Legislative Commission on Data Practices

October 26, 2023

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

Executive Summary: The Minnesota Coalition on Government Information (MNCOGI) summits the following comments to the Legislative Commission on Data Practices, in order to provide the Commission with an overview of important data practices matters that the MNCOGI board has been tracking.

At present, one of the most pressing data practices policy issues facing the legislature is correcting the outcome of the Minnesota Supreme Court's opinion in *Energy Policy Advocates v. Ellison* (Minn. 2022). In that case, a closely divided (4-to-3) court reversed over forty years of interpretive practice, and allowed the Minnesota Attorney General's Office to withhold a much greater volume of its data from the public. In a dissenting opinion, Justice Thissen called the majority opinion "Orwellian" for creating an Attorney General-specific version of a defined term — effectively enabling a form of non-disclosure that the legislature never approved.

In addition, there are several other ongoing issues, and MNCOGI has included excerpts from its comments from the beginning of the last term of the Legislative Commission (circa 2021) in order to illuminate them.

MNCOGI is a non-partisan, non-profit organization whose all-volunteer board is comprised of attorneys, journalists, IT professionals, and other individuals who utilize government data.

Dear Commission members,

Over four decades ago, the Minnesota Legislature created what is now Minnesota Statutes Chapter 13 - the Minnesota Government Data Practices Act (MGDPA). The MGDPA regulates "government data" maintained by a host of government entities, and — importantly — establishes a public right of access to much of that data (*see*, *generally*, Minn. Stat. § 13.03). This public access right allows citizens of all backgrounds to examine government information for purposes as varied as news reporting, historical research, contesting property tax valuations, researching college papers, and innumerable other things.

Adopted in the wake of the tumult of the 1960s, when public trust in government had fallen precipitously, the MGDPA embodied a dramatic proposition — that all government data would be public, unless the legislature acted to classify it otherwise (or if a federal law did the same).

In practical terms, this has vested the Minnesota Legislature with the annual duty of overseeing the MGDPA and its central role in the management of government data in the state. This duty entails weighing multiple proposals that come before the legislature to re-classify data. For many years, MNCOGI's volunteer board members have tracked these proposals, seeking to ensure that debates over data classification are ultimately resolved in favor of the public's right to know what its government is up to — a key, animating purpose behind the MGDPA.

There are a variety of reasons why government entities might wish to re-classify data, including situations where new forms of data are being collected that pose previously unforeseen policy issues for individual citizens. In certain of these situations, reasonable, tailored policy solutions can be reached.

From MNCOGI's perspective, what should *not* be validated are governmental attempts to re-classify public data purely for administrative ease or operational simplicity, or for political reasons —

including seeking to shield data about government actions from perceived adversaries; from institutional watchdogs (such as the press); or simply from curious citizens.

Unfortunately, the later category of actions sometimes occurs within government entities. For example, evidence of a state agency's attempts to hide data for political reasons was entered into the record during the litigation over the proposed NorthMet mine, as documented in the case *In the Matter of the Denial of Contested Case Hearing* (Minn. 2023). In the facts of that case, several parties who were engaged in administrative challenges to various aspects of the NorthMet mine plan became aware — through whistleblower actions and Freedom of Information Act requests sent to a federal agency — that the Minnesota Pollution Control Agency (MPCA) had destroyed relevant records, and had withheld data responsive to requests that the parties had submitted under the MGDPA.

In that case, the Minnesota Supreme Court unanimously — and correctly — held that the MPCA's actions had prejudiced the parties, and disadvantaged the public. Such an example (1) illustrates why MNCOGI so closely tracks developments in this area, and seeks to preserve the public's data access prerogatives.

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(1)"During the course of permit review, however, PCA committed a series of open-government violations that deprived the public of material information about the NorthMet Project. The Environmental Protection Agency (EPA) "intended to submit written comments" that warned of deficiencies in Poly Met's permit application. (MCEA Br. 11.) PCA knew that if EPA submitted these comments: (1) PCA would have to respond; (2) PCA's "responses would be public"; and (3) "the public would find out what the EPA's specific concerns about the [Poly Met] permit were from the [EPA's] comments and [PCA's] responses.

So PCA lobbied EPA to keep quiet. (*See* MCEA Br. 11–12.) PCA official Shannon Lotthammer sent an email to EPA's chief-of-staff in which Lotthammer asked EPA not to submit written comments during the NorthMet Project notice-and-comment period. (*Id.*) Lotthammer later deleted the email, destroying "the only document that reflected [PCA's] request that EPA not send a written comment letter during the public comment period." (MCEA Add.091 at ¶253 (Finding of Fact).) *- Continued at bottom of next page.*

One year prior to this, however, a closely-divided Minnesota Supreme Court issued an opinion in another case that has created substantially negative impacts for public access.

