Legislative Commission on Data Practices and Personal Privacy

Written Testimony of Robert E. Cattanach

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

Thank you for this opportunity to provide testimony to the Commission. Because of a long-scheduled doctor's appointment, I may not be able to appear before you in person so permit me to offer these written comments.

Background

I have unwittingly become the focal point of requests for help from the general public regarding how they can pursue their rights under the MGDPA because of a legal action I was required to commence against the City of St. Paul to obtain public data. I did not seek this status out, but after hearing compelling story after story from everyday citizens who are being frustrated by their own government when they try to get data to which they are plainly entitled, nor do I shy away from it.

In my own case, I just was simply seeking access to data that plainly was public, and critically important to demonstrate the City of St Paul's lack of transparency as it tried to push through a controversial project despite overwhelming public opposition. When it became clear that the City was slow-rolling production, or stonewalling production completely, of highly damaging documents until after critical votes on the project, I had no alternative but to sue to get the data. I was unable to find any lawyer who was willing to represent me other than a pay-as-you-go basis, even though the MGDPA provides for the recovery of legal fees. (More on this unfortunate reality below).

As an attorney practicing full time, which in my job typically required 60 hours a week, I nevertheless managed to find a few hours to put together a basic complaint, and proceeded against the City *pro se.* Several hundred hours later, I understood why no lawyer is willing to take cases under the MGDPA, at least at the trial court level. And even though I 'won' with a first-of-its-kind order from Judge Diamond, I've yet to see a nickel in any kind of damages or fees, or even court costs. And I'm convinced I still have not been given all of the responsive documents, but the City just wore me down, and I settled for what I could get at the time. The City has made it clear that it will appeal the case until there are no appeals left for it to pursue – and has enlisted a brigade of government entities and associations to file *amicus* briefs to support its position. The point of all this is that government entities are well funded, and more interested in avoiding embarrassing disclosures than complying with the law.

Over the following almost 3 years, I have been approached by no less than 30 different people and organizations, including the media, desperate for help in trying to force the government to provide them with basic, undisputedly pubic, data. Almost all of their stories are compelling, and almost all of the responses by government entities are utterly unjustified. But these

government entities continue to violate the MGDPA to this day with no consequence, simply because they can.

Even the City of St Paul has remained defiant, apparently unwilling to institute basic protocols that would ensure compliance going forward after my case was over. In another legal action filed less than two months ago by a grass-roots non-profit in which I am assisting, after telling us "we've given you everything we have" with an unmistakable tone of contempt, the City was forced to admit that in fact it had *not* produced all responsive data. Once again, however, this admission occurred only because the non-profit filed suit, and someone from the City other than the designated person for responding MGDPA actually double-checked their work, and is now begrudgingly providing additional responsive data.

I offer these examples not to pick on the City of St. Paul – that serves no purpose – but to illustrate to this Commission that apathy, if not outright hostility, to the essential principles of the MGDPA remains the rule rather than the exception, and those principles are at serious risk of being eroded because the existing enforcement mechanisms simply don't work.

The challenge to this Commission is that government entities responsible for complying with the MGDPA are keenly aware that they can violate the Act with impunity, because the risk of meaningful enforcement is almost non-existent. And even where, as in my case, someone has the ability to seek enforcement, the time and expense of pursuing one's rights are simply too prohibitive to make it worthwhile absent extraordinary circumstances. So what can be done?

Require that Reasonable Attorney's Fees be Awarded ("May" to "Shall") Where the Request Was Made in Good Faith, and Judicial Enforcement Was Requested Only After Good Faith Efforts to Obtain the Data Had Failed for, and Allow the Award of $45/hour for Time Spent by *Pro Se* Litigants for Such Good Faith Actions

This is not a novel concept. In the data breach world, in which I have lived for well over a decade, Courts now recognize that aggrieved parties should be at least minimally compensated for the time they were forced to spend pursuing their rights. When considering this concept Judge Diamond referred to this as a 'day-laborer' rate (which he ultimately concluded would require explicit language in the MGPDA, and declined to award, so in that case none of my time was compensated). While the exact hourly rate is not critical, in the data breach context courts have allowed impacted parties to be compensated at the rate of $45/hour *if* the requestor can *document* the time spent.

I can appreciate that this suggestion will receive an immediate and negative reaction by government entities, and some safeguards may be appropriate, including perhaps limiting this change to a provisional pilot project to ensure that there are no unintended consequences, but *something* has to be done. For all its laudatory purposes, the essence of the MGDPA is being frustrated by recalcitrant government entities, which face no meaningful consequence for refusing to produce pubic data in a prompt and appropriate manner.

Statutory Exceptions Should be Rare, Not the Rule

While in no way pretending to be an expert on this – I defer to Don Gemberling and Matt Ehling – I have lived in this space sufficiently to see disturbing trends, and the attempts, some successful, to provide wholesale exemptions from disclosure is certainly one of them, as I'm sure this Commission is well-aware. While it is too early to know how the most recent expansion of the exemption in the context of Inspector General a will actually impact the disclosure of what could be highly relevant, otherwise public, data, the categorical classification of civil investigative data as 'non-public' with broad discretion in the Attorney General to retain that classification well into the future even after any investigative relevance has long passed, is deeply concerning. Such vaguely defined discretion has the very real potential to be abused to shield data that has the potential to be politically embarrassing, and undermine the basic tenants of the MGDPA.

Understanding that this particular 'horse has left the barn,' let me offer an additional fail-safe mechanism for you to consider to avoid the unintended consequence of continuing to prevent the disclosure of sensitive but ultimately public data from disclosure, based on the principles and language in Mn. Stat. 13.39 subd.2:

> If data has been classified as non-public by virtue of any amendment to the MGDPA after December 1, 2024, any person can request that the [placeholder] Legislative Commission on Data Practices ("[The Commission]") review such data to determine whether the disclosure would be in the public interest. The [Commission] may order that all or part of the data be released to the public or to the person bringing the action. In making the determination whether data shall be disclosed, the [Commission] shall consider whether the benefit to the person bringing the action or to the public outweighs any harm to the public, the government entity, or any person identified in the data. The data in dispute shall be examined by the [Commission] in camera.

I fully respect that this could be a controversial issue, much as was the case when the wholesale exception for investigations was adopted in the last legislative session. The potential for misuse of the ability to classify data relating to investigations that have been fully completed as continuing to be non-public, however, warrants this essential corrective action. I further appreciate that this Commission may be reluctant to undertake a significant additional responsibility, which may require additional staff support, but please consider the value of the concept first, and if you agree it has merit, consider the most appropriate forum for the review, which could also be the Commissioner of Administration or any Court of competent jurisdiction. I appreciate this opportunity to be heard.
Respectfully submitted,

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