

HENNEPIN COUNTY ATTORNEY'S OFFICE
M E M O R A N D U M

TO: Hennepin County Sheriff Rich Stanek
Public Safety Commissioner Michael Campion
Minnesota BCA Superintendent Timothy O'Malley
FBI Agent in Charge Ralph Boelter

FROM: Michael O. Freeman

RE: Hennepin County Attorney's Office Report on Allegations of Misconduct
Involving Metro Gang Strike Force

DATE: September 9, 2010

I am reporting to you on my prosecutorial conclusions stemming from investigative efforts performed by agents of your respective law enforcement agencies.

Allegations of wrongdoing first appeared in a report the Minnesota Legislative Auditor issued on May 20, 2009.¹ As described in the Legislative Auditor's report, the purpose of the audit was "to determine whether the Metro Gang Strike Force (MGSF) had adequate policies, procedures, and internal controls to ensure appropriate handling of seized and forfeited money and property." The auditors examined the period from July 1, 2005 through March 31, 2009. The Legislative Auditor's report was based upon interviews of the Minnesota Gang and Drug Oversight Council's statewide coordinator, the chair of the Metro Gang Strike Force Advisory Board, the Metro Gang Strike Force's current and former commanders, other Metro Gang Strike Force staff, and employees of the Department of Public Safety and Ramsey County Sheriff's Office (the strike force's fiscal agent through December 31, 2008). The auditor also examined and reviewed documentation supporting transactions related to seized and forfeited property, confidential informant funds, and selected expenditures of state grant funds. The report concluded that "The Metro Gang Strike Force's internal controls were not adequate to safeguard seized and forfeited property, properly authorize its financial transactions, accurately record its financial activity in the accounting records, and conduct its financial activities in a reasonable and prudent manner."

On August 20, 2009, a review panel commissioned by the Minnesota Department of Public Safety (MDPS) released a report of its investigation into the activities of the MGSF. The report was highly critical of MGSF activities. Importantly, the review panel's work was not intended to be, and was not, a criminal investigation. The review panel's report notes that its

¹ The Legislative Auditor's report was supplemented by a follow up report on seized vehicles dated June 10, 2009.

investigation was hampered by its lack of subpoena authority and the unwillingness of persons involved to cooperate or speak with investigators. Many of the review panel's findings were based on broad general conclusions. The review panel's report also recognizes that a criminal investigation looking for a specific proof of criminal wrongdoing would be necessary and recommends that such an investigation be undertaken.

Shortly after the review panel's report was released, MDPS forwarded the matter to the United States Attorney's Office for the District of Minnesota for further federal investigation and for federal prosecutorial review. The United States Attorney's Office for the District of Minnesota referred the matter to the United States Department of Justice (DOJ) in Washington D.C. In February of 2010, representatives from DOJ indicated to state prosecutors and investigators that although their investigation was continuing, it appeared any federal prosecution would be limited to civil rights violations. This decision suggested that a non-federal review of the matter would be appropriate.

In light of the multi-jurisdictional nature of the allegations, this office conferred with the Dakota and Ramsey County Attorneys and with the Minneapolis and St. Paul City Attorneys to determine how best to fully and consistently review the matters for state law prosecution. As a result, the Hennepin County Attorneys Office (HCAO) agreed that it would review all matters regardless of jurisdiction and, if any state criminal law prosecutions were appropriate, the HCAO would handle them. State law criminal jurisdiction was granted to HCAO by the other jurisdictions.

The first step was to gather and review previously conducted investigative work. This involved, among other things, obtaining materials from the DOJ which were under seal as the product of a federal grand jury inquiry. In April, 2010, the DOJ obtained a court order authorizing release of the federal grand jury material for the purpose of state criminal investigation and prosecution. The DOJ thereafter forwarded materials to the Hennepin County Attorney's Office.²

Following review of this material, it was apparent extensive additional investigation would be required. With the full agreement of your offices, we assembled a team of six investigators with two investigators from each of the Hennepin County Sheriff's Office (HCSO), the BCA, and the FBI. After some initial organizational work, the investigators began working in the field in June. They have put in more than two months of concerted and diligent effort. They conducted their investigation with the utmost dedication and professionalism. They have followed every credible lead and followed up on every loose end.

Among other things, they attempted to interview every officer and employee involved with the MGSF since 2007. Of the 73 former officers and employees, 44 willingly discussed

² Ordinarily, under section 13.82 of the Minnesota Government Data Practices Act, criminal investigative materials are confidential and not public until the matter has been prosecuted and the appeal period has run or until the matter is declined. At that point, with some limited exceptions, the investigative materials become public through the appropriate law enforcement agency. This, investigation is, however, different, in that there was a significant federal role. As a result, federal law will control the release of federal investigative materials. Such materials include the above mentioned federal grand jury materials obtained under federal court order and materials generated by FBI agents through their participation in the investigation.

their experience with the MGSF, including their knowledge (if any) regarding the allegations in the publicized reports. However, 29 either failed to respond to repeated requests for interviews or chose to remain silent rather than discussing their experience with the investigators. Several of those 29 stated that they simply had nothing to offer, while 6 based their refusal to be interviewed upon the advice of counsel. A reason for non-cooperation expressed by many others was either anger or paranoia created by what they believed to have been unfair and unwarranted allegations of misconduct.