In *Energy Policy Advocates v. Ellison*, a non-profit organization sought data from the Minnesota Attorney Generals' Office (AGO) related to that office's use of privately-funded attorneys to pursue certain climate change-related legal matters. The AGO refused to produce certain requested data, and litigation ensued.

During the litigation, the AGO asserted that its section of the MGDPA — Section 13.65 — should be read so that the phrase "private data" that occurs there refers not only to *individuals*, but also to *non-individual persons* like non-profits, corporations, etc. Adopting this reading effectively expands the AGO's statute, allowing the existing term "private" to be read much more broadly than just classifying data on "individuals," and thereby eliminating public access to large categories of AGO data, such as inactive "investigative data" (*see* § 13.65 subd. 1(d)).

Since the inception of the MGDPA, the defined term "private data on individuals" has always — and only — referenced a "not public" classification for "individuals." (When the MGDPA seeks to classify non-individual data, it uses the terms "nonpublic" or "protected nonpublic" instead of "private" or "confidential" — which are solely

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"An EPA branch chief subsequently held a teleconference with PCA officials to share EPA's concerns about Poly Met's permit application. (*See* MCEA Br. 12–13.) During the call, the branch chief read aloud the written comments that EPA had planned to submit to PCA. (*Id.*) While PCA staff took notes during the call that memorialized EPA's comments, the staff destroyed some of these notes and failed to disclose others in answering DPA requests and discovery requests in litigation. (*See id.*)

The problematic nature of PCA's conduct speaks for itself. As the court of appeals observes, PCA's procedures hindered "public access to governmental information." (MCEA.Add.017.)"

- Excerpt from MNCOGI's joint amici brief (with Public Record Media) in the *In the Matter of the Denial of Contested Case Hearing* case.

reserved for individuals). By expanding the term “private” to create an entirely new classification for both *individuals* and *non-individuals*, the internal logic of the statute is disrupted.

The Court’s majority in *Energy Policy Advocates (EPA)* tried to sidestep broader outcomes by noting, in dicta, that its ruling only applied to the AGO’s section of the MGDPA, and did not affect the statute’s definitions elsewhere. Despite the majority’s attempt to cabinet the effects of its ruling, bigger-picture outcomes may yet come to pass. Given that a slim majority of justices set aside long-standing statutory definitions in order to grant the AGO the ability to shield public data, other government entities may be emboldened to withhold data based on irregular legal theories, on the premise that their efforts may eventually be affirmed.

In terms of the immediate, practical effect of the *EPA* case, the AGO has already started to assert that it will withhold data that used to be classified as public — including data related to inactive investigations.

Inactive investigative data is largely public in many important contexts throughout the MGDPA — including in the criminal investigative context (§ 13.82) and the general civil investigative context (§ 13.39). Permitting the public to see the end results of government investigations allows individual citizens (as well as the press) to examine key governmental actions, and to determine whether they were properly handled or not.

In the AGO’s section of the MGDPA, investigative data “that is not currently active” (*see* § 13.65 subd. 1(d)) is classified as “private data on individuals.” Applying the conventional MGPDA definition, that would mean that only “data on individuals” contained within a mixed set of data “on individuals” and “data not on individuals” held by the AGO would be “private” and subject to withholding, while other data would be “public” by default.

Now, as the AGO has made clear in at least one data request response, it will withhold *all* inactive investigative data from public release, pursuant to the Minnesota Supreme Court's ruling in the *EPA* case:

> "Please note further that *inactive* investigative data are also classified as not public with this Office pursuant to Minn. Stat. § 13.65, subd. 1(d). *See also Energy Policy Advocates v. Ellison*, 980 N.W.2d 146, 158 (Minn. 2022)."

- (*See* Attachment B for page from AGO response to data request of Matt Ehling)

The AGO's decision to withhold *all* of its inactive investigative data will mean that data underlying numerous high-profile AGO investigations — including the ongoing Feeding Our Future investigations, as well as multiple other inquiries — will be subject to withholding once those cases are closed. This sets the AGO apart from many other government entities (whose closed investigative data is largely accessible), and will pose a major problem for gauging the quality of the work of the state's top law enforcement office.

