Legislative Commission on Data Practices

January 11, 2024

Written Testimony of Matt Ehling
Board Member
Minnesota Coalition on Government Information

Dear Commission members,

I write today on behalf of the Minnesota Coalition on Government Information (MNCOGI), a non-partisan, nonprofit organization whose all-volunteer board I sit on.

I regret that I cannot attend the January 11 meeting of the Data Practices Commission ("Commission") due to a work conflict, but I am pleased to hear that the Commission will be discussing HF 2480, a bill authored by Reps. Niska and Scott, pertaining to the classification of data maintained by the Office of the Attorney General ("OAG").

MNCOGI's board endorses HF 2480 for the following reasons:

1) HF 2480 would return Minn. Stat. § 13.65 to its prior effect — returning AGO data that had been presumptively public for over forty years to its prior "public" classification;

2) The passage of HF 2480 would send a strong signal to Minnesota government entities that the legislature takes the public data requirements of Chapter 13 seriously, and does not intend that government entities might escape those requirements by employing legal theories* that contravene Chapter 13's long-lived statutory framework.

At the January 11th hearing, MNCOGI board member Don Gemberling** will be testifying on behalf of our organization. For over three decades, Mr. Gemberling helped shepherd the creation and implementation of the Data Practices Act, including processing the original temporary classification of data that resulted in the AGO's current data statute - Minn. Stat. § 13.65.

MNCOGI thanks the commission for this opportunity to submit comments, and hopes that the hearing will result in bi-partisan support for HF 2480.

* See attached portion of the amicus brief filed by MNCOGI in the *Energy Policy Advocates v. Ellison* case (Minn. 2022) relevant to the issues that HF 2480 addresses.
**Mr. Gemberling is the former director of IPAD, the predecessor to the Minnesota Department of Administration's current Data Practices Office. On October 4, 2023, Mr. Gemberling was inducted into the National Freedom of Information Coalition's State Open Government Hall of Fame.

EXCERPT FROM FRIEND-OF-THE COURT BRIEF
FILED BY MINNESOTA COALITION ON GOVERNMENT INFORMATION
IN *ENERGY POLICY ADVOCATES v. ELLISON* (MINN. 2022)

EXCERPT PERTAINS TO § 13.65 ISSUE ADDRESSED BY HF 2480

These disclosures honor Thomas Jefferson's wisdom that the way to achieve an informed electorate is by "giv[ing] them full information of their affairs through the channel of ... public papers, and to contrive that these papers should penetrate the whole mass of the people."[20] Or, put another way, "[t]he basis of our government[] being the opinion of the people, the very first object should be to keep that right."[21]

That right now stands in direct jeopardy. In this case, OAG asks the Court to adopt new, aggressive views on the scope of OAG data available to the people about OAG's policy-making activities. If the Court accepts this invitation, the people's access to OAG communications (like the ones detailed above) stands to disappear. Amici thus urge the Court to follow the plain text, structure, history, and purpose of the Data Practices Act, all of which directly repudiate OAG's troubling position.

II. Under §13.65, subd. 1, the Data Practices Act (DPA) guarantees public access to OAG data about OAG's public-policy activities when no individual person is the subject of the data.

In December 2018, Respondent Energy Policy Advocates submitted data requests to OAG seeking emails and other correspondence related to public-policy efforts by OAG to address climate change. Resp.Br.7-10. OAG refused to produce any of the requested data on the ground that OAG did not consider this data to be "public" under the DPA. *See id.* at 9. OAG later justified this refusal by citing Minn. Stat. §13.65.

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[20] Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *available at* LIBRARY OF CONGRESS, https://bit.ly/2YiUG34.

[21] *Id.*

Part of the DPA, §13.65 safeguards the right of the people to obtain and review "Attorney General Data." Section 13.65 does this (as relevant here) by making OAG data on "administrative or policy matters" public unless the data involve both a non-final public action and an individual (natural person) subject. OAG now argues that §13.65 bars public access to policy-related OAG data involving no individual subject—a view that defies the DPA's plain text, structure, history, and purpose.