This investigation faced a number of difficulties and constraints. First, the relevant Minnesota statute of limitations is three years. Thus, investigators focused on conduct that occurred within 3 years of April 2010, the date the federal authorities first provided its materials to the Hennepin County Attorney's Office.

Second, the federal inquiry focused on potential violations of federal criminal statutes. This included civil rights violations. Included among the civil rights violation is conduct involving seizure of property from another without a legal basis for the seizure. Since such conduct was the focus of the DOJ inquiry, the state law investigation did not focus on such conduct, but rather relied on the federal investigation.

Third, the investigation was hampered by the lack of adequate record keeping and property handling procedures at the MGSF. Clerical staffing for the MGSF and physical facilities for secure storage of evidence were inadequate.³ Also lacking was a records management system sufficient to document that the MGSF was observing normal administrative standards for police agencies or to allow the MGSF to demonstrate (or a reviewing agency to conclude) that standard policies for tracking and disposition of evidence or other seized items were actually followed. Generally, the poor condition of the record keeping system made it impossible for investigators to construct a paper trail connecting seized property with specific investigations and/or prosecutions.

Indeed, a number of officers interviewed reported that immediately upon assignment to the MGSF, they noted these deficiencies and, as a result, generally brought seized property back to their home agencies rather than to the MGSF evidence room. Compounding record keeping inadequacies, the MGSF had no practical way of tracking seized property back to officers' home agencies.

It is difficult to overstate the obstacles the lack of appropriate record keeping posed to investigators. The inability to connect seized property to operations conducted by the MGSF, makes it difficult to conclude seizures were not for a valid law enforcement purpose.⁴ Adequate

³ For example, as a result of inadequate space for seized property storage, some property deemed unnecessary to maintain as evidence was moved into an unsecure location. Much of this property was "marked for destruction" as a way to indicate that it was no longer needed for a case and need not be returned to its owner.

⁴ The review panel appears to have concluded some seizures served no valid law enforcement purpose based upon the nature of the items seized. For example, they question how a jet ski, an ice auger, or a flat screen TV could be related to criminal activity. Yet, during the course of its operations, the MGSF investigated a number of "fencing" operations trafficking in stolen property. . Practically any item of value could be the object of a fencing operation and could be appropriately seized. When investigators managed to connect seized property to a case, they were able

records might have allowed investigators to “work around” witnesses who refused to give statements. The poor record keeping may have also deprived investigators of the ability to show cooperating witnesses records that would either assist in remembering past events or to correct a faulty memory. The fact of the matter is this entire investigation may not have been necessary if adequate records had been kept. In any event, it is impossible to know how this matter may have proceeded if records had been of better quality.

The joint investigation your agencies conducted was as fair, thorough, and professionally done as was possible under the circumstances. Yet, the absence of reliable record keeping and poor evidence handling practices of the MGSF combined with the lack of cooperation of a significant number of MGSF personnel, including the former Commander, creates an unfortunate and frustrating situation.

Minnesota law enforcement adopts and follows strict record keeping procedures for good reasons. Chief among those is that law enforcement should be in a position to demonstrate to citizens that it is acting fairly and within statutory authority. In fact, many MGSF officers who were interviewed expressed that very sentiment and took extraordinary actions along those lines. Faced with inadequate clerical staffing and uncertain evidence handling processes, MGSF officers sometimes brought seized property to their home departments in an attempt to make sure it was properly accounted for. Missing, lost, or inaccurate records cannot help demonstrate that officers acted fairly and within their authority.

As to the lack of cooperation when faced with a criminal investigation, MGSF officers, like non-sworn people, have a constitutional right to remain silent. Yet, in this situation, exercising that right comes at a cost. The investigation of this matter shows that most of the officers assigned to the MGSF deserve nothing less than the gratitude of the public for a difficult job well done. Yet, the failure of a few to cooperate with the investigation leaves incomplete confirmation of that fact for both officers and the public.

Moreover, in light of the prior Legislative Auditor and Review Panel reports which were not focused criminal investigations, but were highly critical of the MGSF, neither the public nor MSFG officers are likely to look at the conclusion of a criminal investigation finding insufficient proof to charge any specific individual with a specific crime as particularly comforting or satisfactory.

While not criminal, ultimate responsibility for the clerical staffing, record keeping, and evidence handling practices at the MGSF rests with its commander. It is a tragedy, that the commander’s failure to meet those responsibilities unfairly tarnished the reputations and careers of the many able and professional officers who served on the MGSF. Those officers and the public deserved better.

It should be noted that nearly all of the 44 former MGSF officers and employees who did submit to interviews stated categorically that they were unaware of any serious misconduct at the

to locate paperwork, either in the form of a search warrant on a police report that, on it’s face, would support a seizure.

MGSF as alleged in the Review Panel report, and in fact, expressed both surprise and dismay at the report.

As to criminal responsibility, the review conducted by the Hennepin County Attorney's Office has been for the purpose to determine whether there is sufficient evidence to support criminal charges, based upon violations of state law, in the activities conducted by members of the MGSF. The Fourth Amendment protects against "unfounded invasions of liberty and privacy" and requires that a criminal complaint be supported by probable cause. Gerstein v. Pugh, 420 U.S. 103, 112, 95 S.Ct. 854, 862 (1975). The Due Process Clause requires an even higher standard of proof in order to obtain a criminal conviction and that is proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). There is an additional requirement for charges based upon circumstantial evidence. Where the proof is based on circumstantial evidence, "the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt" and the State has the burden of removing "all reasonable doubt." State v. Andersen, 784 N.W.2d 320, 330 (Minn. 2010).

