MINNESOTA COALITION ON GOVERNMENT INFORMATION

ANALYSIS OF DISTRICT COURT ORDER IN

PUBLIC RECORD MEDIA v. DEED AND GREATER MSP

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Executive Summary

The district court order in *Public Record Media v. DEED and Greater MSP* was incorrect in holding that draft data related to the State of Minnesota's Amazon bid - which was held in "cloud-based" digital storage for use and review by the Minnesota Department of Employment and Economic Development (DEED) - was not "government data" under Chapter 13, the Minnesota Government Data Practices Act ("MGDPA"). Data that is "received, collected" or "maintained" through a government entity's use of a "cloud-based" digital file-sharing system is "government data" even if the file-sharing system that it used was owned, operated, or managed by a non-government entity. So long as the data was "received, collected" or "maintained" by a government entity, such data is "government data," even if it has not been "downloaded" or otherwise saved onto computers owned by the government.

In resolving the *Public Record Media v. DEED and Greater MSP* case, the district court relied heavily on factual representations and legal arguments made by government agency DEED.[2] A number of those factual representations were disputed by the Plaintiff via evidence obtained through Data Practices requests made to DEED, as well as by citing evidence that DEED and its collaborator Greater MSP (GMSP) entered into the record. These disputes

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[1] MNCOGI board member Matt Ehling is also affiliated with the non-profit open government organization Public Record Media, the plaintiff in the case at issue. Don Gemberling is the retired director of the Minnesota Department of Administration's former Information Policy Analysis Division (IPAD; now the Data Practices Office). Between 1974 and 2005, Mr. Gemberling helped to write and revise much of the MGDPA, as well as its predecessor statutes. In his role at IPAD, Mr. Gemberling was responsible for helping to implement and interpret the MGDPA in the State of Minnesota.

[2] See footnote on page 1 of district court Order Granting Motion to Dismiss and Summary Judgment.

included issues as fundamental as whether draft bid material existed in the digital file-sharing system, and the ultimate authorship/ownership of the Amazon bid itself.[3] Despite the existence of numerous factual disputes, dismissal and summary judgment were granted in favor of DEED and GMSP.

An appeal followed,[4] but it was ultimately made moot by DEED and GMSP's release of the Amazon bid before briefing at the Minnesota Court of Appeals occurred. The case ended with a joint stipulation for dismissal.

Since the government's use of cloud-based data management has become common practice, the Minnesota Coalition on Government Information (MNCOGI) seeks to ensure that government entities do not rely on the district court's order for the incorrect proposition that cloud-based data used by the government falls outside of Chapter 13's coverage simply because it is not housed on a government-owned computer. Such a position would severely undermine the public policy purpose behind Chapter 13 as technological and administrative practices continue to move ever more information off of government computers and into third-party "cloud storage." MNCOGI places this analysis into the legislative record in order to articulate the proper legal standard for evaluating the status of the cloud-based, draft Amazon bid data involved in the *Public Record Media v. DEED and Greater MSP* case.[5]

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[3] For instance, in pre-litigation e-mails and correspondence, the Amazon Bid that was jointly developed by DEED and GMSP was referred to as "Minnesota's" Amazon bid dozens of times. Even the cover page of the bid that DEED released prior to litigation - which was signed by Governor Dayton and members of Minnesota's legislative leadership - referred to the bid as being submitted "on behalf of the State of Minnesota." In court filings, however, DEED and GMSP uniformly referred to the bid as "Greater MSP's bid."

[4] Due to the significance of the issues in play, a dozen individuals and organizations filed amicus briefs in support of PRM's appeal, including the Associated Press, Gannet Co., Inc., Gray Television Group, the Minnesota Chapter of the Society for Professional Journalists, the Minnesota Coalition on Government Information, Minnesota Public Radio, the St. Paul Pioneer Press, Tenga, Inc., data requester and independent journalist Tony Webster, St. Paul Strong, the Minnesota Freedom Foundation, and the Center of the American Experiment.

[5] This analysis document only deals with questions involving the draft bid-related data held in the digital file-sharing system (the "Box') managed by GMSP and jointly used by DEED. Separate legal and factual questions involve the final Amazon bid and its status, and are not part of this analysis.

Background

Beginning on at least September 8, 2017, state agency DEED and regional economic development entity GMSP began joint work on Minnesota's response to an RFP issued by on-line retailer Amazon, in which Amazon sought a location for a new corporate headquarters.[6] Non-profit organization Public Record Media (PRM) submitted data requests for the state's Amazon bid, drafts of the bid, and correspondence about the bid's production. In response, DEED provided e-mail correspondence, a letter from DEED Commissioner Shawntera Hardy to Amazon, and an introductory cover page to the bid, which was signed by Governor Mark Dayton and members of Minnesota's legislative leadership. Regarding the rest of the document, DEED claimed that it had never "created, collected, received, maintained, or disseminated" the Amazon bid or drafts thereof.

However, e-mails obtained from DEED indicated that DEED and GMSP employees had jointly used a cloud-based file-sharing system called "Box" to share data related to the Amazon bid. In the course of producing the bid, GMSP had established the Box account, and had granted DEED access permissions to utilize it.

DEED e-mails showed DEED and GMSP employees using the Box account to share and review documents related to the Amazon bid, including one instance in which DEED employee Thu-Mai Ho-Kim described her review of a "final package," and provided a GMSP employee with suggested changes. ("Hi Val, Was looking at the Box files, and it looks like you guys have been busy putting together a final package. It looks good! I noticed that you included one business quote in the Arts section … I have a bunch more that I think you could sprinkle in there,

[6] E-mails released by DEED in response to a data practices request made by PRM indicate that then-Governor Dayton directed DEED and GMSP to work together on the Amazon bid; that for six weeks, the two entities conducted coordinated activities regarding the production of the Bid; that Governor Dayton and DEED Commissioner Hardy reviewed and provided guidance on the content of the bid, including reviewing a final draft generated by GMSP's writing team; and that DEED and GMSP submitted "Minnesota's bid" to Amazon on October 18, 2017.

that would work out well."). (*See* Am. Comp. Ex. P) Ho-Kim's e-mail was sent two days before the bid was ultimately submitted to Amazon for consideration.

