Minnesota Coalition on Government Information (MNCOGI)
Overview of health plan data classification
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Legislative Commission on Data Practices
October 28, 2014

Background.

The current discussion about the classification of certain health plan (HMO) data was spurred by an earlier debate over the passage of the so-called "Helmberger" Data Practices bill - a bill that arose from a legal dispute over the reach of Minn. Stat. 13.05 Subd. 11, a provision of the Minnesota Government Data Practices Act (Chapter 13).

Minn. Stat. 13.05 Subd. 11 was originally enacted by the Minnesota Legislature in 1999, in recognition of the large number of private contractors that had become involved with government operations. Such contractors were (and still are) routinely retained to perform a variety of government functions underwritten by taxpayer dollars.

Minn. Stat. 13.05 Subd. 11 was historically viewed as covering private entities that contracted with the government in order to execute certain government functions. The coverage was limited to the contracted functions that particular private entities were performing. Such entities were assumed to be covered by virtue of the fact that their contracts were executed under Minnesota law, even though those contracts did not contain any express reference to Minn. Stat. 13.05 Subd. 11.

In 2013, the Minnesota Supreme Court, in its *Helmberger v. Johnson Controls* decision, opined that in order for the MGDPA to apply to private entities, their contracts with the government needed to contain an express reference to 13.05 Subd. 11. Without such express "notice" language, Chapter 13 would not cover private contractors.

During the 2014 legislative session, the Minnesota Legislature responded to the court's decision with the so-called "Helmberger" bill, which modified 13.05 Subd. 11 to ensure that all private contractors were covered by Chapter 13, even without the existence of specific notice language in their contracts.

During the debate over the bill's passage, the Minnesota Council of Health Plans (representing HMOs) first sought protection for specific HMO data pertinent to contracted work with the Department of Human Services (DHS). The Council then sought an amendment that would have exempted HMOs entirely from 13.05 Subd. 11 for one year. MNCOGI opposed that amendment, but supported an alternative amendment that subjected HMOs to the law, but delayed implementation for one year.

Now, the legislature has an opportunity to revisit the issue of health plan data, and the larger question of what data - if any - should be reclassified before the one-year HMO "buffer" period expires.

As today's hearing largely involves an overview of this matter, MNCOGI presents the following framework as an aide to evaluating any data classification requests that are brought forward.

1. The "Helmberger" bill re-set the data landscape to where it was from 1999-2013.

Before evaluating whether any changes to HMO data classification are warranted, it is important to understand what the "Helmberger" bill (SF 1770) did to the Data Practices Act and the general data landscape.

As noted in the introduction, SF 1770 did not create a *new* public right to access private contractor data, but merely *reinstated* the understanding of 13.05 Subd. 11 that existed from 1999-2013. The understanding that private contractor data pertinent to a government function was subject to Chapter 13 was explored in several Data Practices advisory opinions during those years - opinions that upheld the concept where it applied.

In the aftermath of the passage of SF 1770, the data landscape that exists in relation to 13.05 Subd. 11 is the same as it was during the years 1999-2013, save for the current one-year delay governing HMOs that will expire in June of 2015.

2. Understanding the "welfare data" section of Chapter 13 will clarify the current debate.

More pertinent to today's discussion, it is important to understand that SF

1770 did not change a key provision of state law that governs HMO data. That is Minn. Stat. 13.46 - the "welfare data" section of Chapter 13.

13.46 Subd 1(c) defines the "welfare system" as comprising the Department of Human Services (DHS) and other government organizations, and any entities under contract to those organizations "to the extent specified in the contract." Minnesota's HMOs fit squarely within this definition, as they are entities under contract to DHS to administer public health care programs.

13.46 provides a great deal of protection for data on individuals, which is understandable given the sensitive nature of the health care information collected and maintained by the covered organizations. In addition, 13.46 Subd. 6 deals with "other data" that is not pertinent to individuals. This other data is classified as "public" with the exception of security data, and civil and welfare investigative data. Subdivision 6 thus can be read to leave certain operational and organizational information held by contracted entities available for public review, unless it is classified by a separate provision of law.

Data pertinent to subcontract entities that contract with HMOs may also be covered by Chapter 13 in certain instances. For instance, in 2001 the Commissioner of Administration issued a Data Practices Advisory Opinion (01-052) maintaining that Delta Dental (a subcontractor to Blue Cross/Blue Shield) must release certain data related to work conducted under the auspices of the state's "PMAP" public health care program.

In short, the legislature must take into consideration the full scope and reach of Minn. Stat. 13.46 when considering any changes to HMO data sets.

3. Requests to create "not public" data deserve close scrutiny.

Chapter 13 affords a public presumption to all government data, unless the data are otherwise classified by state or federal law. This presumption was instituted to ensure that citizens had access to information about government operations undertaken in their names, and paid for with their tax dollars.

Direct public access to government data permits citizens, the press, and policy makers to undertake their own investigations, and to make their own

evaluations about a wide manner of government processes. Such access is a foundational principle of good governance. Accordingly, MNCOGI believes that any claim that certain government data should be withdrawn from public view should be closely scrutinized. MNCOGI likewise believes that the creation of "not public" data must be linked to a clear public benefit that eclipses any civic good otherwise derived from the availability of that data.