This purpose and standard of review is in stark contrast to the inquiry of the Legislative Auditor and the Review Panel MDPS commissioned. The purpose of the Legislative Audit was "to determine whether the Metro Gang Strike Force had adequate policies, procedures, and internal controls to ensure appropriate handling of seized and forfeited money and property. Legislative Auditor Report at 3. Thus, for example, the Auditor may determine that records are missing without determining whether the missing record, in fact, exists somewhere else. Similarly, the Auditor may determine money is unaccounted for without determining where it went or for what purpose. In contrast, criminal charges require proof of every element of the crime beyond a reasonable doubt. A missing record or missing money, without more, cannot serve as the basis of a criminal charge.

The Review Panel's focus was on reaching broader conclusions about operations and on making policy recommendations based on those broader more general conclusions. The Review Panel had neither the authority nor the personnel to conduct a criminal investigation. For example, the Review Panel found widespread misconduct by the MGSF employees in part on a statement by an employee that "a number" of MGSF officers took electronic items home for personal use. Yet, when questioned as part of this criminal investigation, the employee expanded the belief that only one officer did so and that the information was based on the statement of another employee who, in turn, denied any such knowledge. For purposes of criminal charging, sweeping statements as to what generally occurred or as to what someone else believed generally occurred are not sufficient. Investigators need to trace statements to their source and find specific conduct by specific people.

Unlike the Legislative Auditor or the Review Panel, this office must review the investigation submitted in order to determine whether sufficient affirmative proof exists to

support charges against a specific individual for specific acts that violate Minnesota Criminal law.

LEGAL ANALYSIS

Review of the fruits of your investigation, which also included investigation into allegations of wrongdoing by the Review Panel and the Legislative Auditor, implicates three broad categories of Minnesota criminal statutes: 1) theft related offenses, 2) misconduct by a public official, and 3) failure to protect property or data in the custody of a public officer.⁵

1. Theft and Related Offenses

i) **Theft** – Minn. Stat. § 609.52 Subd. 2, (1) provides that whoever: (1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property. In addition, the penalty that attaches to a theft depends upon the nature of the property and/or its value. Minn. Stat. § 609.52, subd. 3.

ii) **Embezzlement** – Minn. Const. art. XI, § 13 (penalty –Minn. Stat. § 609.54) provides in relevant part that all “officers and other persons charged with the safekeeping of state funds shall be required to ... keep an accurate entry of each sum received and of each payment and transfer.” Further, “[i]f any person converts to his own use in any manner or form, ...any portion of the funds of the state ...except in the manner prescribed by law, every such act shall be and constitute an embezzlement of so much of the aforesaid state ... funds... and shall be a felony.”

iii) **Failure to Pay Over State Funds** – Minn. Stat. § 609.445 provides that “Whoever receives money on behalf of or for the account of the state or any of its agencies or subdivisions and intentionally refuses or omits to pay the same to the state or its agency or subdivision entitled thereto, or to an officer or agent authorized to receive the same, may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.”

2. Misconduct By A Public Officer

i) **Misconduct of Public Officer or Employee** –Minn. Stat. § 609.43 provides that a public officer or employee who does any of the following, for

⁵ Some of the conduct also implicated civil rights violations. Those claims are being prosecuted criminally by the federal authorities and have also been addressed in a separate federal civil suit and therefore are not being addressed as a matter of state law.

which no other sentence is specifically provided by law, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both:

* * *

(2) in the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity; or

(3) under pretense or color of official authority intentionally and unlawfully injures another in the other's person, property, or rights

* * *

ii) **Public Officers, Interest in Contract** – Minn. Stat. § 471.87 provides that “Except as authorized in section 471.88, a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially there from. Every public officer who violates this provision is guilty of a gross misdemeanor.”

3. Failure to Protect Property and Data

i) **Interference with Property in Official Custody** – Minn. Stat. § 609.47 provides that “Whoever intentionally takes, damages, or destroys any personal property held in custody by an officer or other person under process of law may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.”

ii) **Data Practices.** Minn. Stat. § 13.82, defining and regulating Comprehensive Law Enforcement Data, applies to agencies that “carry on a law enforcement function.” There are provisions for disclosure of arrest data, request for service data, 911 calls, domestic abuse data, and response to incident data. Minn. Stat. § 13.92, subs. 2-6. Data on active investigations is generally non-public while the investigation is active. *Id.* Subd. 7. However, there is no duty for law enforcement to create, collect or maintain data that is not required to be maintained by statute or rule. Minn. Stat. § 13.82, subd. 18. In addition, there is a provision on “protection of identities” that contains a lengthy list of data that must be withheld from public disclosure - including situations where disclosure would reveal the identity of an undercover officer or an informant. Minn. Stat. § 13.82, subd. 17. Further, there is a provision that data that is not public “must be destroyed in a way that prevents its contents from being determined.” Minn. Stat. § 13.05, subd. 5(c). Willful violations of the data practices act are misdemeanors and may also result in disciplinary action against the public employee. Minn. Stat. § 13.09.