To explain the meaning of these "Box" e-mails during litigation, DEED submitted an affidavit from Thu-Mai Ho-Kim. In her affidavit, Ms. Ho-Kim stated that she "transmitted data to GMSP on the Box" and that her colleagues "uploaded data into the Box" for use in the Amazon bid. (Ho Kim Aff. 3) She also stated that "administrative rights granted to me by GMSP on the Box allowed me to view other folders related to its Amazon project" (Ho Kim Aff. 3) and that at one point she "viewed another file folder on the Box with a title related to topics on which DEED contributed data. This file appeared to have been created by GMSP and contained substantial editing to the data DEED had provided, including added graphics and colors." Ms. Ho-Kim further noted that she "did not download these materials to my desktop or otherwise receive a copy of them." (Ho-Kim Aff. 6).

DEED argued that since Ho-Kim did not "download" certain data from the Box that she reviewed, such data was not "government data" because Ho-Kim only "viewed" or "accessed" it. DEED argued that "access" to the data was not enough to convert the data into "government data," and that DEED never "received" drafts of the Amazon Bid. ("DEED did not download, receive, or otherwise maintain that data … "access to" is not among the specific verbiage selected by the legislature to define government data.")[7] (*See* Defendant DEED's Memorandum In Support of Motion to Dismiss).

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[7] DEED's "access" reference was largely culled from correspondence submitted by PRM's counsel to DEED, describing DEED's use of the Box: "Under Minnesota Statutes Chapter 13, "government data" subject to public inspection and copying are defined as "all data collected, created, received, maintained, or disseminated by any government entity regardless of its physical form, storage media, or conditions of use." Through its access to the Box, DEED has the ability to both upload or transmit documents and to review or receive documents created by Greater MSP. Routine access to the Box by DEED staff makes clear that data uploaded to the file sharing portal is "maintained" by the agency and therefore "government data" under Chapter 13." (*See* Am. Comp. Ex. W)

PRM's pleadings in the case relied on DEED's "receipt" and "maintenance" of data via the Box, rather than exclusively on the concept of "access." Plaintiff presented arguments to the court that DEED had sought to mischaracterize its allegations by focusing purely on "access" verbiage. (*See* Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.)

In its dismissal/summary judgment order, the district court adopted DEED's argument, holding that: "It is immaterial whether DEED "viewed" or had "access" to the drafts or final Proposal because the MGDPA does not cover data that a government entity merely accessed or viewed. Rather, the MGDPA covers only data that a government entity "collected, created, received, maintained, or disseminated" … The Court may not add words to the MGDPA's definition of "government data." (*See* district court's Order Granting Motion to Dismiss and Summary Judgment.)

The district court's conclusion is an incorrect interpretation of Chapter 13 as applied to the fact of the case, in that it disregards DEED's use of the Box system as a tool to "receive, collect" and "maintain" data. The effect of the court's interpretation would be to impose improper limits on Chapter 13 that would place common data-management activities utilized by government entities (such as the use of cloud-based e-mail solutions to receive and view e-mail messages) outside of Chapter 13's coverage.

Legal Authorities

Purpose of Chapter 13

The history of the MGDPA reveals that the statute's broad definitions and scope were implemented to enable vibrant oversight of government operations through public data access. "[The Minnesota Legislature enacted the MGDPA's presumption of public access] in response to media requests that the general concept of openness in government be incorporated into the legislative plan for data practices." *See generally* Donald A. Gemberling & Gary A, Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act - From "A" to "Z,"* WM. MITCHELL L. REV. (1982).

Indeed, the structure and form of the MGDPA arose from a legislative desire to stem government "gamesmanship" that sought to frustrate public access. "[M]uch of the advice to the Legislature in its development of the initial Act came from … data processing

professionals" [who helped the Legislature recognize] "the infinite variety of gamesmanship advantages which are available to agencies in their disputes with the public." As such, the Legislature drafted the Act with an "acute awareness" of how "in any contest between … the public and a government agency … only the agency has the advantage of knowing what types of data are maintained, how they are maintained, and how the data can be made accessible." In its construction of the MGDPA, the Legislature defined government data broadly, so as to stop "agencies from imposing technology as a barrier to access." *See generally* Donald A. Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, IN GOVERNMENT LIABILITY (Minn. CLE Cmte. ed., 1981).

In 1994, the Commissioner of Administration addressed the problem of government gamesmanship at length in a Data Practices Advisory Opinion. In describing the gamesmanship issue, the commissioner also described the Minnesota Legislature's response to that issue, in the form of Chapter 13's structure and purpose:

> In its enactment of various provisions of Chapter 13, the legislature has attempted to deal with the simple reality that governmental institutions that actually collect, create, use, maintain and disseminate data and information have tremendous power over … the public's ability to determine just what exactly is happening in the operation of its government. This power, in part, derives from the simple reality that governmental institutions are in the actual possession of the information and data in question. Government agencies hold the physical and electronic keys to government files, collections of data and electronic data bases that can block physical access to government data or information. More importantly government agencies, through their inherent power to describe or to not describe or to acknowledge or not to acknowledge the existence and content of government data generated by human agents who serve the agency, also hold the language keys to data and information. The use of these language keys by government agencies offers a potentially far greater problem for issues of accessibility to and accountability for government data and information than the physical keys.

> To counter the potentially devastating effect of the operation of these language keys on two of the MGDPA's most important provisions, the presumption of openness and rights of subject of data, the legislature, in Chapter 13, uses exceedingly broad language to define terms like government data, and data on individuals. By doing so the legislature attempts to give persons approaching the government, and attempting to gain access to data … some advantages to counter or perhaps to balance the power of the physical and language keys possessed by government agencies. (*See* Data Practices Advisory Opinion 94-023)

Broad definition of "government data"

"Government data" under the MGDPA is defined as "all data collected, created, received, maintained, or disseminated by any government entity regardless of its physical form, storage media or conditions of use." That definition is broad, and intentionally so. "The focus of [the Data Practices Act] is information, not documents." *Northwest Publications, Inc. v. City of Bloomington,* (Min. Ct. App. 1993). The MGDPA focuses on data - and the government's interaction with it - rather than on particular locations, infrastructure, or devices where data happens to be housed. "Chapter 13 regulates data, not machinery such as PCs or laptops." (*See* Data Practices Advisory Opinion 01-075.)

