of the Guardian Ad Litem Board or the guardian ad litem program to the State Court Administrator, pending further order of the court."³⁶

The immediate effect of the stay is to deny members of the public a rules-based process by which to appeal a decision by the GAL Board concerning access to its data. Under the Minnesota Supreme Court's order, individuals cannot direct their appeals to the

³⁵ *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*, No. ADM10-8009, No. ADM10-8050, *2 (Minn. May 11, 2023).

³⁶ *Ibid.*

State Court Administrator. The GAL Board told us that individuals could still appeal the Board's denials of data access to the GAL Board Program Administrator. However, the Program Administrator's review would not be governed by the GAL Board data access rules, which the Board recently suspended. Instead, the Board told us that the Program Administrator's consideration of appeals of denials of data access would be based on the Program Administrator's managerial authority to review the decisions of the Board's Chief Information Officer.

It is unclear how long it will take the Minnesota Supreme Court to respond to the GAL Board's petition. As a result, it is unclear how long the Board's appeal process will lack the clarity that formal data access rules provide.

RECOMMENDATION

The Legislature should consider possible changes to state statutes regarding access to GAL Board data.

While the Judicial Branch is taking steps to address the perceived tension between the GAL Board's administrative independence and the role of SCAO in considering appeals of denials of data access, the Legislature could also provide the Board and SCAO longer-term clarity about their respective roles in implementing data access requirements. Below, we present two options.

1. **The Legislature could amend statutes to clarify the meaning of “administrative control.”** As we discussed above, SCAO believes that the authority to consider an appeal entails administrative control. We disagree, but understand that “administrative control” could be interpreted in different ways. By clarifying the definition of “administrative control,” the Legislature could allow the GAL Board and SCAO to fully implement the Judicial Branch data access rules as they currently exist without concern that they were violating state statute or undermining GAL program independence.
2. **Depending on forthcoming actions by the Minnesota Supreme Court, the Legislature may want to consider revising statutes regarding access to GAL Board data.** For example, if the Court approves the Board's proposed independent rules governing access to its records, the current data-access-related language in the Board's statute may be confusing to the public.

As the Legislature considers amendments to statutes to clearly define “administrative control,” the Legislature should consider whether to make similar changes for other entities established in the Judicial Branch but which are not under the judiciary's administrative control. The State Competency Attainment Board is an example of such an entity; like the GAL Board, the State Competency Attainment Board “is subject to the Rules of Public Access for Records of the Judicial Branch” but “is not subject to the

administrative control of the judiciary.”³⁷ Similarly, the State Board of Public Defense “is a part of, but is not subject to the administrative control of, the judicial branch of government.”³⁸ However the State Board of Public Defense is in an even more ambiguous position regarding data access: its statutes are silent on whether Judicial Branch data access rules apply to its records, and it is not included in the Judicial Branch data access rules’ list of “Boards and Commissions that are governed by independent rules promulgated by the Supreme Court.”³⁹

The Judicial Branch could also consider clarifying the provisions of the Judicial Branch data access rules regarding appeals. It could also update the list of entities “governed by independent rules promulgated or approved by the Supreme Court” so that the entities mentioned above, and similar entities created in the future, would understand the appropriate role for SCAO in their data access process.⁴⁰ Further, the Judicial Branch could also consider whether key definitions in the Judicial Branch data access rules, such as “records,” “court administrator,” and “custodian,” clearly indicate whether they apply to entities that participate in the judicial process but are outside of the administrative control of the judiciary.

³⁷ *Minnesota Statutes* 2022, 611.56, subds. 1 and 7. The 2023 Legislature changed the name of this board from the State Competency Restoration Board to the State Competency Attainment Board (*Laws of Minnesota* 2023, chapter 14, sec. 32). The State Competency Attainment Board was inactive until the Legislature appropriated funding for its establishment and operation in March 2023 (*Laws of Minnesota* 2023, chapter 14, secs. 36 and 37). We encourage the Legislature and relevant Judicial Branch officials to provide as much clarity as possible to this Board about its responsibilities for responding to data requests and the scope of its administrative independence from the judiciary as it begins its operations.

³⁸ *Minnesota Statutes* 2022, 611.215, subd. 1.

³⁹ *Minnesota Rules of Public Access to Records of the Judicial Branch*, Appendix A (2021), 43.