1. CLAIMS OF THEFT AND SEIZURES WITHOUT A LAWFUL BASIS.

One of the allegations investigated involved the broad claim that there were seizures made without a valid law enforcement purpose.⁶ The taking of property without a lawful purpose implicates the theft statutes and misconduct by a public officer. This particular allegation was a specific focus of the United States Department of Justice Civil Rights Section during the six month review of these matters by DOJ. Investigators relied on the Federal investigation into this area. With the exception of a single incident involving an alleged assault to date, the Civil Rights Section has declined prosecution.

The investigation conducted by the state investigative team also failed to produce sufficient evidence to support criminal charges. For example, one allegation involved a claim that officers took \$4,500 from a Honduran national at the Minneapolis Impound Lot but only documented the seizure of \$4,014. However, the investigation disclosed that this same individual earlier reported his loss as \$4,000, which matches the amount reported by MGSF officers. In addition, other documentation from the alleged victim was inconsistent with his allegation.

Another claim involved the allegations of a Minneapolis man who alleged a baseless seizure of his cash (\$3,600) by MGSF officers at a Minneapolis bar. Subsequent investigation of the incident provided different details. The bouncer at the bar reported to the officers that he saw marijuana in the possession of two persons, following which both marijuana and cash were seized and seizure notices were provided to both individuals.

Investigators also found a number of cases where some documentation was missing concerning forfeiture of seized cash. This is consistent with the Legislative Auditor's Report which says

The strike force did not have documentation to show that it served seizure notices for 202 of 545 cash seizures we tested, totaling about \$165,650. By not serving the required notice of seizure, the strike force violated the statutory administrative forfeiture process and may not have a legal right to retain the seized cash.

Legislative Auditor's Report at 15. The Legislative Auditor neither investigated nor found any instance of MGSF officers taking cash from people and keeping it. In fact, this finding by the Auditor was based on an inquiry whether cash seized and placed in the MGSF evidence room was ultimately deposited into the MGSF account. Placing evidence into the MGSF evidence room for tracking and storage is inconsistent with a plan to steal it. What the Legislative Auditor did find was an absence of forms in the MGSF files supporting the forfeiture process.

⁶ This was based upon the Special Review Panel's interview with the MGSF commander who indicated that some MGSF officers seized items that were "really neat" and others seized property where they believed the individual did not "deserve" to have them. Report of the MGSF Review Panel at 15. Also claims from other officers that they waited outside during the execution of search warrants. Id at 16. There were no details regarding those claims such as specific officers, individuals, dates, times or property seized. The commander of the MGSF has since refused to provide further information.

An example is a case file investigators located. The police report, dated February 11, 2004, details the execution of a search warrant at 1720 27th St. E. in Minneapolis. Executing the warrant, officers found two Ziploc bags of marijuana in the kitchen, four individually packaged bags of marijuana in the living/dining room, and twenty individually wrapped baggies of marijuana in the living/dining room of the address. In total, officers recovered about one pound of marijuana. Hector Irizarry was at the residence. Officers searched him and found \$158 on his person and \$41 in his billfold. Irizarry's girlfriend of nine years was at the address. She told officers that the marijuana was both hers and Irizarry's. Irizarry said the marijuana belonged to his girlfriend.

The police report says "A Notice of Forfeiture was completed for the \$199.00 and a copy was left with Irizarry." The file also contained a search warrant signed by Hennepin County District Court Judge Peter Albrecht, authorizing officers to search for and seize "Money, precious metals and stones, bank books, bank statements, and other papers which show profit from drug sales." Investigators also located a search warrant receipt, inventory and return completed and signed by officer stating that a copy of the warrant and receipt was left with Irizarry and listing the \$199 as seized. Investigators also located a MGSF evidence receipt indicating that the money seized was received into the MGSF evidence room. Finally, investigators located a memorandum from the commander of the MGSF dated July 29, 2008 (more than four years after the seizure) indicating that the \$199 seized from Hector Irizarry was "cleared for deposit" in the MGSF account.

The Legislative Auditor correctly noted that the MGSF had no forfeiture forms in its possession relating to the seizure in this case. It also appears that the Minnesota Attorney General's Office has no record of processing any forfeiture relating to the seizure. Yet, these deficiencies do not mean that the initial seizure of the \$199 was illegal. The seizure was very clearly authorized by search warrant. Moreover, the facts that the money was entered into evidence inventory and was later deposited into the MGSF account indicate that no officer took the money for personal use. As to the propriety of the forfeiture, the police report indicates a forfeiture notice was served.⁷

In order to issue criminal charges, there must be proof that specific items were taken by officers without a lawful basis. Insufficient documentation as to the reason for a seizure or missing forfeiture notices do not constitute such proof, and can even make it more difficult to determine whether a seizure was unauthorized. This is not to excuse the failure to follow normal administrative standards for police agencies in documenting the seizure and forfeiture of property. Rather, the issue continually before us is whether there is sufficient admissible evidence to support the filing of a criminal complaint.