In its construction of Chapter 13, the Minnesota Legislature used active verbs to describe the government's interaction with discreet bits of data as a means of defining "government data," as opposed to using other criteria, such the data's administrative purpose. The broad scope of the MGDPA's definition of "government data" also extends beyond the collection, creation, receipt, maintenance, and dissemination of data to encompass a host of changeable storage modalities, represented by language encompassing all manner of physical forms, storage media, or conditions of use. "The legislature added the "regardless of physical form, storage media, or conditions of use" language to the definition of government data specifically to clarify that electronic and other forms of non-traditional government records are subject to Chapter 13." (*See* Data Practices Advisory Opinion 00-019).

Thus, over time, “government data” has been interpreted to include an extremely broad range of data that the government has interacted with. For instance, videotapes of high school extracurricular athletic contests have been held to be government data. (*See* Data Practices Advisory Opinion 03-010) Audio recordings of a watershed district board meeting made by watershed board members are government data. (*See* Data Practices Advisory Opinion 07-006) Even X-rated videos downloaded by a government employee, and maintained as part of that employee’s disciplinary file, have been held to be “government data.” (*See* Data Practices Advisory Opinion 02-049)[8]

Under Chapter 13’s broad definition, government data can be highly granular, and not always convenient for the government to produce. For instance, in November of 1999, State Representative Phil Krinke sought e-mails from MnDOT regarding the Hiawatha Light Rail project - including any stored on digital "back-up tapes" maintained by the agency. MnDOT claimed that a more limited set of printed e-mails that had already been provided to Rep. Krinke were sufficient to fulfill the terms of his data request. ("All e-mails that were printed and added to our paper files were subject to your review.") In Data Practices Advisory Opinion 00-019, the Commissioner of Administration rejected this narrowing by the agency, opining that, "the data contained in those e-mails [including e-mails only saved on the back-up tapes] are treated the same as data contained in any other type of document" and thus must be provided to Rep. Krinke under the terms of the MGDPA. The Commissioner noted that Rep. Krinke was due access to all e-mails "collected, created, received, maintained, or disseminated" by MnDOT - even the e-mails that had not been printed by MnDOT for internal agency use, and which were only maintained on digital back-up tapes that MnDOT would have to reconstitute. The Commissioner took this position even though MnDOT claimed to lack knowledge about the contents of the back-up tapes, (stating that it was "impossible to determine" whether e-mails pertinent to Rep. Krinkie's data request were on the tapes.)

[8] Not all government data is classified as “public” by Chapter 13, but classification of data as “not public” does not alter its status as “government data.”

Data outside of government facility can be "government data"

Chapter 13's definition of "government data" covers data that a government entity has "created, collected, received, maintained, or disseminated," regardless of where that data is located or housed.

In 1995, the Commissioner of Administration was asked to address the following question: "When an employee, or former employee, or an agent, or former agent, of an entity subject to Minnesota Statutes Chapter 13 possesses work-related data outside of the workplace, are those data government data as defined in Section 13.02, subdivision 7?" (*See* Data Practices Advisory Opinion 95-008) The commissioner answered by noting that the location of data was not pertinent to the question of whether it was "government data" - only whether the data had been created, maintained, or disseminated by a government entity:

> The focus of Mr. Johnson's question is whether the location at which an employee creates, maintains, or disseminates data affects the definition of the term government data. For example, if a current or former employee maintains government data outside of the traditional workplace, are the data still government data? The answer to this question is yes. Government data are government data regardless of where the data reside.

Even work-related notes written in a government employee's personal telephone log and maintained at that employee's home have been considered to be "government data" by the commissioner (*See* Data Practices Advisory Opinion 95-013):

> Under the very narrow facts presented, including the fact that the District acknowledged the existence of the telephone log entry, the limited data at issue, i.e. the name and telephone number of an individual whose business might be affected by the board member's decisions, and perhaps the content of the telephone message, the data contained in the particular entry in the school board member's telephone log appear to be government data.

In *Pathmanathan v. St. Cloud State University* (Minn. Ct. App. 1990), the Minnesota Court of Appeals held that data possessed by a government contractor and housed at an off-site location was "government data" under Chapter 13, and had to be disclosed to a requester. In the facts relevant to *Pathmanathan*, St. Cloud State University had hired a private investigator to conduct a background investigation of a prospective employee, and the investigator created field notes and audio-recordings during the investigative process. The prospective employee eventually sought those materials through a data practices request, but was denied access by the university, which stated that the data was solely in the possession of the contractor, and thus was not "government data," since the university believed that Chapter 13 required government entities to have "physical possession" of materials to trigger the statute's effect. In applying Chapter 13 to the facts, the Minnesota Court of Appeals held that:

> "The statute does not explicitly require the agency's physical possession. As the facts of this case demonstrate, it is possible for the government to own data that is "created" or "maintained" for government purposes by a private entity. Construing the statutory language narrowly to exclude materials created or maintained by an agent would frustrate the statutory purpose of allowing access to governmental records … We conclude that the physical possession distinction is not recognized by the statute and the undisputed facts require disclosure of the information."

The court's reasoning hinged, in part, on contract terms executed between the university and its contractor, which granted "exclusive ownership" of the materials in question to the university. For the Minnesota Court of Appeals, such ownership triggered the application of Chapter 13. "When … the government agency's ownership of the materials is clear and undisputed, a threshold requirement of "physical possession" invites arbitrary application which would be at odds with the statute. The same disclosure responsibility should apply to information retained by the private agent as to information in the hands of the public agency." *Pathmanathan v. St. Cloud State University* (Minn. Ct. App. 1990) In the parlance of Chapter 13, data need not be physically "maintained" within the confines of a government entity's facility for it to be "government data," and thus subject to the statute.

