

MINNESOTA COALITION ON GOVERNMENT INFORMATION
Written testimony of Matt Ehling
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Thank you Mister Chairman. Matt Ehling, Minnesota Coalition on Government Information. We would like to thank both you and Representative Lesch for the opportunity to provide some options for statutory language pertaining to cloud data used by the government, and how it interacts with the state's Data Practices Act.

As I noted in my comments last month, because of the district court opinion in the Amazon bid case, there now exists some discord about the reach of the Data Practices Act as it applies to third-party cloud-based data used by government entities, such as the "Box" file-sharing data at the heart of the Amazon case. That court case is somewhat of an outlier, in that it is one of the few cases that provides a limit on the intentionally broad, statutory definition of "government data" in Chapter 13. Most court cases dealing with Chapter 13 involve disputes over the classification of government data, as opposed to whether particular data utilized by the government is "government data" or not. The existing statutory definition is so broad, in fact, that very few types of data that the government interacts with have ever been found by a court to *not* be government data. Because of this, we feel it is likely that an appellate court would have recognized the Amazon bid data housed on the "Box" for what it was - "government data" that had been received, collected, or maintained by a government entity.

However, since there was no appellate court resolution of this matter, the district court opinion is still on the books, and may have negative ramifications for public access to cloud based data used by the government - and this is a category of data that is growing every year, as the government houses more and more of its data with third party vendors, as opposed to on its own servers.

As I've noted, dealing with this issue will either take further litigation, or else a statutory change confirming that cloud data used by the government is, in fact, government data. In terms of the later, we have proposed some options for what a legislative response might look like.

For purposes of discussion, we have presented two options - first, a narrow option, which is designed to provide a specific definition of "cloud data" that fits within Chapter 13's broader definition of government data. Alternately, we have provided more expansive language that addresses the government's use of third-party computing generally.

I would note that both of these options require additional work, but they showcase two distinct paths that might be taken.

The first option aims to describe computer-based processes that we now call "cloud data," and also aims to define when those processes result in "government data" - essentially establishing a sub-definition of government data.

Option 1 begins by creating a new section in Chapter 13. Subdivision 1 of that section defines "cloud data" as data stored on a computer, computer network, or similar, that is possessed, controlled, or owned by a third party, and is accessible to a government entity through telecommunications technology, an internet connection, or other electronic process.

Subdivision 1 also defines a "right of access" as one that is established by an express or implied contract or agreement between a third party and a government entity, or a consensual act undertaken by a third party that permits data to be accessible to a designated government entity. While contractual arrangements are one trigger for government access to cloud data, there are many other, informal activities involving cloud data that also need to be captured as well. For instance, in the Amazon case, a third party that stored Amazon bid-related data on a "Box" account shared that data with the government through a very informal means - they simply sent a digital link that permitted a state agency to log-in and access the data.

Subdivision 2 then states that if a government entity has a right of access to cloud data, it has collected, received, and/or maintained government data. This right of access is the criterion that makes cloud data "government data."

The third subdivision serves an important function by indicating that while something called "cloud data" is defined by this new section, that section does not provide an exclusive definition of receipt, collection, and maintenance of electronic or computer-based data under Chapter 13. As computer-based data processes are always developing and changing, it is important that this section not be interpreted as defining the *only* way that computer data used by the government is considered to be "government data."

In short, the effect of option one is to describe the government's use of cloud data; to define that activity as falling within Chapter 13; and then to leave other issues for another day.

This approach gets at the cloud data issue, but it does it in a way that is slightly unusual, given the structure of the rest of Chapter 13, which sets out one broad definition of government data, as opposed to sub-definitions. Accordingly, there may be other ways to get at this definitional problem by placing a "right of access" concept elsewhere within Chapter 13, and indicating that it equals receipt, collection, and maintenance of

government data. I would note that this "right of access" idea is how some other state and federal courts have addressed issues involving government use of cloud data, by finding that the government having a "right of access" to third party data or "constructive possession" of third party data essentially result in that data falling under various open records statutes.

Moving on to option two; this alternate option goes in a slightly different direction. Rather than narrowly defining something called "cloud data," this approach states that when a government entity uses the computing capabilities of a third party - broadly defined - then the data that is received or otherwise captured through the government's use of those computing services is government data. This language, as with option one, is not perfect, and leaves many things undefined, but it is an example of what a broad approach might look like, as opposed to a more narrow approach.

As I've noted, these are not the only options available to deal with this issue, but they show a range of possibilities, and we are interested in continuing this conversation to arrive at the best language possible, in order to ensure that Minnesota's historically generous access to information about what it's government is up to does not become obscured by the cloud data era in which we are living.

Thank you.