⁷ Along these lines, the liability insurer for the MGSF has settled a purported class action by establishing a \$3 million fund and a process for persons to bring claims against the MGSF. Importantly, claimants will have to demonstrate entitlement to the funds by the lesser civil standard of preponderance of the evidence. In addition, the purpose of the settlement process is to determine whether claims are meritorious – something that apparently has not yet been done. Finally, as the above case demonstrates, assuming Mr. Irizarry files a claim, the issue to be resolved will not be the legality of the seizure, but will instead be whether a forfeiture notice was ever served. This would involve a credibility determination weighing the officer's contemporaneous report against the six year old memory of a man who was found in a house with a pound of marijuana and who sought to lay the blame on his girlfriend of nine years is correct.

In sum, this case, and others like it, clearly demonstrate the inadequacy of the record keeping practices at the MGSF. What can be proven does not constitute theft, failure to keep or pay over state funds, or misconduct of a public official.

2. REMOVAL OF PROPERTY FROM THE MGSF EVIDENCE ROOM.

The criminal investigation also addressed claims that MGSF employees removed property from the MGSF evidence room and converted it to their personal use without any payment to the MGSF. Such conduct may constitute theft if it can be proven that the property was taken without claim of right and its value can be established. Minn. Stat. § 609.52, subs. 2(1), 3. If the property was cash and represented “state funds,” the conduct may also constitute embezzlement. Minn. Const. art. XI, § 13; Minn. Stat. § 609.54. If either theft or embezzlement can be proven, the conduct may also constitute misconduct by a public officer or employee. Minn. Stat. § 609.43. Finally, even if value cannot be proven, the intentional taking may represent interference with property in official custody. Minn. Stat. § 609.47.

a. Allegations of widespread takings could not be confirmed.

There was an allegation of widespread taking of property from the MGSF property room. The allegation apparently rests upon the statement of a civilian MGSF employee made to the review panel. However, when questioned by investigators, the employee’s statement was inconsistent and not supportive of the allegation of widespread taking.

b. Some property inventoried at officers’ home department.

Some of the property that initially appeared to be unaccounted for, and therefore potentially stolen or mishandled, was in fact properly safeguarded in the property rooms of the home agencies of several MGSF officers. Several officers reported that there was inadequate clerical staff, inadequate secure storage space, and inadequate record keeping at the MGSF offices. As a result, these officers generally brought seized property back to their home agencies rather than to the MGSF evidence room. The records maintained by the MGSF did not track those property seizures, nor did they track resulting prosecutions.

c. Removal of property marked for destruction.

The investigation also revealed practices at MGSF of disposing of property in ways that were not authorized by the operational guidelines of MGSF. Once property was deemed “unnecessary” as evidence and was not subject to return to its owner, it was marked “destroy” or listed in reports as “marked for destruction” and often moved to an unsecure location because of space limitations in the MGSF property room. Although there does not appear to have been a general policy or practice of allowing employees to take property marked for destruction, a few employees indicated that on occasion, once property was marked “destroy” or listed as “marked for destruction,” the MGSF commander or MGSF administrative clerk granted permission for them to take the property home.

The removal of seized property for personal use could potentially constitute theft. However, the crime of theft requires proof beyond a reasonable doubt that the property was taken “without claim of right.” Minn. Stat. § 609.52, subd. 2(1). The employees who admitted removing property marked for destruction have claimed that the MGSF commander or clerk authorized the removal of the property which would give the employees a “claim of right.” The MGSF commander has refused to speak with investigators regarding these claims.

Additionally, assigning criminal penalties to theft charges requires proof as to value of the property. Minn. Stat. § 609.52, subd. 3. However, many of the items alleged to have been taken were used electronics, such as older television sets and computer monitors, for which there is a limited secondary market, and where it can be costly to dispose of the items.

The MGSF operating policies clearly provided three permissible options for the disposal of evidence, that is not contraband or subject to forfeiture, after 60 days notice is given to the lawful owner:

- 1) Destruction;
- 2) Sale at a public auction; or
- 3) Retention for use by the appropriate jurisdiction.

Operating Procedures and Guidelines, adopted May 2, 2006, § 3-14.10 (Disposal of Evidence). Permitting employees to simply take the property that is being disposed of is not one of the permitted options and could potentially constitute Misconduct by a Public Officer or Employee under Minn. Stat. § 609.43, in that it is in excess of the employees’ lawful authority. However, in State v. Serstock, 402 N.W.2d 514 (Minn. 1987), the Minnesota Supreme Court narrowly construed the statute and held that “‘lawful authority’ as used in Minn.Stat. § 609.43(2) is determined by state statutes which define or describe a public official's authority.” Serstock, 402 N.W.2d at 517. Since the MGSF operating policies are not state statute, their violation is not a permissible basis for charges under Minn. Stat. § 609.43.

The removal of property marked for destruction also implicates the statute regarding interference with property in official custody. Minn. Stat. § 609.47. However, the property implicated here had been marked as “destroy” or listed as “marked for destruction” and was often moved outside of the secure property storage area – in many cases into an actual dumpster and a reasonable person faced with those circumstances would no longer believe that the property was being held in official custody. As such, there is insufficient evidence to support criminal charges under § 609.47.

d. *Removal of seized computers.*

There was an allegation made that “it was routine for officers to take home for their personal use seized computers.”⁸ If the computers were removed from the evidence room and converted to personal use, the actions could constitute theft under § 609.52, subd. 2(1), misconduct by a public officer under § 609.43, and if the property was still being held for evidence or other official purposes, interference with property in official custody under § 609.47.