In a similar vein, the Commissioner of Administration (in Data Practices Advisory Opinion 99-006) held that data maintained for a government entity in a contractor's electronic database was subject to public disclosure, due to the interaction of Chapter 13 and the Official Records Act. Under the facts that led to the opinion, a requester (William Wakefield of Data Lister, Inc.) had sought various workers' compensation verification data maintained by the Minnesota Department of Labor and Industry (DOLI), including data elements such as a "policyholder's name, address, inception date, insurance company, class code, coverage status" and related data. Pursuant to state statute, DOLI gathered workers' compensation information on various Minnesota companies, and served as the repository for such data. In 1983, the Minnesota Legislature enacted a law permitting DOLI to contract with private entities in the service of helping DOLI meet its statutory requirements. DOLI subsequently contracted with the Minnesota Workers' Compensation Insurers Association, Inc. (MWCIA), a private entity, to help perform its statutory duties.

In describing DOLI's relationship with MWCIA, DOLI Commissioner Gretchen Maglich stated that, "We use a computer terminal to reach into the data which has been filed with the MWCIA as our designee … The MWCIA in effect acts as our department's electronic filing cabinet." Despite this arrangement, DOLI maintained that it was not obligated to produce data to Mr. Wakefield because DOLI did not "possess the data in the form of copies of all insurance filings" and that such insurance verification data "is the property of MWCIA." MWCIA concurred with DOLI, holding that the state agency was "merely a contract user of a privately owned database." The Commissioner of Administration held otherwise, finding that DOLI and MWCIA had discounted the role of Chapter 13 in their data maintenance arrangement:

> The Commissioner respectfully disagrees with the DOLI/MWCIA position. First, it does not take into account Chapter 13's public access requirements.
>
> Commissioner Maglich stated that the contract with MWCIA allows for something very similar to what the department

> traditionally had in the paper filing system … When DOLI was the entity that collected, filed, and maintained the insurance verification information, DOLI would have been able to access all the data in any manner …
>
> Furthermore, if an individual requested access to certain public insurance information, DOLI was obligated to provide access to those data.

The Commissioner of Administration also highlighted the role of Minnesota's Official Records Act (Minn. Stat. § 15.17) in the DOLI/MWCIA arrangement, given DOLI's statutory responsibility to collect and maintain workers' compensation information:

> Another problem with DOLI's position is that it does not appear to take into account the requirements imposed by Minnesota Statutes, section 15.17, the official records act. Subdivision 1 of section 15.17, states, All officers and agencies of the state...shall make and preserve all records necessary to a full and accurate knowledge of their official activities. When read together, section 15.17 and section 13.03 impose an obligation upon government entities to preserve records used to conduct public business so those records will be available for public inspection.

The Commissioner ended the opinion by noting that "DOLI should make arrangements to provide the data to the requestor."[9]

[9] In the 1999 session, the Minnesota Legislature amended Chapter 13 to state that when a private person contracts with a government entity to perform a "government function," all of the private persons's data relevant to that government function is "government data" under Chapter 13. (Minn. Stat. § 13.05 subd. 11) In both *Pathmanathan* and Data Practices Advisory Opinion 99-006, the private entities involved had contracts with government entities. However, in both circumstances, the commissioner did not rely on Minn. Stat. § 13.05 subd. 11 to establish that the data in question was "government data," since that provision was not yet included in the statute. Instead, the commissioner relied on the statutory definition of "government data" in Minn. Stat. § 13.02 and the operation of the access provisions set out in Minn. Stat. § 13.03. The commissioner also relied on the data's interaction with another statutory authority (Minn. Stat. § 15.17); on St. Cloud State University's express ownership of data held by a contractor, as articulated in a contract (in *Pathmanathan*); and on the nature of the contractual relationship between DOLI and MWCIA, through which data was maintained for state agency DOLI (and thus effectively maintained *by* DOLI for the purposes of the MGDPA). (Opinion 99-006)

Data on non-government device or account can be "government data"

As commercially available data management technology has exploded - including all manner of inexpensive digital infrastructure - such as "smart" phones and third-party e-mail solutions - government employees have increasingly used personal devices and accounts to conduct government business. The Commissioner of Administration has opined - in a series of opinions - that when government employees use these personal, non-governmental devices and accounts to conduct government work, the data that results is "government data" under Chapter 13. This is because a government employee's use of a non-governmental device or account to "create, receive, collect, maintain, or disseminate" data makes that data "government data" by operation of the plain language of the statute.

In 2018, such a matter arose in the context of a data request filed by the Star Tribune newspaper, which sought access to certain text messages of St. Louis County Commissioner Peter Stauber. In replying to the Star Tribune, the county wrote: "[w]ith regard to text messages, Commissioner Stauber does not have a county owned mobile device, therefore the county is not the custodian of the data." In Data Practices Advisory Opinion 18-013, the Commissioner of Administration opined that "government employees and public officials can create and maintain government data on personal devices and accounts."[10] The Commissioner cited several other opinions on related matters, including Data Practices Advisory Opinion 08-028 (an audio recording of a school board meeting made by a school superintendent on a personal recorder was "government data" accessible to a public requester even after the superintendent had retired); Opinion 10-023 (e-mail correspondence in the private e-mail account of the Mayor of North St. Paul was "government data" if it related to an issue involving the City of North St. Paul); and Opinion 12-019 (text messages and e-mails involving members of the Duluth Airport Authority and members of a private company sent from and received on personal devices of authority members were "government data.")

[10] Commissioner Stauber's text messages were ultimately released pursuant to a court order in October of 2018. https://www.mprnews.org/story/2018/10/30/judge-orders-prompt-release-stauber-emails-with-gop-group

Data Practices Advisory Opinion 10-023 is worth exploring in further detail, as the functions undertaken by the Mayor of North Saint Paul in operating his private e-mail account for government purposes would have involved creating government data (in the form of e-mail messages); "disseminating" such messages through the use of the account; "receiving" messages in the same account; and "maintaining" both sets of government data within the account. Virtually all commercially available e-mail accounts (such as Google's "Gmail" platform) are "cloud-based," meaning that all of the e-mail data is stored on remote computer servers, rather than on the users's local computer. In order to interact with such data, the user must possess a password to the e-mail portal, and use that password to "log-in." Once logged-in, the user can then create or disseminate e-mail data, or review e-mail data that has been received, collected, or maintained in the account.[11]

Data created by another party can be "government data"

Under Chapter 13, data can also be "government data" even if it has not been created by a government entity. Data created (in whole or in part) by non-government entities that has been "received, collected" or "maintained" by the government is still "government data" subject to Chapter 13.