A. Plain text establishes that OAG data on policy matters is public when no data-on-individuals is involved.

"The object of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Cilek v. Office of Minn. Sec'y of State*, 941 N.W.2d 411, 415 (Minn. 2020) (some punctuation omitted). The Court applies statutes "according to [their] plain meaning" and will "not add words or phrases to unambiguous statutes or rules." *Id.*; *see also Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604 (Minn. 2014).

The DPA regulates "the collection, creation, storage, maintenance, dissemination, and access to government data." Minn. Stat. §13.01, subd. 3. To this end, the DPA expressly mandates that all government data is presumed "accessible by the public for both inspection and copying." *Id.*; *see id.* §13.03, subd. 1 ("All government data collected, created, received, maintained or disseminated by a government entity shall be public ...."). This presumption of public access can be defeated only if a "federal law, a state statute, or a temporary classification of data" clearly provides that "certain data are not public." Minn. Stat. §13.01, subd. 3.

The DPA's presumption of public access is "the heart" of the DPA. *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991). The Court has emphasized "the general presumption that data are public informs our interpretation of every [DPA] provision." *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 347 n.2 (Minn. 2016). Based on this principle, the Court has concluded the DPA does not support interpreting DPA "exception[s] to swallow" the DPA's "presumption" of public access. *Id.*

Of equal importance in DPA interpretation is the law's unique data-classification system. "[E]very government data must fit" into "one and only one" of "six discrete classifications."[22] Data that identifies a natural person are either: (1) "public data on individuals"; (2) "private data on individuals"; or (3) "confidential data on individuals." Minn. Stat. §13.02, subds. 3, 12, 15. For data with no identifiable natural-person subject, such data are either: (1) "public data not on individuals"; (2) "nonpublic data"; or (3) "protected nonpublic." *Id.* §13.02, subds. 4, 9, 13.

Through these categories, the DPA "removes virtually all discretion concerning [data] access from administrative agencies of state and local government."[23] Applying the DPA then requires careful observance of DPA terminology in classifying given data. Courts may not "effectively override the legislative determination" to classify data one way versus another. *State v. S.L.H.*, 755 N.W.2d 271, 279 (Minn. 2008).

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22 Donald Gemberling & Gary Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act – From "A" to "Z,"* 8 WM. MITCHELL L. REV. 573, 595-96 (1982).

23 *Id.* at 579.

Data on Individuals	Degree of Accessibility	Data not on Individuals
1) Public[8]	Accessible to anyone[9]	2) Public[10]
3) Private[11]	Accessible to data subjects and to governmental officials whose duties reasonably require access[12]	4) Nonpublic[13]
5) Confidential[14]	Accessible only to government officials whose duties reasonably require access[15]	6) Protected, nonpublic[16]

Law Review Chart of the DPA's Data-Classification System[24]

The DPA's presumption of public access and data-classification scheme crystallize the plain meaning of the DPA's attorney-general data provision. Section 13.65, subdivision 1, establishes that five subcategories of "data created, collected and maintained by the Office of the Attorney General are **private data on individuals**." One of the five subcategories is "communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions."

The DPA expressly defines "private data on individuals" as "data made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data." Minn. Stat. §13.02, subd. 12; *see also id.* §13.02, subd. 1 (establishing that the definitions in §13.02 control the entire DPA: "[a]s used in" the DPA "the terms defined in this section [i.e., §13.02] have the meanings given them").

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24 Gemberling & Weissman, *supra* note 22, at 579.

Read together, §13.65 and §13.02 provide that "communications and noninvestigative files regarding administrative or policy matters" are "private data on individuals" when the communications and files are both "(a) not public; and (b) accessible to the individual subject of those data." By extension, if such communications or files lack any individual subject able to access the data, then §13.65, subdivision 1 does not apply, leaving in place the DPA's presumption of public access.