⁸ Report of MGSF Special Review Panel at 19.

Investigators learned that this allegation came from the same civilian employee who had given inconsistent statements regarding the removal of other property from the MGSF evidence room. When questioned by investigators as part of this investigation, the former employee said that the allegation related to a single incident where a MGSF officer removed a computer for training purposes.

The Special Review Panel report also noted that several “officers stated that they used laptops removed from the evidence room for official purposes.” There was no evidence developed that any specific employee took a specific computer and converted it to personal use so there is insufficient evidence to support theft or misconduct by a public officer charges. While there is evidence that the computers were taken from the MGSF property room, absent proof that specific computers were converted to personal use, there is insufficient evidence that any of the employees “took” the property as required by the interference with property in official custody statute 609.47.⁹ Similarly, there was no evidence that any employee damaged or destroyed that property while it was in official custody. Accordingly, there is insufficient evidence to issue criminal charges.

e. Removal and return of an ice auger.

An additional allegation concerned the removal of an ice auger, seized as part of a narcotics case, from the MGSF property room. The item was later returned to the property room. Since there is no legitimate official use for such an item its conversion to personal use could implicate the crimes of theft under § 609.52, subd. 2(1) and 2(5)(i)(temporary taking), misconduct by a public officer under § 609.43, and interference with property in official custody under § 609.47.

The item was discovered missing from the property room by the case officer who seized the item and sought to return the item to its owner. The case officer let it be known that he was looking for the ice auger. The ice auger then reappeared in the property room. No one saw who returned the ice auger. The case officer suspected a particular MGSF employee but had no evidence to support his suspicions. Investigators attempted to talk to the suspected employee but the employee exercised his Fifth Amendment right to refuse to speak with them. Absent direct evidence of someone seeing a particular employee in possession of the ice auger or circumstantial evidence that is consistent with a particular employee’s guilt beyond a reasonable doubt, there is insufficient evidence to issue criminal charges.

f. Missing seized watches.

⁹ If the property was to be disposed of, then retaining the computers for official use could have been permissible under the MGSF operating procedures § 3-14.10(Disposal of evidence). As noted by the Special Review Panel, the MGSF did not keep records as to which property was being retained for official use. The pervasive lack of proper documentation formed the basis for significant criticism by the legislative auditor and the Special Review Panel and formed the basis for numerous remedial recommendations. This lack of documentation is not a crime in itself but is relevant to the criminal investigation because it represents a lack of evidence to support criminal charges.

Another allegation involved 70 stolen watches seized in two separate cases in 2006 by an officer with MGSF. A Review Panel inventory of the MGSF property room in 2009, located only 50 of the watches.¹⁰ As with the removal of other items from the MGSF property room, the taking of these items by employees for personal use could implicate the crimes of theft under § 609.52, subd. 2(1), misconduct by a public officer under § 609.43, and interference with property in official custody under § 609.47.

A MGSF officer reported to the Review Panel seeing the MGSF administrative clerk, the clerk's sister and another officer viewing the watches. The clerk created a report showing that the watches had been sent to a jeweler for disposition, but recently advised investigators that the jeweler had declined to accept the watches and she subsequently failed to correct her earlier report. A search warrant was executed at the clerk's home by the FBI in 2009, but no watches were recovered.

No person can testify as to what happened with the 20 missing watches. Although the matter is troubling, there is no evidence showing where the watches went or who took them. Therefore, no criminal charges could be brought.

3. PURCHASES OF PROPERTY FROM THE MGSF PROPERTY ROOM.

Another claim investigated involved the purchase, by employees or their family members, of property from the MGSF evidence room at below-market prices.¹¹ The purchase of property at below market prices could implicate the crimes of misconduct by a public officer under § 609.43, theft under § 609.52, subd. 2(1) and interference with property in official custody under § 609.47.

a. Possible misconduct by a public officer.

A charge of misconduct by a public officer based upon sales of property from the MGSF to employees would require proof that the officers were operating in "excess of lawful authority." The purchases by employees of property from the MGSF appear to have violated the MGSF policy regarding the disposal of evidence because the only sale permitted is at a public auction. MGSF Operational Guidelines § 3-14.10. However, the violation of those administrative guidelines is insufficient to prove that the employees acted "in excess of lawful authority" under § 609.43. Serstock, 402 N.W.2d at 517. Thus, there is insufficient evidence to support charges of misconduct by a public officer based upon sales that violated department guidelines.

b. Possible theft based upon below-market value sales.

¹⁰ The Review Panel report indicates the Officer who seized the watches refused to authorize disposal of them. Yet, the Review Panel investigative report relating to the matter says the officer authorized disposal of the watches thinking "disposal might mean melting them down or something."

¹¹ A law has since been passed that prohibits the sale of forfeited property to "an officer or employee of the agency that seized the property or to a person related to the officer or employee by blood or marriage." Minn. Stat. § 609.5315, subd. 1 (effective August 1, 2010).

There is no specific provision in the Minnesota theft statutes that addresses the sale of property at below-market prices. Ordinarily, a person who purchases an item presumptively has a “claim of right” against the property and cannot be prosecuted for theft under Minn. Stat. § 609.52, subd. 2(1). This is true unless the purchase price was so outrageously low that the entire transaction could be considered a swindle by ‘artifice, trick, or device’ against the MGSF. Minn. Stat. § 609.52, subd. 2(4). A number of specific instances of sales were investigated and analyzed for possible prosecution under the theft statutes.