For instance, the Commissioner of Administration opined that this was so in Data Practices Advisory Opinion 00-042, which held that videotapes of cable access television programs created by private individuals were "government data" when maintained by a government cable commission.

Minnesota courts have followed this same line of logic in cases involving data created by private entities, but maintained by the government. In *Shakopee Mdewakanton Sioux v Hatch,* 2002 WL 1364113, tribal gaming audits collected and received by the Minnesota Department of Public Safety were found to be "government data" under Chapter 13. "The applicability of

[11] It is worth noting that viewing e-mail messages in an e-mail portal does not require the user to "download" that data to a local computer's long-term storage, as the data is temporarily stored in - and viewable via - the computer's short-term memory cache.

MGDPA disclosure is activated by the State's receipt or possession of documents, without regard to the source or ownership of the documents." Likewise, the financial statements of a municipal power agency not subject to the MGDPA, once "received" by a government entity, were subject to disclosure under the MGDPA *Southern MN Municipal Power v. Boyne,* 578 N.W.2d 362 (1998). "Once in the control of the respective cities, who are subject to the Data Practices Act, these statements are available for inspection by the general public."

In *City Pages v. State of Minnesota,* (Minn. Ct. App. 2003) private law firm billing records collected by the Minnesota Attorney General's Office were found to be "government data" within the coverage of the statute. "The billing records are government data within the meaning of the statute; they meet the statutory criterion of being collected and received by a state agency." In the *City Pages* case, Blue Cross had unsuccessfully argued that the billing records of a case it had litigated in conjunction with the State of Minnesota were not "government data" within the scope of the MGDPA.

Government data and the "Box"

District Court order is incorrect

In light of the preceding legal authorities, the district court's holding - that draft data for the State of Minnesota's Amazon bid that was stored in the "Box" portal for DEED's use, review, and modification was not "government data" - was incorrect as a matter of law.

Through statements contained in an affidavit filed during litigation, DEED employee Thu-Mai Ho-Kim described several types of data present in the Box: data that she admits she and DEED staff "transmitted" and "uploaded" to the Box; data that she says was not created or uploaded by her; and data that she had initially uploaded, but which had been substantially edited

by another party.[12] Ms. Ho-Kim also indicated that there were several documents - such as the "substantially edited" document - that she viewed via the Box portal, but did not download to her DEED computer. (Ho Kim Aff. 5, 6)

In line with DEED's representations and arguments, the district court held that it was "immaterial whether DEED "viewed" or had "access" to the drafts or final Proposal because the MGDPA does not cover data that a government entity merely accessed or viewed. Rather, the MGDPA covers only data that a government entity "collected, created, received, maintained, or disseminated." In adopting DEED's argument - which was framed around the absence of the term "access" in Minn. Stat. § 13.02 Subd. 7 - the court ignored activities undertaken by DEED that clearly fell within the scope of Chapter 13. For instance, from a purely technological standpoint, both "access" and "viewing" require the "receipt" of data by a user's computer.

Box data was "received, collected, and maintained" by DEED

As a threshold matter, DEED interacted with the Box data using the active verbs set out in the statute itself. In the Ho-Kim affidavit, DEED admitted to "transmitting" (essentially "disseminating") data through its use of the Box. However, other activities described in Ho-Kim's affidavit and DEED e-mails clearly indicate that DEED employees also "received" and "collected" data via the Box, and thereafter "maintained" it - even if DEED did not want to characterize its activities in that particular way.

Regarding the receipt of data, Merriam-Webster dictionary defines "receive" as "to come into possession of" or "to act as a receptacle for" something. In the case of the draft Amazon bid

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[12] Ms. Ho-Kim's statements make clear that DEED had "provided" data for inclusion in the Amazon bid, and that "substantial editing" to that data had occurred. The editing of data meant for inclusion in the Amazon bid created a "draft," and such a draft was necessarily responsive to PRM's data requests.

Despite this, GMSP submitted a declaration during litigation representing that "draft versions of the final Bid document, were not uploaded or saved to the cloud-based service called Box." (*See* Declaration of Joel Akason) GMSP's representation did not address the question of whether *other* drafts - which GMSP and/or DEED did not choose to call "draft versions of the *final* Bid" (emphasis added) had been housed on the Box. The record evidence, in fact, indicates that such draft material existed in the Box account.

data, e-mails and affidavits make clear that DEED employee Thu-Mai Ho-Kim "received" (or came "into possession of") data via the use of the Box portal, as evidenced by the fact that the data - housed on remote computer server space rented from "Box" - was visible on her local computer monitor at DEED. Without "receiving" the data through her use of the Box, Ms. Ho-Kim would not have been able to view the data at all.

The technological reality of how cloud data functions serves to underscore DEED's "receipt" of data through its use of the Box. Cloud data processes turn upon the local receipt of remotely stored data. The point of cloud data management is to house data somewhere besides a local user's computer for redundancy purposes, administrative ease, or other considerations. In order to view remotely-stored cloud data, digital "bits" that comprise the data must first be transmitted from their remote storage location; must transit the internet; and then must be received by a computer accessible to the local user.[13] "Downloading" such data to a computer's long-term memory is not a necessary part of "receiving" it, as remotely stored data is initially made visible to a user through being received in a computer's web browser.[14]

In terms of "collecting" data, DEED also used the Box portal as a means to "collect" data pertinent to the Amazon project. Merriam-Webster's dictionary defines "collect" as "to bring together into one body or place" or "to gather or extract from a number of persons or sources."