Against this plain-text reading, OAG argues that under §13.65, subd. 1, OAG may withhold policy-related OAG data even when no "private data on individuals" is involved—i.e., the provision also covers "data **not** on individuals." OAG.Br.7-15. But this is not how the DPA works. Under the DPA's data-classification system, "private data can only be data on individuals" and the legislature uses "'private data on individuals' or its statutory numeric equivalent" as a careful, precise term to establish when data-on-individuals "are to be treated as 'private data.'"[25]

Had the legislature meant for §13.65, subdivision 1—expressly titled "private data"—to further cover data-not-on-individuals, the legislature would have said so. The DPA uses the classification of "**nonpublic data**" when the law intends to expose data-not-on-individuals to the same kind of access restrictions as "private data on individuals." The DPA defines nonpublic data as "data not on individuals made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data." Minn. Stat. §13.02, subd. 9.

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[25] Gemberling & Weissman, *supra* note 22, at 629.

If §13.65, subdivision 1 was meant to reach beyond "private data on individuals," the legislature would have declared the data regulated by subdivision 1 "are private data on individuals **or nonpublic data**." Many other DPA provisions bear witness to this reality. For example, the DPA provides that "[e]lectronic access data are private data on individuals or nonpublic data." Minn. Stat. §13.15, subd. 2; *see, e.g.*, Minn. Stat. §13.201 ("data ... are classified as private ... or nonpublic"); §13.44, subd. 3(b) ("private data on individuals or nonpublic data"); §13.591, subd. 1 ("data ... are private or nonpublic data"); §13.64, subd. 3 ("data ... are private data on individuals or nonpublic data"); §13.82, subd. 7 ("[i]mages and recordings ... are classified as private or nonpublic data").

OAG thus asks the Court to add the words "or nonpublic data" to §13.65, subdivision 1—words the legislature did not use. But this Court "will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently." *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006); *see also, e.g., 328 Barry Ave., LLC v. Nolan Props. Grp., LLC*, 871 N.W.2d 745, 749–50 (Minn. 2015) ("[W]e cannot add words to an unambiguous statute under the guise of statutory interpretation."); *see id.* (refusing to add "substantial completion" to limitations provision when legislature used the phrase only in sister repose provision).

Perhaps recognizing this, OAG diverts the Court's attention to Minn. Stat. §13.46, which governs data related to Minnesota's welfare system. OAG.Br.11-13. OAG observes that §13.46, subdivision 2 classifies "data on individuals" as "private data on individuals." *Id.* OAG argues that if

"data must be *about* an individual in order to be classified as 'private data on individuals,' there would have been no need for the legislature to have specified that only welfare 'data on individuals' was protected as 'private data on individuals'" – i.e., "the legislature's mere use of the term 'private data on individuals' would have sufficed." OAG.Br.11.

OAG neglects that the DPA's data-classification system allows the legislature to restrict access to "data on individuals" in two ways – not just one. When the legislature classifies "data on individuals" as "private data on individuals," the legislature allows any individual subject of the data to see the data (while denying access to the general public). But the legislature may also classify "data on individuals" as "**confidential data on individuals**" – a classification that allows only government officials to access data-on-individuals, denying access to the general public and any individual subject of the data. Minn. Stat. §13.02, subd. 3.

Section 13.46, subdivision 2's classification of "data on individuals" as "private data on individuals" then makes perfect sense: it ensures that natural persons remain able to see most welfare data about them. In other instances, the legislature has classified government data-on-individuals as solely "confidential data on individuals." For example, "reports ... by parole or probation officers ... regarding an individual on probation are confidential data on individuals." Minn. Stat. §13.84, subd. 4. Such data classifications cement that §13.65, subdivision 1's use of "private data on individuals" means what it says: this provision governs only data that are about an "individual" (natural) person. *Id.* §13.02, subd. 12.

