Legislative Commission on Data Practices and Personal Privacy
November 20, 2025
Minnesotans for Open Government
Written Testimony of Matt Ehling and
Don Gemberling*, Board Members

Co-chairs Feist and Scott, and members of the Commission,

Minnesotans for Open Government (MNOG) submits the following written comments as background for the agenda topics that the Commission has identified for today's hearing:

Retention of Government Records
(Agenda Items 2 and 3)

Records retention in government entities: Executive Summary

Minnesota law requires government entities to establish record retention schedules to govern the length for which "government records" (containing "government data") must be kept. With limited exceptions, government entities can make their own determinations about the length for which records must be kept. However, these schedules have to be approved by the state's Records Disposition Panel, per Minn. Stat. § 138.17.

The retention of government records is important for multiple reasons, including operational continuity and government accountability. If government records are destroyed prematurely, there is no "paper trail" for auditors or investigators to review in the event of problems. Similarly, the untimely destruction of records undermines the ability of the press and the public to access government data through the state's open data framework, the Minnesota Government Data Practices Act (MGDPA).

The state's records management system (governed by § 138.17) has duties that are executed by the State Archives and the Records Disposition Panel. The Minnesota Department of Administration also once had a hand in administering parts of this system, but the funding was never complete, and it was eliminated entirely in the mid-2000s. The Records Disposition Panel has also met less and less frequently, meaning that there is a dearth of independent analysis of how records retention schedules are created and managed. At the same time, the volume of government records has increased, and government entity destruction of records has also sped up, with many entities reducing the period for which they hold certain records.

This confluence of factors calls for increased legislative scrutiny of records management issues.

**Don Gemberling is the former director of the Minnesota Department of Administration's Information Policy Analysis Division (IPAD, the predecessor to the Data Practices Office.)*

Records retention in government entities: Background

The MGDPA (Minnesota Statutes Chapter 13) regulates access to government data maintained by government entities. It (generally)* does not regulate the duration for which such data must be maintained (i.e., the "retention period" of the data). The retention of "government records" (which are comprised of "government data") is regulated by two inter-locking statutes: The **Official Records Act** *(see* Minn. Stat. § 15.17) and the **Records Management Statute** (*see*, generally, Minn. Stat. § 138.17).

The **Official Records Act** requires government entities to "make and preserve all records necessary to a full and accurate knowledge of their official activities." This requirement has been in Minnesota law since 1941, with the purpose of ensuring that:

1. Records that document important government actions ("official activities") are created, and then preserved, so that the institutional actions of the government are available for use and review, and;

2. That such records are transmitted between government administrations, for the purpose of continuity of government operations.

Prior to the late 1970s, the Official Records Act also governed public access to "government records," but the access function was moved to the MGDPA in 1979 once that statute was created.

The **Records Management Statute** establishes a statutory framework for determining the retention period that official records must be maintained for. The Records Management Statute provides that:

1. Government entities must establish a "records retention schedule" that contains a listed retention duration for all of the various records that they maintain;

2. Record retention schedules must be submitted to, and approved by, the Records Disposition Panel (which consists of the attorney general, the legislative auditor, the state auditor, and the director of the Minnesota Historical Society;

3. The Records Disposition Panel may determine whether and how original government records can be replaced by reproductions thereof; and can direct the destruction of records, and the transferring of records to the state archives.

**Some exceptions to this general rule have started to emerge in recent years* - *see page 3.*

The State Archives provides model record retention schedules to guide the creation of government entity retention policies, but government entities have much leeway to determine the retention periods for their records. § 138.17 requires that retention schedules be created (see § 1381.17 subd. 7) but the statute does not specify specific retention periods.

Within that last ten years, the Legislature has also started to add statutory requirements for various forms of "government data" directly into the MGDPA (body camera and license plate reader data are examples). Government entities that maintain such records must retain them for the duration of time required by statute. (See §§ 13.824 and 13.825, for instance).

Records retention schedules created by government entities need to be submitted to the state Records Disposition Panel. Once the Panel approves a schedule, government records can only be destroyed in accordance with that schedule. Failure to do so may be punished by a misdemeanor (§ 138.225).

Records retention in government entities: Purpose and case study

The importance of maintaining "official records" is seen in the facts underlying *In the Matter of the Denial of Contested Case Hearing* (Minn. 2023). The *In RE Denial* case dealt with an administrative challenge to a permit for a proposed mining project in northern Minnesota brought by a tribe and a collection of environmental groups. During the permitting process, certain of the involved environmental groups submitted MGDPA requests to the Minnesota Pollution Control Agency (MPCA) for data about that process. Some of the requested data related to interactions between MPCA and the federal Environmental Protection Agency (EPA) — an agency that would be submitting written comments about the permit into the administrative record. In the case of the permit in question (for the NorthMet project), EPA's comments included specific concerns.