- i) **Jet skis.** In 2008, two jet skis – one a 1995 model and the other a 1996 model – were purchased for \$800 from the MGSF by an employee’s sister with the approval of the commander. The criminal investigators located mechanics who examined both jet skis near the time of the transaction. The mechanics told the investigators that both units needed substantial work and that one of the jet skis was essentially “junk.” According to the mechanics, the woman paid approximately \$1,400 for repairs to the two units but both became inoperable soon afterward and remain so. While the purchase price of \$800 for two jet skis appears on its face to be low, the fact that the units were virtually inoperable, required substantial repairs, and still could not be rendered useful suggests that the \$800 price may not have been unreasonable. This is not to excuse the sale to MGSF family members or the failure to follow proper auction procedures. However, it does not appear that the sale price was so far below market value as to constitute a swindle.
- ii) **Large chair.** The daughter of a supervising MGSF officer purchased a large chair from MGSF for \$190. The investigation revealed that witnesses described the chair as being in need of substantial repair. One of the investigators is a retired police officer with substantial experience in estate sales and the disposition of used property who concluded that it is extremely difficult to sell used furniture and that the price paid could be regarded as a fair price for a used, damaged chair. Accordingly, there is insufficient evidence that the sale price was so far below market value that the transaction could be deemed a swindle.
- iii) **Electric stove.** There was an allegation that someone purchased an electric stove from the MGSF. The investigation were unable to find any witnesses who recalled the stove and no “purchaser” could be identified. Accordingly, there was insufficient evidence to support criminal charges against anyone regarding this transaction that may or may not have occurred.
- iv) **Two trailers.** In 2008, two trailers were sold by MGSF – one to the MGSF commander and one to the commander’s son-in-law. The commander paid \$300 for an 8’ x 12’ homemade flatbed

trailer seized by MGSF in 2007. The MGSF records do not indicate who originally owned the trailer or what the materials used to construct the trailer may have cost.

The commander's son-in-law paid \$500 for a 7' x 9' flatbed trailer that had been purchased from Gander Mountain for \$1,300 in 2005. This trailer was seized pursuant to a search warrant from a person involved in a fraudulent check-writing ring who had used a fraudulently obtained \$250 gift card to help pay for the trailer. The investigators located both trailers on the commander's vacation property in northern Minnesota.

The investigators struggled to assign an appropriate market value to each of these used trailers. In any event, there is insufficient evidence that the prices paid were so far below the market value for these used trailers that the transaction could be deemed a swindle of the MGSF. Again, this is not to excuse the sale of property to MGSF family members or the failure to follow proper disposal procedures. Rather, under the limited scope of review for potential criminal charges, there is insufficient evidence of a theft.

In addition to allegations of sales below market value, the Review Panel indicated that there "is reason to believe" that MGSF employees took a laundry list of items from the property room for personal use.

Presumably, the reason to believe the items taken went to MGSF officers is based on the belief that the items were once located in the MGSF property room, that paper does not indicate that they were disposed of or how, and that the items are no longer in the property room.

Yet, given the poor record keeping, the inadequate evidence processing, and the disposal practices, it is equally, if not more, plausible that the items were either disposed of, were never in the property room or are located at some other department's evidence room. Accordingly, the available evidence simply is inadequate to warrant a criminal charge.

4. UNACCOUNTED FOR SEIZED CASH

Investigators also looked into a claim that cash MGSF officers seized and turned over to the MGSF was subsequently illegally taken. For example, the Legislative Auditor reported that it was "unable to substantiate the disposition of \$18,126 of forfeited cash."¹² Auditor's Report at p. 7. Based upon a review of records of the MGSF and the MGSF fiscal agent and upon interviews with clerical staff, investigators determined that the MGSF's administrative assistant was assigned the task of tracking seized cash deposited with the MGSF. On occasion, it would be determined that seized cash should be returned to the person from whom it was seized. Yet the administrative

¹² Both the MGSF commander and the MGSF fiscal agent responded to the Auditor that the fiscal agent had actually deposited \$2,960 more than originally indicated. Thus the amount that in which the disposition could not be substantiated was actually \$15,166.

assistant's tracking record did not always reflect the return. On other occasions, the MGSF used the seized cash to directly pay for items. The Legislative Auditor, for example, identified three instances when a total of \$15,111 was used for confidential informants. Auditor's Report at 8. The Auditor also identified \$11,657 that went into the MGSF travel and training account. Id.

In a written response to the Auditor, the MGSF commander said he recalled paying a MGSF worker \$5,000 in cash as a bribe while the worker was working to be properly put on the payroll of Ramsey County or the St. Paul Police Department. The commander also recalled paying cash to a confidential informant and also using the \$3,000 cash to pay for a training. Auditor's Report at 33-34.

Investigators also determined that the MGSF commander, would periodically have his administrative assistant gather seized cash that had been placed with the MGSF for deposit in a bank. A memorandum bearing the commander's signature would list the seized cash amounts and, if possible the person from whom the cash was seized. The memorandum would "clear" the funds for deposit. The memorandum was addressed to the accountant for the MGSF's fiscal agent. The commander would then give the cash and the memorandum to the accountant for counting and deposit into the MGSF account. There were occasions in which the deposit amount stated on the memorandum would not match the amount deposited.