B. DPA history and structure confirm OAG may not hide data on policy matters involving no data-on-individuals.

Because the DPA's plain text and its application here are "free from all ambiguity," the Court may end its analysis of §13.65, subdivision 1 there. Minn. Stat. §645.16. Alternatively, any possible ambiguity is settled by "contemporaneous legislative history"; the "occasion and necessity" for §13.65; and the "circumstances under which" the legislature passed §13.65. *Id.* §§645.16(1), (2), (7). All of these sources confirm that §13.65, subdivision 1 does not allow OAG to withhold policy-related OAG data that entirely lacks an individual (natural person) subject.

During the 1970s, the legislature began enacting the laws that now comprise the DPA. The legislature started in 1975 with a data-privacy statute. *See* Act of June 5, 1975, ch. 401, 1975 Minn. Laws 1174, 1174–76. The statute's "primary emphasis" was to address the particular "effect of governmental data gathering and utilization on individuals who were the subject of information maintained by governmental agencies."[26]

The data-privacy statute ultimately "la[id] the cornerstone" for the DPA's "most unique feature": its "data classification system" (as noted above).[27] The statute achieved this "by defining the terms 'private data on individuals', 'confidential data on individuals' and 'public data on individuals'" (i.e., the terms on which this case turns).[28]

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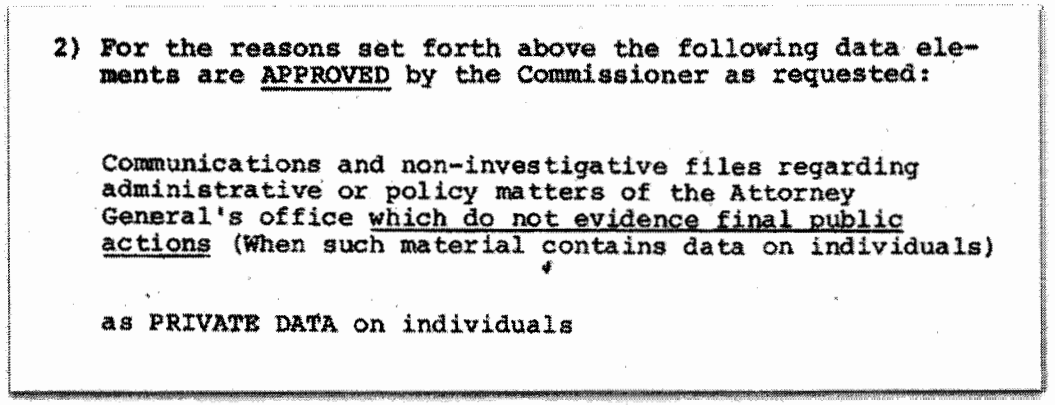
[26] Donald Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, in GOV'T LIAB. 241, 243 (Minn. CLE ed., 1981).

[27] *Id.* at 250.

[28] *Id.* (some punctuation added for clarity).

The next year, the legislature authorized state agencies to "apply to the [C]ommissioner [of Administration] for permission to classify data ... on an emergency basis until a proposed statute can be acted upon by the legislature." Act of April 13, 1976, ch. 283, 1976 Minn. Laws 1063, 1065. The modern DPA affords the same procedure (with certain added limits) in the form of "temporary classification[s]." Minn. Stat. §13.06.