In a September 28, 2017 e-mail sent from GMSP to DEED, Valerie Vannett of GMSP told DEED staffers and others involved in discussions about the Amazon project that "I can open a folder on Box, our file share system, as a repository for documents/information. Please give me

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[13] "Data transmission is the transfer of data or information between a source and a receiver. The source transmits the data and the receiver receives it." *See generally*, Shashi Banzal, *Data and Computer Network Communication* (2007)

[14] Once received by a local computer, data is temporarily stored in the computer's short-term memory cache until it is either over-written, or until the computer is turned off. Data in the short-term cache may also be saved to the computer's long-term memory by means of "downloading" or otherwise copying the data to a local memory device. This process explains how e-mail messages are visible to a user once they are received, without the entire e-mail message being "downloaded" and saved to the computer's long-term memory.

the e-mail for the person(s) you'd like to have access and I'll get that moving - the Box system will send them an invite to the folder." In this e-mail, Ms. Vannett also stated that, "If you'd rather e-mail docs to me or Neil Young [of DEED] you're welcome to do that as well."[15] Ms. Vannett's inclusion of DEED as a party who would be receiving data related to the Amazon Bid demonstrates that the Box system - in addition to e-mail - was a conduit utilized by DEED for "receiving" Amazon Bid-related data, and for gathering such data from disparate sources and "collecting" it in one place.[16] Ms. Vannett's sentence about granting DEED "access" to the Box file-sharing system establishes that from that point forward, DEED was able to use the Box portal as a tool for "receiving" and "collecting" Amazon bid data, since DEED had been granted administrative permissions to utilize the Box portal.[17]

What is true of "collection" is also true of "maintenance." Black's Law dictionary defines "maintain" as "to keep in an existing state" or to "preserve or retain." DEED clearly retained data pertinent to the Amazon bid through its use of the Box, keeping such data available for use and reference while the Amazon Bid was being formulated. The record evidence highlighted this fact. In her affidavit, Ms. Ho-Kim stated that she utilized the Box to reference stored material related to the Amazon bid at various times, noting that "[t]he administrative rights granted to me by GMSP on the Box allowed me to view other folders related to its

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[15] The record evidence shows that DEED and GMSP worked in tandem to develop the Amazon bid, which was produced for and submitted on behalf of the State of Minnesota. For instance, in a DEED press release issued at the time of the bid's submission to Amazon, DEED Commissioner Hardy stated that, "Today, the Department of Employment and Economic Development (DEED) and Greater MSP submitted a comprehensive and competitive response to Amazon's HQ2 Request for Proposal. . . . The State of Minnesota's bid is the culmination of six weeks of hard work by local communities, business leaders, and our economic development partners." (*See* Am. Comp. Ex. Q)

[16] It is notable that in her e-mail, Ms. Vannett stated that documents pertinent to the Amazon project could be transmitted to both herself at GMSP, and to Neil Young at DEED. Despite this evidence that both e-mail and the Box portal were used as conduits for DEED to receive and collect data related to the Amazon Bid, DEED treated those conduits far differently - choosing to disclose e-mails the agency had received and collected, while arguing that most data received and collected via the Box was not "government data."

[17] Despite clear context showing DEED's use of the Box to receive and collect data, DEED used references to "access" during litigation to try to cleave off the Box data from coverage by Chapter 13.

Amazon project"[18] (Ho Kim Aff. 5) and that "[a] few days before GMSP's proposal was due to Amazon, I also viewed another file folder on the Box with a title related to topics on which DEED had contributed data." (Ho-Kim Aff. 6) In her affidavit, Ms. Ho-Kim described her use of the Box to store Amazon bid-related materials, stating that she and her colleagues maintained a digital "folder" on a DEED computer that was used for staging "materials in preparation of uploading them to the Box." (Ho-Kim Aff. 8) Likewise, Ms. Ho-Kim described her use of the Box as a place from which she retrieved stored Amazon bid-related materials, which she then modified and housed once again on the Box: "If I wished to edit materials that I uploaded [to the Box] I would have to download them from the Box to my computer, re-save as a new document, and then upload the new document to the Box." (Ho-Kim Aff. 4). As with the "collection" of Amazon bid data, once DEED was granted administrative permissions to utilize the Box, DEED's use of the Box to "maintain" data pertinent to the Amazon bid made the Box data "government data."

DEED's interaction with data in the Box is amply described by the series of active verbs that the legislature used in Chapter 13's definition of "government data," and thus falls within the ambit of the statute's plain language on that score alone. The framers of the Data Practices Act worked diligently to ensure that the government's data-related activities were so broadly described by Minn. Stat. § 13.02 Subd. 7 that none of its substantive interactions could escape categorization as government data.[19] The substance of DEED's interactions with Amazon-related data stored in the "Box" were the same as with Amazon-related data stored in DEED's e-mail accounts. DEED's attempt to cleave "Box" data off from Chapter 13's coverage was improper, and should not have been validated by the district court.

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[18] Like other filings submitted by DEED during litigation, the Ho-Kim affidavit refers to the Amazon Bid as "Greater MSP's bid" even though the bid is referred to as "Minnesota's" Amazon bid in pre-litigation e-mails and documents.

[19] The Data Practices Act is meant to leave "no discretionary wiggle room for governmental officials to assert that information . . . [is] not appropriate for public disclosure." *See* Donald A. Gemberling & Gary A. Weissman, *Data Practices at the Cusp of the Millennium*, 22 WM. MITCHELL L. REV. (1996).

Remotely stored "Box" data was government data

In its arguments before the district court, DEED made much of the fact that certain data from the Box had been "downloaded" to government computers, but that other Box data had not. According to DEED, only the "downloaded" data fell within the scope of Chapter 13. However, the fact that certain Amazon bid-related data was stored using a cloud-based, third-party software application is not at all relevant to whether such data was "government data" or not. In fact, the government data definition in Minn. Stat. § 13.02 clearly states that data collected, created, received, maintained, or disseminated by any government entity is government data "regardless of its physical form, storage media, or *conditions of use*" (emphasis added).