Shortly thereafter, a whistleblower contacted one of the environmental groups, and informed them of the existence of e-mails between MPCA and EPA which showed that MPCA had asked EPA not to submit written comments into the records (its standard practice), but rather to convey comments to MPCA staff via a telephone conference call, only. MPCA did not provide any such e-mails to the environmental groups through their MGDPA requests.

Litigation over the permit ensued, and it was ultimately determined that the e-mail containing MPCA's request to the EPA had been destroyed by an MPCA staffer. Likewise, contemporaneous notes taken during EPA's conference call with MPCA were also determined to have been destroyed. The judge who heard the the administrative case found that the destruction "of the only document that reflected [MPCA's] request that EPA not send a written comment letter during the public comment period" constituted a violation of the Official Records Act. Based on this — and other "irregularities in procedure" — the Minnesota Supreme Court later found that MPCA has violated the Administrative Procedures Act, and sent the mining permit back for further review.

Without the involvement of the whistleblower, the fact that MPCA has attempted to keep EPA's critical comments out of the public record at a key time would not have been known, since the "only document" which chronicled that official action had been destroyed by the government.

The facts in the *In RE Denial* case clearly demonstrate the important government accountability issues that are bound up with the retention of official records, and show the consequences that flow from their improper destruction.

Records retention in government entities: Issues

At present, day-to-day records management is handled by each government entity. Their plans for executing such management (i.e., each entity's "records retention schedule") are approved by the state Records Disposition Panel. The Panel, however, has met less and less frequently to discuss records retention standards and issues.

The State Archives provides records retention guidance in the form of model records retention schedules, but these schedules constitute standardized guidance, rather than standardized requirements, and government entities can depart from them as desired.

For various periods during the 1980s and 1990s, the Minnesota Department of Administration played a role in overseeing records management issues, but the funding for that activity was never consistent, and it was eliminated entirely in 2006, and has never been restored.

As independent oversight and outside support of records management issues has receded, the overall growth in the scale of government records has accelerated, due to advances in electronic data processing technology. While the state's data and record management laws contemplate the use of digital and other "non-paper" technologies*, the scale of digital data maintained by government has outpaced the attention paid by policy makers to associated records management issues. In this gap, many government entities have begun to implement records retention policies that eliminate government data on a more expedited basis.

*****_While § 15.17 and § 138.17 both contain some language referring to older technology (i.e., "photostatic" images and "microfilm") both statutes are also written broadly enough to encompass digital technology. § 15.17 subd. 1 states that "government records may be produced in the form of computerized records." § 138.17 states that "government records" encompasses data and information "regardless of physical form or characteristics, storage media, or conditions of use." Similar language is used in the MGDPA. (See § 13.02 subd. 7)_

For instance, in 2023 the Minnesota Department of Human Services announced that it would delete all of its e-mails after one year unless they constituted official records. Other government entities have taken similar action, including the City of St. Paul and the Minnesota Department of Health.

As the *In RE Denial* case demonstrates, an "official record" can encompass a single e-mail that documents official activity by the government — and in that case, that single e-mail was destroyed by an MPCA staffer in violation of the Official Records Act. In an environment where outside programatic support for records management is minimal, and where outside oversight is limited, the opportunity for important records to disappear is increasingly high.

Official Records: The *Halva* case and a private right of action

When government entities reduce the length of time for which they hold records through official channels (i.e., they seek approval from the Records Disposition Panel) that issue becomes a policy question (i.e., how can problems flowing from shortened retention periods be solved through the adoption of standardized policies?). When government entities improperly destroy government records that fall *within approved retention schedules*, that becomes an enforcement question.

Currently, Chapter 138 provides a criminal penalty for the improper destruction of government records (*see* § 138.225). However, MNOG is not aware of a time in which this criminal provision has been utilized to punish records destruction.

While the MGDPA contains a private right of action and an administrative remedy to sue for access to government data (§ 13.08 and §13.085), the Official Records Act and Records Management Statutes do not contain such provisions.