In 1977, OAG sought emergency classification of "communications and noninvestigative files regarding administrative or policy matters of the [State] Attorney General's office which do not evidence final public actions."[29] The Commissioner granted OAG's application, but made clear in his grant of approval that the classification was limited to "PRIVATE DATA on individuals" and applied only **"[w]hen ... material contained data on individuals"** – a condition that OAG accepted.[30]



2) For the reasons set forth above the following data elements are APPROVED by the Commissioner as requested:

Communications and non-investigative files regarding administrative or policy matters of the Attorney General's office which do not evidence final public actions (When such material contains data on individuals)

as PRIVATE DATA on individuals

Commissioner Grant of OAG Emergency Application

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29 Memorandum from Richard Brubacher, Minn. Comm'r of Admin., to Byron Starns, Minn. Chief Deputy AG, on Minn. OAG Request for Emergency Classification of Data on Individuals as Non-Public Under §15.1642, at 1, 4 (Dec. 30, 1977), https://bit.ly/3nWDGbq.

30 *Id.* at 4.

Four years later, in 1981, the legislature enacted the present text of §13.65 as part of an omnibus bill classifying a variety of government data. *See* Act of May 29, 1981, ch. 311, §35, 1981 Minn. Laws 1427, 1440–41. The bill applied the classification of "private" to OAG "[c]ommunications and non-investigative files regarding administrative or policy matters which do not evidence final public actions." *Id.* The legislature thus adopted the same text that the Commissioner of Administration approved in 1977—text that the Commissioner made clear applied to OAG data only to the extent "such material contained data on individuals."[31]

The 1981 data-classification bill's other data-classification sections reflect the legislature's careful, precise use of DPA data classifications to establish when a given DPA statutory provision governed both data-on-individuals and data-not-on-individuals. One significant example is data identifying stolen property, which the legislature declared was "either private or nonpublic depending on the content of the specific data." *See* 1981 Minn. Laws at 1433 (codifying then Minn. Stat. §15.1695, subd. 1(c)). Another example is certain real-estate sales data, which the legislature provided was "private ... or nonpublic depending on the content of the specific data." *Id.* at 1438 (codifying §15.784, subd. 1).

By contrast, for OAG data, the legislature used classifications that govern solely data-on-individuals: "private" and "confidential." *Id.* at 1440–41. The legislature did the same for licensing data and health data. *Id.* at 1437–39 (codifying §15.781, subds. 2 & 3; §15.785, subds. 1 & 2). But

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[31] Brubacher Memorandum, *supra* note 29, at 1, 4.

when a data category called for restrictions on data-on-individuals and data-not-on-individuals, the legislature used separate subdivisions, as evinced by the "confidential" and "nonpublic" subdivisions for housing agency data. *Id.* at 1439 (codifying §15.786, subds. 2 & 4).

In sum: the history and circumstances of §13.65, subdivision 1's enactment confirm that this provision governs only data-on-individuals. That is how OAG first obtained the benefit of a specific classification for policy-related OAG data: by agreeing that this classification applied only "[w]hen ... material contained data on individuals."[32] And that is how the legislature structured the classification in 1981: as one about "private" data alone, rather than as one reaching "private or nonpublic data."

C. Adopting OAG's view of §13.65 would harm the DPA.

To the extent that §13.65 remains ambiguous even after legislative history and structure have been examined, the Court may weigh "the consequences of ... particular interpretation[s]." Minn. Stat. §645.16(6). This consideration then counsels rejection of any §13.65 interpretation that would harm the DPA overall, for "the legislature intends the entire statute to be effective and certain." Minn. Stat. §645.17(2).

OAG's reading of §13.65 risks such overall harm in three ways:

First, OAG's reading of §13.65 strikes at "the heart" of the DPA: its general presumption that government data are public. *Demers*, 468 N.W.2d at 73. This presumption has been part of the DPA since 1979,

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[32] Brubacher Memorandum, *supra* note 29, at 1, 4.

when the legislature established that: "[a]ll government data ... **shall be public unless classified** ... as nonpublic or protected nonpublic, or **with respect to data on individuals, as private or confidential**." Act of June 5, 1979, ch. 328, §7, 1979 Minn. Laws 910, 911.