With respect to these seized funds, investigators came to the same conclusion as the Legislative Auditor – "that the state of the records and the lack of internal controls made it impossible for us to conclude that all seized cash was either held in the property room or deposited with the fiscal agent." In point of fact, it is pretty clear that some seized cash was removed from the evidence room and was not deposited, but was returned to the person from whom it was seized or used to fund MGSF operations such as paying informants. It is also clear that the amount of seized cash the fiscal agent deposited into the MGSF's account cannot be reconciled with the amount MGSF officers seized and deposited with the MGSF, with the amount the MGSF commander's administrative assistant believed she forwarded to the commander, or with the amount the commander actually forwarded to the fiscal agent for deposit.

The deficiencies in the available records and the lack of internal controls were clearly sloppy and inexcusable. However these deficiencies also make it impossible to prove beyond a reasonable doubt (1) whether any cash is actually missing, (2) who took it, or (3) that any missing cash was converted to a use other than appropriate return of seized cash or funding of MGSF operations. As a result criminal charges of theft, embezzlement, or failure to pay over state funds simply cannot be brought.

5. DOCUMENT SHREDDING

On May 20, 2009, the day MGSF operations were suspended; several MGSF officers were seen shredding documents. The shredding was interrupted by deputies of the Hennepin County Sheriff's Office. Bags of shredded documents were seized for possible analysis.

The shredding of records by MGSF employees on the day that the MGSF operations were suspended implicates the Official Records Act and the Minnesota Data Practices Act.

The Official Records Act requires public officers to “make and preserve all records necessary to a full and accurate knowledge of their official activities.” Minn. Stat. §15.17, subd. 1. The responsibility for preserving records rests with the chief administrative officer of each agency. There are no criminal penalties attached to violations of the Official Records Act. Minn. Stat. § 138.17 requires government entities to follow a disposal schedule in destroying records. However, that statute also provides that “[w]hen records containing not public data as defined in section 13.02, subdivision 8a, are being disposed of under this subdivision, the records must be destroyed in a way that prevents their contents from being determined.” Minn. Stat. §138.17, subd. 7. There are no criminal penalties provided for violations of § 138.17. The Minnesota Data Practices Act does provide criminal penalties for the wrongful destruction of records but requires proof that the violations are willful.

The question then, for criminal charging purposes, is whether there is sufficient evidence that the officers shredding the documents were willfully violating the Minnesota Data Practices Act. Minn. Stat. § 13.82, defines and regulates “Comprehensive Law Enforcement Data” and applies to agencies that “carry on a law enforcement function.” There are provisions in the Comprehensive Law Enforcement Data section for the disclosure of arrest data, request for service data, 911 calls, domestic abuse data, and response to incident data. Minn. Stat. § 13.82, subs. 2-6. Data on active investigations is generally non-public while the investigation is ongoing, but may become public once the investigation is completed and may be disclosed pursuant to court order. *Id.* Subd. 7.

In addition, there is a provision on “protection of identities” that contains a lengthy list of data that must be withheld from public disclosure - including situations where disclosure would reveal the identity of an undercover officer or an informant. Minn. Stat. § 13.82, subd. 17. Further, there is a provision for data that is not public which “must be destroyed in a way that prevents its contents from being determined.” Minn. Stat. § 13.05, subd. 5(c); see also § 158.17, subd. 7.

In order to sustain convictions against the officers who were shredding documents for willful violations of the data practices act, the state would have to be able to prove beyond a reasonable doubt that the officers intended to violate the data practices act, that the shredded documents were required to be maintained by the Data Practices Act, and that the shredded documents did not involve the “protection of identities” of undercover officers or informants.

An analysis of the material indicated that the shredded documents appeared to constitute work papers, handwritten notes, information on informants, photographs, DMV printouts, and assorted other materials deemed to be of no particular interest. There is nothing about the nature of the analyzed documents that, by itself, shows an intent to violate the Data Practices Act. A student worker who witnessed the shredding reported that she saw nothing that appeared inappropriate.

Investigators did attempt to obtain additional evidence about the nature of the destroyed documents and the reason for the shredding. Some of the officers involved in the shredding said that they had been instructed by their home departments to clean out their files. While there is

no indication that anyone from the participating departments instructed MGSF officers to shred records, the MGSF officers stated they were shredding the documents in response to the directive to clean out their files.

Absent other evidence about the nature of the documents being destroyed, or the motivation behind the shredding, there is insufficient evidence to support criminal charges for willful violations of the Data Practices Act or intentional misconduct by a public officer.

Conclusion

This was a difficult investigation, posing significant challenges. Among those challenges were the disorganized, incomplete, haphazard, substandard, and at times inaccurate record keeping, evidence handling, and evidence disposal practices of the MGSF. The challenge posed by the failure to routinely follow the most basic record keeping and evidence handling practices, was compounded by the refusal of certain MGSF members, including its Commander, to speak with investigators. These failures do a great disservice to all who served on the MGSF, to the law enforcement community, and ultimately to the public.

The investigators assigned to the matter conducted as professional and thorough investigation as was possible under the circumstances. That investigation did not produce sufficient legally admissible evidence to charge any individual with any state crime arising out of the matter.

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