For over four decades, the AGO has co-existed with the language of § 13.65 (first crafted in 1977, through a temporary classification of data sought by the AGO itself). Even when the AGO has been in the midst of multi-million dollar civil litigation (such as the tobacco cases litigated by former AG Humphrey) the legislature has not modified the AGO's statute to reduce public data access. Now, however, that outcome has come to pass without any input from the legislature at all.

Accordingly, MNCOGI urges the legislature to remedy this problem by passing a bill that would return § 13.65 to its prior function. (Reps. Niska and Scott proposed such legislation last session — H.R. 2480.)

As always, MNCOGI looks at this issue through a nonpartisan lens, and urges the legislature to view this (and all data access issues) as matters of maintaining the public's "right to know" — the most fundamental kind of infrastructure in a representative democracy.

Sincerely,

Matt Ehling
MNCOGI board member

PS - Please see the Attachment A for excerpts from MNCOGI's previous, 2021-era comments to the commission.

<u>ATTACHMENT A</u>

ONGOING DATA PRACTICES ISSUES

<u>High-level Data Practices matters</u>

Improving data requester experience

Given that ensuring public access to governmental information is a key function of the state's Data Practices Act (DPA), the Commission may wish to explore ways to improve the experience of the data-requesting public. MNCOGI continues to hear from public requesters who have been stymied in their efforts to access public data. Possible policy updates could involve providing new remedies for governmental non-compliance, or enhancing existing remedies. Past suggestions have included instituting binding Data Practices opinions (at present, such opinions are advisory only), or modifying the existing civil remedy in § 13.08 to provide for more robust penalties.

Improve records retention

For government data to be accessible to the public, government entities must not only *produce* data they are legally required to disclose, but they must also *retain* data that will be requested in the future. However, the retention of government records is sometimes uneven, and controversies over records retention have arisen over the last few years.

Solutions to record retention problem have been proposed in the past. For instance, Representative Scott proposed a bill in 2017 to set a standardized retention period for certain governmental correspondence, including e-mails. This proposal was supported by former Legislative Auditor Jim Nobels, due to the fact that the Office of the Legislative Auditor needs to review such documentary material when it undertakes its program evaluation mission. Overseeing records retention is part of the Legislative Auditor's statutory duties, and the legislature might want to examine the current role of the Records Disposition Panel, on which

the Legislative Auditor serves, along with the Attorney General and the State Auditor.

Complaint data about government employees

Since 2012, there has been a disparity in law between small cities and counties, and larger cities and counties in regard to the public's ability to access complaint data about certain government employees. (In short, residents of small cities and counties are prevented from accessing the same kinds of complaint data that are available to citizens of larger cities and counties.) This outcome resulted from a 2012 update to the "personnel data" section of the Data Practices Act (§ 13.43), but it has posed functional problems for citizen data access since then. For several sessions running, Senator Howe has introduced a bill that would address this disparity, and the Commission might wish to review either the bill or the issue.

Use of artificial intelligence by government

The adoption of artificial intelligence technologies by government entities will pose many challenges for government accountability and public understanding of governmental functions, as the technology itself is highly opaque, and raises many novel policy questions. A comprehensive legal framework is needed to address the bundle of issues arising from the use of artificial intelligence technology by government entities. MNCOGI is willing to help the legislature probe these issues, and to offer suggestions for language to help regulate this area.

ATTACHMENT B

As stated in this Office's prior response:

> Note that under chapter 309, which governs charitable registration in Minnesota, organizations are automatically barred from soliciting in Minnesota the moment they fail to comply with registration deadlines without further AGO action. The AGO determines whether the paperwork and filing fee is complete and notifies charities of potential noncompliance, *but makes no "determination" as to the merits or accuracy of registration filing contents for the purposes of completing its registration.*

(Emphasis added.)

To the extent your request was intended to obtain data internal to the AGO regarding the initial registration process, the AGO notes that such data are classified as not public pursuant to Minn. Stat. § 13.65, subd. 1(b), which applies to "communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions." And as explained in previous correspondence, data such as active investigative data, attorney work product, and privileged correspondence are subject to other statutory classifications rendering such data inaccessible under the MGDPA. *See* Minn. Stat. §§ 13.39, subd. 2(a), .393. Please note further that *inactive* investigative data are also classified as not public with this Office pursuant to Minn. Stat. § 13.65, subd. 1(d). *See also Energy Policy Advocates v. Ellison*, 980 N.W.2d 146, 158 (Minn. 2022).

Again, thank you for contacting the AGO.

Sincerely,

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