⁴⁰ *Minnesota Rules of Public Access to Records of the Judicial Branch*, Rule 1, subd. 2; and Appendix A (2021), 2 and 43.

Board Members

Crysta Parkin, Chair
Timothy Zuel, Co-Chair
Angela La Illemont
Emelie Rivera
Ruby Tolbert
Ann Ahlstrom
Stephanie Bumgardner



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June 29, 2023

SENT VIA EMAIL
Katherine.Theisen@state.mn.us

Katherine Theisen
Office of the Legislative Auditor
Room 140 Centennial Building
658 Cedar Street
St. Paul, MN 55155-1603

Dear Ms. Theisen,

Thank you for the opportunity to provide comments on the OLA's report titled *Guardian ad Litem Board: Data Access Rules*. We appreciate the OLA's time in reviewing and discussing the process available to the public to seek review of decisions made by the GAL Board in response to public data requests. The focus of the OLA's report arose within the context of a citizen requesting a document that does not exist. This is the first instance, since the GAL Board was created in 2010, that a member of the public sought review or appeal of a public records decision.

In its report, the OLA advocates for the State Court Administrator's Office to retain a right of review over decisions made by officials in the GAL Program. The GAL Program is subject to the Rules of Public Access for Records of the Judicial Branch ("branch rules") pursuant to state statute which also says that the GAL Board is not subject to administrative control of the judicial branch. Various provisions of the judicial branch public access rules and the statutory exclusion of the GAL Board from the Branch's administrative control may be interpreted to exclude or exempt the GAL Board and its records from the branch rules including the right of the public to seek appeal through the state court administrator.

The GAL Board believes the OLA is correct that citizens should have a right to seek further review if a request for records is denied. In an attempt to provide such a review and resolve potential differences with the branch rules, the GAL Board adopted independent rules of public access. Thereafter, in accordance with an order from the Supreme Court and dialogue with the OLA, the GAL Board submitted a petition to the Supreme Court seeking approval of the GAL Board's independent rules or alternatively an amendment to the Branch's rules seeking authority for the GAL program administrator to review decisions of GAL officials; suspended its independent rules; and is following the branch rules.

The Guardian ad Litem Board believes that the best policy to follow with regard to public access and release of records in its control, is for the GAL program administrator to be directly involved



in any review or appeal of a decision made by a GAL program official relating to public records decisions.

Thank you again for your time and courtesies in this matter.

Respectfully submitted,

Tami Baker-Olson

Tami Baker-Olson
Program Administrator, State Guardian ad Litem Board



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June 28, 2023

Judy Randall, Legislative Auditor
Katherine Theisen, Special Reviews Director
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Sent via email to: Katherine.Theisen@state.mn.us and Judy.Randall@state.mn.us

Dear Ms. Randall and Ms. Theisen,

Thank you for providing my office with your final report entitled *Guardian ad Litem Board: Data Access Rules* (Report). As noted in the Report, the State Court Administrator's Office (SCAO) has had discussions and correspondence with the Office of the Legislative Auditor (OLA) to provide the background and our legal analysis on an issue that came up when a member of the public made a request for records in 2021 to the Guardian ad Litem Program. The Guardian ad Litem Program denied access to some of the records requested upon their finding that they were confidential. The member of the public then requested that the State Court Administrator hear an appeal of the Guardian ad Litem Program's decision. This was the first such request made to SCAO.

SCAO reviewed whether the State Court Administrator could hear an appeal of the Guardian ad Litem Program's access to records decision. The State Court Administrator did not hear the appeal based on the following analysis:

- Minn. Stat. § 480.35, subds. 1(a) and 2, provides that the Guardian ad Litem Board is "not subject to the administrative control of the judiciary," and that the Board shall create an "*independent* guardian ad litem program." *Id.*, subd. 2(a) (emphasis added). Since 2010, when Minn. Stat. § 480.35 became effective, the Guardian ad Litem Program has been an independent agency that is separate from the judiciary. The State Court Administrator does not have oversight or other authority over the Guardian ad Litem Board Program.
- Despite its status as an agency independent and separate from the Judicial Branch, Minn. Stat. § 480.35 also provides that the records of the Guardian ad Litem Program are "subject to the Rules of Public Access for Records of the Judicial Branch." Minn. Stat. § 480.35, subd. 6. Rule 9 of the Rules of Public Access to Records of the Judicial Branch ("Access Rules") provides that if a "custodian" denies a request for access to records, the

decision to deny access may be appealed to the State Court Administrator. Access Rule 3, subd. 1, defines “custodian” as “the person responsible for the safekeeping of any records held by *any court, court administrator, or clerk of court* (emphasis added).” The definition of custodian does not include the Guardian ad Litem Board Program, since they are not responsible for records held by a “court, court administrator, or clerk of court.” Therefore, Access Rule 9 does not apply access requests made to the Guardian ad Litem Board Program.