However, in *Halva v. MNSCU* (Minn. 2021), the Minnesota Supreme Court held that the MGDPA's private right of action provision could be used to sue for enforcement of the Official Records Act:

> "First, subdivision 4 of the Official Records Act reads: "Access to records containing government data is governed by sections 13.03 and 138.17." Minn. Stat. § 15.17, subd. 4. Section 13.03, part of the Data Practices Act, is a statutory provision that allows members of the public to request government data, as Halva did in this case. See Minn. Stat. § 13.03 (2020). Section 13.03 can be enforced through the judicial remedies provided by section 13.08. Minn. Stat. § 13.08 (2020). Therefore, an individual aggrieved by the failure of a government body to comply with the Official Records Act has a cause of action under sections 13.03 and 13.08." **- *Halva v. MNSCU* (Minn. 2021)**

The existence of the *Halva* opinion means that an avenue now exists for private lawsuits over the improper destruction of official records, which should help to address instances of abuse like the one seen in the facts of *In RE Denial*. From a high-level perspective, however, the Legislature should consider how to institute some standardization around certain record groups so that government entities are not able to avoid the disclosure of important government records by simply reducing the length of time for which record groups are held.

Exhibits 64A and 307A are in the administrative record, presumably because the MPCA concluded they document what agency staff referenced and relied upon when recommending and deciding to make an agreement with the EPA. Exhibits 64A and 307A tell a reviewing court that the MPCA entered into an agreement with the EPA, that the agreement terms called for the MPCA to give the EPA an extra 45 days to review a "pre-proposed permit", and the EPA agreed not to issue written comments during the public comment period. However, there is nothing in the administrative record establishing which agency suggested the agreement, why it was suggested, or the basis for recommending it. Exhibit 333 is the only document containing this information. (*See* Tr. 613:1–9 (Lotthammer testimony).) Exhibit 58 documents when an agreement was discussed, confirms that the MPCA Commissioner personally approved and recommended making an agreement, and it identifies the MPCA staff Comm'r Stine designated to negotiate with the EPA. *See* Findings of Fact ¶ 114.

52. Exhibits 58 and 333 document the information that Comm'r Stine relied upon when he decided to authorize making an agreement with the EPA that would postpone the EPA's written comments on the draft NPDES permit. There is no legal basis to place exhibits 64A and 307A in the administrative record while excluding exhibits 58 and 333. Accordingly, along with exhibits 64A and 307A, exhibits 58 and 333 should have been preserved under either or both the ORA and Rule 7000.0750, subpt. 4(D). If the emails had not been destroyed, the MPCA would have had to disclose them as public records in response to Relators' DPA requests.[29] The act of destroying exhibits 58 and 333 was an irregularity in procedure not shown in the record.

[29] The question of whether Relators have a separate cause of action for violation of the MGDPA is beyond the scope of the Transfer Order. Minn. Stat. § 13.08 (2018). The Court agrees with PolyMet's observation that the MGDPA does not "prescribe or proscribe any procedures for permit approval that enter 'into the [MPCA's] fundamental decision-making process.'" (PolyMet's Proposed Conclusions of Law ¶ 24) (citing *Mampel*, 254 N.W.2d at 378).)

EXHIBIT B: Agenda Items 2 and 3

2013 e-mail obtained from Minnesota Department of Human Services
through a data request under the MGDPA

From: Golden, James I (DHS)
To: Hudson, Mark J (DHS)
Cc: Leitz, Scott D (DHS); Breen, Chandra F (DHS)
Subject: RE: PCG
Date: Monday, May 13, 2013 9:25:00 AM

Mark,

We do not want to ask Grassley, Nienow , Feinwachs or Robinson. We should have people/advocates like Ann Henry and Ralonda Mason. We should also ask Chandra if she wants to recommend particular advocates. See the contact information below.

[redacted]

[redacted]

JG

From: Hudson, Mark J (DHS)
Sent: Friday, May 10, 2013 11:26 AM
To: Golden, James I (DHS)
Subject: PCG

They would like to talk to any critics of MCO's as part of the value report. I am sure if I thought it would not take too long but wondered if you had ideas beyond Grassley, Marty Nienow , Feinwachs and Robinson. Let me know

EXHIBIT C: Agenda Item 4

Minn. Stat. § 84.0873 (cross-referenced in MGDPA at § 13.7931)

84.0873 DATA ON INDIVIDUALS WHO ARE MINORS.

(a) When the Department of Natural Resources collects, creates, receives, maintains, or disseminates the following data on individuals who the department knows are minors, the data are considered private data on individuals, as defined in section 13.02, subdivision 12, except for data classified as public data according to section 13.43:

(1) name;

(2) date of birth;

(3) Social Security number;

(4) telephone number;

(5) email address;

(6) physical or mailing address;

(7) location data;

(8) online account access information;

(9) data associated with the location of electronic devices; and

(10) other data that would identify participants who have registered for events, programs, or classes sponsored by the Department of Natural Resources.