MNCOGI further notes that there is an important relationship between public access to government data, and the impact of government entities and programs on the public itself. Put simply, the greater the impact, the greater the public's interest in having access to data for the purposes of oversight. This is certainly the case with public and private entities that utilize large amounts of taxpayer resources.

For instance, Minnesota's public health care programs are administered by non-profit HMOs that disseminate billions of state and federal dollars on a biannual basis. Because of this fact, the public has a vested interest in understanding how those entities manage government funds. This fact that should be considered when and if requests are made to re-classify HMO data.

4. Changes to HMO data classifications should not convert important public data to "nonpublic" data.

During the course of the debate over the passage of SF 1770, many data-related amendments were discussed and proposed. Some were very broad, including amendments that would have classified all "financial and business" data held by HMOs as "nonpublic" data. Such a change would have effectively removed from public view much existing, public information about the operation of HMOs, including statutory financial statements and annual reports that are provided to the Minnesota Department of Health (MDH) for oversight purposes. Such reports - which contain aggregate-level financial information about HMO operations - are currently maintained as public data and available for public inspection.

As the legislature evaluates how and whether to classify HMO data going forward, it should take care to ensure that it does not remove important, currently public data from view.

5. Limits on the exposure of private business data must be understood.

Much of the debate surrounding the passage of SF 1770 involved HMO concerns about the exposure of certain business information through data practices requests.

To properly frame this discussion, it must be understood that Minn. Stat. 13.05 Subd 11 (even as amended by SF 1770) does not generally expose all business data held by private entities. It only makes available data that is relevant to a contracted government function.

More pertinent to today's discussion, private entities (such as HMOs) under contract to the "welfare system" only expose certain business data that is relevant to a function under contract. Chapter 13 coverage would not reach their other, private lines of business.

6. "Trade secret" data is already covered by Chapter 13, but its application has limitations.

It is also worth noting that there are other, existing protections for certain types of business information already found in the Data Practices Act. Minn. Stat. 13.37 Subd 1(b) contains a classification for "trade secrets information" that can be applied to private vendor data when private entities interact with the government.

It is equally important to understand that the "trade secrets" classification is not absolute or all-encompassing. The extent of trade secret information is limited by Minnesota law, and must meet the following criteria. The data must be:

"A formula, pattern, compilation, program, device, method, technique or process;

(1) that was supplied by the affected individual or organization;

(2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy and;

(3) that derives independent economic value, actual or potential, from not

being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."

All of the above criteria must be met in order for data to be withheld as "trade secret" information. Government agencies that utilize private vendor data exercise discretion in their review of trade secret claims, and independently evaluate assertions made by private vendors, who are required to properly label such data. Many agencies (such as MDH) have policies in place to notify private entities if their data is not eligible for coverage as "trade secret" information.

Recently, MDH has specifically described certain limitations on using the "trade secret" definition to cover cost or pricing information. An example of this approach can be found in the recently produced MDH document "Request for Application for the Registration of Medical Cannabis Manufacturers" available on the internet at this link:

http://www.health.state.mn.us/topics/cannabis/mfrrfa.pdf

In the document, the agency notes that it "will not consider prices or costs submitted by the Applicant to be trade secret information under any circumstance."

7. Any review of HMO data needs to include an overview of all relevant statutes.

Any review of HMO data classification needs to include multiple statutes, beyond the provisions found in Chapter 13. HMOs hold vast stores of government data - including both data on individuals, and data not on individuals. MNCOGI notes that the data at the center of the current discussion is all data "not on individuals" - essentially business or organizational data. There are many existing statutes outside of Chapter 13 that govern and classify this kind of data held by HMOs. These include, but are not limited to:

- Requirements to provide certain public reports on HMO "demonstration projects" (Minn. Stat. 62D.23);

- Requirements to provide annual reports to the Commissioner of Health

(Minn. Stat. 62D.08) that include unaudited financial statements that are maintained as nonpublic data;

- Information on “aggregate spending” on major categories of health care services that are maintained as public data (Minn. Stat. Subd. 9(b));

- Information on “aggregate non personally identifiable health plan encounter data” that are maintained as public data (Minn. Stat. Subd. 9(b));

- Administrative expenses to be reported to the Commissioner of Human Services, and maintained as nonpublic data (Minn. Stat. 256B.69 Subd 9a);

- HMO “provider payment rates” to be provided to the Commissioner of DHS and maintained as nonpublic data (Minn. Stat. 256B.69 Subd 9b).

Given the complexity of the statutory landscape governing health plan data - and possible ambiguities arising from the inter-relation of statutes - MNCOGI notes that it is important to clearly understand what is currently “public” and “nonpublic” before re-classifying any additional data.

8. Should any currently “nonpublic” data be converted to “public” data?

Given the important oversight purpose described previously, the legislature may wish to evaluate whether any currently “nonpublic” health plan data should be reclassified as “public” data, including any nonpublic details on HMO administrative expenses. Likewise, if there are any statutory provisions that create ambiguities about the classification of HMO data, the legislature may wish to remove such ambiguities in favor of a clear, public classification.