- More generally, while Minn. Stat. § 480.35, subd. 6, provides that access to Guardian ad Litem Program records is subject to the Access Rules, the Access rules focus on the records of the courts, not the Guardian ad Litem Program. In addition to leaving anyone within the Guardian ad Litem Program outside of the definition of “custodian,” the scope of the Access Rules applies to court records and to court administration. Access Rule 1, subd. 1: “These rules govern access to the records of all courts and court administrators of the judicial branch of the state of Minnesota.” Access Rules 4 and 8 cover access to case records, which are not in the possession of the Guardian ad Litem Program. The Access Rules only mention “guardian ad litem” in one instance (describing access to guardian ad litem reports in juvenile protection proceedings).
- Minn. Stat. § 480.35, subd. 6, does provide that “[t]he State Guardian Ad Litem Board may propose amendments for supreme court consideration,” but until recently, no amendments to the Access Rules have been proposed by the State Guardian Ad Litem Board to address access request issues.
- The denial of a request for records may occur for several reasons. The requested records may be confidential, the request may be overly broad, the requested records may not exist, etc. The State Court Administrator does not have control over Guardian ad Litem Board Program records. The State Court Administrator does not have access to confidential Guardian ad Litem Board Program records, nor a knowledge of what records are not in the possession of the Guardian ad Litem Board Program. Any appeal of a request for records of the Guardian ad Litem Board Program would require the State Court Administrator to have access to confidential Guardian ad Litem Board Program records and a knowledge of the records, both public and confidential, that the State Guardian Ad Litem Program possesses. Since the Guardian ad Litem Board Program is an independent agency, this type of access and knowledge is neither attainable nor appropriate.

Because the State Court Administrator has no administrative control over the Guardian ad Litem Board Program or its records, the definition of “custodian” in Access Rule 9 does not apply to the Guardian ad Litem Board Program, and the State Court Administrator does not have access to confidential Guardian ad Litem Board Program records, it was SCAO’s conclusion that the State Court Administrator should not make appeal determinations of a denial of access to Guardian ad Litem Board Program records.

In response to the OLA’s analysis of this issue, SCAO would note the following:

- While SCAO agrees with OLA’s position that Minn. Stat. 480.35 requires that the Guardian ad Litem Program be subject to the Judicial Branch data access rules, SCAO disagrees that data access issues are not part of the day-to-day management and operation of the Guardian ad Litem Board. While data access requests may not be a frequent topic, it is a topic that is within their regular scope of their work.
- The administrative control and data access provisions on Minn. Stat. § 480.35 were simultaneously enacted and there is a presumption that the Legislature is aware of relevant law at the time it adopts a statute. However, at the time Minn. Stat. § 480.35 was

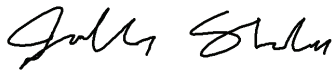
enacted, the right to appeal a data access request under the Access Rules was for denials of access by the “custodian,” which as noted above, does not include the Guardian ad Litem Program.

- While the Office of Administrative Hearings hears access appeals from agencies it does not have administrative control over, SCAO would distinguish itself from the Office of Administrative Hearings. SCAO is not a quasi-judicial entity. Any judicial activity that occurs within the judicial branch is done by the courts.

As noted in the Report, this May, the Minnesota Supreme Court issued an order to address the issue of the Guardian ad Litem Program being an independent agency and the appeal of a denial for access to records available under Access Rule 9. That order requested the Guardian ad Litem Board provide proposed amendments to Rule 9 (or respond otherwise) by June 30, 2023. The order also stays Rule 9 “as to the appeal of any records of the Guardian Ad Litem Board or the guardian ad litem program to the State Court Administrator” pending further order by the court. The Guardian ad Litem Board has since filed a response to the Supreme Court with two proposals to address this issue that is now pending with the Supreme Court.

Thank you for the opportunity to review and respond to your audit report.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Shorba".

Jeff Shorba
State Court Administrator



OLA

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