The legislature found this presumption "attractive" because it "put most decisions about whether to open or close types of data in the hands of the state legislature."[33] In the end, "[t]he Senate agreed to accept the House's presumption of openness in governmental data handling" and "the House agreed to accept [Senate] provisions which classified a variety of data or types of data as either private or confidential."[34]

The presumption's plain text (now at Minn. Stat. §13.03, subd. 1) repudiates OAG's view that the classification of "private data" under §13.65, subdivision 1 equally applies to data-not-on-individuals. As the presumption dictates, data is public "unless classified ... **with respect to data on individuals, as private**." Adopting OAG's view then means effectively handing the legislature's sole authority to classify data over to OAG—exactly what the presumption is meant to prevent.

Second, OAG's reading of §13.65 introduces chaos into the DPA's otherwise stable definition of data-on-individuals. The DPA takes care to distinguish between data-on-individuals and data-not-on-individuals for a reason. "Individual data subjects enjoy certain ... rights not enjoyed by non-natural data subjects. Individuals have a right to know what kind of

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33 Gemberling & Weissman, *supra* note 22, at 580.

34 Gemberling, *supra* note 26, at 253-54.

data an agency maintains on them, a right to contest the accuracy of data, and a right to notice when an agency collects data."[35] Minn. Stat. §13.04, subd. 2 (right to notice or "Tennessen warning"), subd. 3 (right to know about data), & subd. 4 (right to contest accuracy of data).

If "private data on individuals" includes data-not-on-individuals—as OAG now urges—the non-natural subjects of data-not-on-individuals (e.g., corporations) may claim the same DPA rights as individuals. After all, OAG cannot claim that data-not-on-individuals are private data while denying the rights that go with this classification. Going forward, that would mean almost every time OAG solicits public-policy data from a business, OAG must issue a Tennessen warning and could face penalties unless it allows the business to access the data within ten days.

Third and finally, OAG's reading of §13.65 invites a new form of agency gamesmanship destructive of the DPA. In drafting the DPA, the legislature obtained the advice of "public administrators and academics who were data processing professionals."[36] These experts observed "the infinite variety of gamesmanship advantages ... available to agencies" in answering data requests.[37] Government entities had "the advantage of knowing what types of [government] data are maintained, how they are maintained, and how the data can be made accessible."[38]

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35 Gemberling & Weissman, *supra* note 22, at 585.

36 Gemberling, *supra* note 26, at 257-58.

37 *Id.*

38 *Id.*

So the legislature drafted the DPA to neutralize these advantages and the possibility of agency gamesmanship in general.[39] For example, the DPA establishes that data seekers "upon request, shall be informed" of the "meaning" of data, preventing government entities from using jargon or computer symbols to hinder searches for responsive data. Minn. Stat. §13.03, subd. 3(a). The DPA also requires government entities to keep their data "in such an arrangement and condition as to make them easily accessible for convenient use." Minn. Stat. §13.03, subd. 1.

OAG's reading of §13.65 upsets this anti-gamesmanship framework. Under this reading, agencies may game data requests by asserting that DPA limits on data access actually reach far beyond their plain meaning (e.g., "private data on individuals" also covers data-not-on-individuals). OAG's reading also means turning OAG data long presumed public into not-public data. This reading's ultimate consequence, then, is the hiding of unprecedented amounts of data on OAG's public-policy activities—no matter how impactful these activities are—leaving the public in the dark. That is reason enough to reject OAG's reading of §13.65.

III. The DPA's attorney-data provision (§13.393) does not support OAG's invocation of the common-interest doctrine.

In resisting Respondent Energy Policy Advocates' data requests, OAG asserts not only §13.65's private-data subdivision but also Minn. Stat. §13.393—the DPA's attorney-data provision.[40] Coming into play

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39 *See* Gemberling & Weissman, *supra* note 22, at 583-84.

40 The legislature enacted the DPA's attorney-data provision in 1979 as Minn. Stat. §15.1694. *See* Act of June 5, 1979, ch. 328, §19, 1979 Minn. Laws