As noted previously, multiple legal authorities have recognized that the *location* of government data is immaterial to its status as "government data." The Minnesota Court of Appeals affirmed this in *Pathmanathan v. St. Cloud State University,* holding that "[t]he statute does not explicitly require the agency's physical possession … We conclude that the physical possession distinction is not recognized by the statute and the undisputed facts require disclosure of the information." This concept also been long-recognized by a string of Data Practices Advisory Opinions. For instance, notations maintained by a school board member on a home telephone log were considered to be "government data" when those notes related to government business. (Data Practices Advisory Opinion 95-013). Work-related materials utilized by a government employee who was working from home were likewise "government data." (Data Practices Advisory Opinion 95-008). And in an opinion with important ramifications for the Amazon case, data maintained by the government in a third-party electronic database was considered by the Commissioner of Administration to be "government data." (Data Practices Advisory Opinion 99-006).

The circumstances involving Opinion 99-006 and those involving the Amazon case are strikingly similar, in that both centered on data used for a government project that was housed on a third-party computing system. What is strikingly *different* about the two is the treatment

afforded that data by the Commissioner of Administration versus the district court judge in the Amazon case.

The facts behind Opinion 99-006 involved workers' compensation data held in the databased of a private contractor (MWCIA) on behalf of state agency DOLI. In describing its use of the database, DOLI's commissioner told the Commissioner of Administration that, "We use a computer terminal to reach into the data which has been filed with MWCIA … The MWCIA in effect acts as our department's electronic filing cabinet." In reaction to DOLI's contention that such workers' compensation data could not be provided to a public requester, the Commissioner of Administration opined that: "The Commissioner respectfully disagrees with the DOLI/MWCIA position. First, it does not take into account Chapter 13's public access requirements … DOLI should make arrangements to provide the data to the requestor."

Just as DOLI used the MWCIA database to collect and maintain government data (workers' compensation data), DEED used the Box account established by GMSP to receive, collect, and maintain government data (draft Amazon bid-related data). However, in the case of the Box, the district court in *Public Record Media v. DEED and Greater MSP* adopted DEED's argument that DEED had only "accessed" certain Box data, but had not "received" or "maintained" it. The court then held that it was "immaterial whether DEED "viewed" or had "access" to the drafts or final Proposal," as they were, according to the court, not covered by Chapter 13.

In comparing these matters, the Commissioner of Administration was correct, and was operating within the interpretive tradition of Chapter 13, while the district court's holding that cloud-based Box data was beyond the reach of Chapter 13 was incorrect, and was in tension with existing interpretations of Chapter 13.

Non-government account ("Box") may be used to store government data

Just as the *location* of data has no bearing on its status as government data, the same is true of the *modality* used to interact with that data. So long as data has been "created, collected, received, maintained, or disseminated" by a government entity, it is within the purview of Chapter 13, regardless of the mechanism utilized by the government.

In its arguments, DEED asserted that since draft Amazon bid data was housed on a third-party file-sharing system, that precluded the data from being subject to the MGDPA. "As an initial matter, Greater MSP maintained the Box." (*See* Defendant DEED's Memorandum in Support of Motion to Dismiss") Here, DEED's position is once again countered by advisory opinion guidance opining that personal (and thus non-governmental) devices and accounts can be used to create, collect, receive, maintain, or disseminate government data. In Data Practices Advisory Opinion 18-013, the Commissioner opined that "government employees and public officials can create and maintain government data on personal devices and accounts" and cited several previous opinions on related matters, including opinions 08-028, 12-019, and - importantly -10-023 (e-mail correspondence in the private e-mail account of the Mayor of North St. Paul was "government data" if it related to an issue involving the City of North St. Paul). In these opinions, the Commissioner repeatedly underscored the idea that even though government employees had used personal devices and accounts to receive, collect, or maintain government data, that data was still subject to Chapter 13 since it met the statutory definition. The *modality* or *infrastructure* through which the data was received or collected - whether a personal e-mail account, cell phone, or similar - was immaterial. Thus, even though GMSP administered the Box portal used in preparing the Amazon bid, all of the data that *DEED* collected, created, received, maintained, or disseminated while using the Box was government data subject to Chapter 13.

Even if one went further (as DEED did in its arguments) and asserted that the draft Amazon bid data was primarily, if not solely, a product of GMSP[20], that still would not have prevented the data from falling within the ambit of Chapter 13. Once "received" by DEED, any Amazon bid data would have been subject to the MGDPA and all of its provisions. "The applicability of MGDPA disclosure is activated by the State's receipt or possession of documents, without regard to the source or ownership of the documents." *Shakopee Mdewakanton Sioux v Hatch 2*002 WL 1364113

Keezer v. Spickard **does not apply**

In seeking to defend itself against PRM's Data Practices lawsuit, DEED relied heavily on *Keezer v. Spickard* (Minn. Ct. Ap. 1992). In *Keezer*, the Minnesota Court of Appeals held that the content of oral conversations between a sheriff and a Human Services Department employee - and between those government employees and third persons - was not government data because the MGDPA does not cover "unrecorded data that exist only in a human brain." DEED relied on *Keezer* to argue that when DEED employees used the Box to review Amazon bid data, they were simply making "mental impressions" that did not fall under the MGDPA. However, DEED's argument avoided a key fact - namely that via the Box, DEED employees received and maintained *recorded* data, such as digital documents. The presence of actual recorded data, as opposed to mere mental impressions, makes *Keezer* inapplicable.

DEED's reliance on *Keezer* is not the first time that a government entity has attempted to use that case as a means to avoid Chapter 13's strictures. In the facts encompassed by Data Practices Advisory Opinion 94-023, the City of Brooklyn Park asserted that police supervisory

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[20] DEED's assertion that the Amazon bid belonged solely to GMSP is contradicted by thousands of pages of correspondence showing joint work on the project by both DEED and Greater MSP over a six week period, including a September 12, 2017 e-mail sent by DEED to Amazon representing that DEED and GMSP were "co-leads" in developing Minnesota's Amazon bid: "On behalf of the State of Minnesota and our partners at the Greater Minneapolis-St. Paul Partnership (Greater MSP), we are formally acknowledging our intent to to submit site options for your project by the appropriate due date. For this important project, we will have two co-leads for which all official questions/requests and submissions will come from. These two co-leads are me (Jeff Rosate) [of DEED] and Joel Akason [of GMSP]." (*See* Am. Comp. Ex. E)

files were "not government data" since they only served as memory aids, and that it was therefore "not proper to conclude that just because a supervisor's files are generated during a supervisor's on-duty time that the generation of the data in those files makes the data government data." The Commissioner disagreed, opining that:

> "The supervisors' files, unlike the data complained about in the *Keezer* case, are kept in some physical form outside the mind of the individual supervisors working for the City. Application of the statutory definition of the term government data, both as a matter of simple interpretation and as an interpretation of the legislative policy inherent in the definition leads to a conclusion that the supervisors' files are government data for purposes of the MGDPA."