(b) Access to data described in paragraph (a) is subject to Minnesota Rules, part 1205.0500. Data about minors classified under this section maintain their classification as private data on individuals after the individual is no longer a minor.

(c) When data about minors is created, collected, stored, or maintained as part of the electronic licensing system described in section 84.0874, the data is governed by section 84.0874 and may be disclosed pursuant to the provisions therein.

History: *1Sp2021 c 11 art 3 s 7*

EXHIBIT D: Agenda Item 7

Freedom of Information Act (FOIA) Exemptions (U.S. Department of Justice website)

What are the 9 FOIA Exemptions?

Not all records are required to be released under the FOIA. Congress established nine exemptions from disclosure for certain categories of information to protect against certain harms, such as an invasion of personal privacy, or harm to law enforcement investigations. The FOIA authorizes agencies to withhold information when they reasonably foresee that disclosure would harm an interest protected by one of these nine exemptions.

The nine exemptions are described below.

- **Exemption 1:** Information that is classified to protect national security.
- **Exemption 2:** Information related solely to the internal personnel rules and practices of an agency.
- **Exemption 3:** Information that is prohibited from disclosure by another federal law.
- **Exemption 4:** Trade secrets or commercial or financial information that is confidential or privileged.
- **Exemption 5:** Privileged communications within or between agencies, including those protected by the:
    1. Deliberative Process Privilege (provided the records were created less than 25 years before the date on which they were requested)
    2. Attorney-Work Product Privilege
    3. Attorney-Client Privilege
    4. Presidential Communications Privilege
- **Exemption 6:** Information that, if disclosed, would invade another individual's personal privacy.
- **Exemption 7:** Information compiled for law enforcement purposes that:
    - 7(A). Could reasonably be expected to interfere with enforcement proceedings
    - 7(B). Would deprive a person of a right to a fair trial or an impartial adjudication
    - 7(C). Could reasonably be expected to constitute an unwarranted invasion of personal privacy
    - 7(D). Could reasonably be expected to disclose the identity of a confidential source
    - 7(E). Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law
    - 7(F). Could reasonably be expected to endanger the life or physical safety of any individual
- **Exemption 8:** Information that concerns the supervision of financial institutions.
- **Exemption 9:** Geological information on wells.

EXHIBIT E: Agenda Item 7

Portion of Minn. Stat. § 13.82 ("Comprehensive Law Enforcement Data")

Subd. 4. **Audio recording of 911 call.** The audio recording of a call placed to a 911 system for the purpose of requesting service from a law enforcement, fire, or medical agency is private data on individuals with respect to the individual making the call, except that a written transcript of the audio recording is public, unless it reveals the identity of an individual otherwise protected under subdivision 17. A transcript shall be prepared upon request. The person requesting the transcript shall pay the actual cost of transcribing the call, in addition to any other applicable costs provided under section 13.03, subdivision 3. The audio recording may be disseminated to law enforcement agencies for investigative purposes. The audio recording may be used for public safety and emergency medical services training purposes.

Subd. 5. **Domestic abuse data.** The written police report required by section 629.341, subdivision 4, of an alleged incident described in section 629.341, subdivision 1, and arrest data, request for service data, and response or incident data described in subdivision 2, 3, or 6 that arise out of this type of incident or out of an alleged violation of an order for protection must be released upon request at no cost to the victim of domestic abuse, the victim's attorney, or an organization designated by the Office of Justice Programs in the Department of Public Safety as providing services to victims of domestic abuse. The executive director or the commissioner of the appropriate state agency shall develop written criteria for this designation.

Subd. 6. **Response or incident data.** The following data created or collected by law enforcement agencies which document the agency's response to a request for service including, but not limited to, responses to traffic accidents, or which describe actions taken by the agency on its own initiative shall be public government data:

(a) date, time and place of the action;

(b) agencies, units of agencies and individual agency personnel participating in the action unless the identities of agency personnel qualify for protection under subdivision 17;

(c) any resistance encountered by the agency;

(d) any pursuit engaged in by the agency;

(e) whether any weapons were used by the agency or other individuals;

(f) a brief factual reconstruction of events associated with the action;

(g) names and addresses of witnesses to the agency action or the incident unless the identity of any witness qualifies for protection under subdivision 17;

(h) names and addresses of any victims or casualties unless the identities of those individuals qualify for protection under subdivision 17;

(i) the name and location of the health care facility to which victims or casualties were taken;

(j) response or incident report number;

(k) dates of birth of the parties involved in a traffic accident;

(l) whether the parties involved were wearing seat belts;

(m) the alcohol concentration of each driver; and

(n) whether the agency used a portable recording system to document the agency's response or actions.