As with the supervisory files at the center of Data Practices Advisory Opinion 94-023, draft Amazon bid data in the Box portal was recorded data subject to the MGDPA, as opposed to *Keezer's* "unrecorded data that exist only in a human brain."

Carufel **case on "access" does not apply**

Just prior to the issuance of the district court's order in the Amazon case, the Minnesota Court of Appeals issued an unpublished opinion in *Andrew Carufel v. Minnesota Department of Public Safety et al.* (Minn. Ct. Ap. 2018) In that case, plaintiff Andrew Carufel had alleged several causes of action, including violations of the MGDPA. Carufel's allegations relied, in part, on certain location data maintained on the web site of Intoxalock, a private company. Intoxalock maintained records on participants in an "Ignition Interlock Participation Agreement" program run by the Minnesota Department of Public Safety (DPS). Under the Ignition Interlock program, participants who used an "ignition interlock" device manufactured by Intoxalock had their use of the device recorded by Intoxalock. Program guidelines issued by DPS further noted that participant data had to be hosted on a web site operated by Intoxalock, where DPS could access the data as needed.

Carufel's complaint stated that location data was "not necessary for the administration and management of the Ignition Interlock Program," and therefore DPS had violated the MGDPA when the device manufacturer (Intoxalock) collected and stored location data on the web site to which DPS had access.[21] The Minnesota Court of Appeals disagreed with the proposition that the Intoxalock data was "government data," noting that Carufel's complaint did not allege that the data sought was "collected, stored, or received by the state respondents" and that Carufel's claim failed because the MGDPA "does not regulate the government's ability to access data."

DEED seized upon *Carufel* to buttress its theory that DEED employees had only "accessed" the Box data, thereby placing it outside of Chapter 13's coverage. The facts involving the Amazon data in the Box and the data on the Intoxalock web site are far different, however, and those facts make *Carufel* inapplicable.

In *Carufel*, the Minnesota Court of Appeals held that "presentation and storage of data by private manufactures' on their websites is not 'collection and storage of data' by the government." The complaint in *Carufel* did not allege that DPS had collected or stored data on program participants, but rather that Intoxalock had collected, received, and maintained such data. This is a far different set of circumstances than in *PRM v. DEED*, where PRM not only *pled* that DEED had received and maintained Amazon bid data through the Box, but the record evidence showed that DEED had *actually* received, collected, and maintained Amazon bid-related data through the Box. Actual "receipt" or "collection" is distinct from the mere ability to access, in that the former triggers the application of the MGDPA. As the Minnesota Court of Appeals noted in *Carufel*:

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[21] The violation alleged by Carufel was premised, in part, on Minn. Stat. § 13.05 subd. 3, which states that "Collection and storage of all data on individuals and the use and dissemination of private and confidential data on individuals shall be limited to that necessary for the administration and management of programs specifically authorized by the legislature or local governing body or mandated by the federal government."

> "The complaint asserts that state respondents have the *ability* to access location data through the device manufacturer's Web Portal. Importantly, the complaint does not allege that state respondents have *actually* accessed any location data through the Web Portal."

The actual receipt, collection, and maintenance of tangible data (even if colloquially referred to as "accessing" data) does not present the same deficiencies as those found in *Carufel,* where the "access" that was pled only involved the *possibility* of accessing data. This important distinction was not recognized by the district court in the Amazon litigation, and the court adopted DEED's semantic argument that since DEED employees only "accessed" data held in the Box, such data was not subject to Chapter 13, since the word "access" is not included in Minn. Stat. § 13.02 Subd. 7. A clear-eyed view of DEED's real-world activities involving the Box data indicates that those activities fell within the scope of the active verbs that make up the "government data" definition in Minn. Stat. § 13.02, and that DEED's attempt to re-name them did not alter the substantive nature of those interactions.

Summary

The draft Amazon bid data that was received, collected, and maintained by DEED via the cloud-based "Box" portal was "government data" under the statute's plain language, and under existing legal authorities interpreting the statute. The district court order in *Public Record Media*

v. DEED and Greater MSP should not be relied upon for guidance in interpreting Chapter 13 and its interaction with cloud-based data.[22]

[22] Separate, but equally important issues surround the *final* Amazon bid - as opposed to the draft bid data in the Box - such as its status as an "official record" subject to Minn. Stat. § 15.17 (the "Official Records Act").

Minn. Stat. § 15.17 requires that "All officers and agencies of the state, counties, cities, towns, school districts, municipal subdivisions or corporations, or other public authorities or political entities shall make and preserve all records necessary to a full and accurate knowledge of their official activities."

In developing and submitting the Amazon bid to further economic development in Minnesota, DEED was utilizing statutory authority granted to it by the Minnesota Legislature. For instance, Minn. Stat. § 116J. 8731 (The Minnesota Investment Fund) permits DEED to offer "financial and technical assistance" for "business start-up, expansions, and retention." Likewise, Minn. Stat. § 116J.8748 (The Minnesota Job Creation Fund) permits DEED to offer capital investment awards to business.

Via the Amazon bid, DEED Commissioner Hardy notified Amazon that it may be eligible for such financial incentives. This exercise of statutory authority was clearly an "official activity" of the agency. Therefore, the final Amazon bid that documented such activity constituted an "official record" subject to Minn. Stat. § 15.17, and it should have been preserved by DEED for public access under the MGDPA. Instead, DEED claimed that it did not possess the final Amazon bid - that only its private partner GMSP did - and therefore it could not turn the bid over under the MGDPA.