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# Data Practices at the Cusp of the Millennium

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## DATA PRACTICES AT THE CUSP OF THE MILLENNIUM<sup>†</sup>

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<sup>†</sup> This article is an update of the authors' 1982 opus, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From 'A' to 'Z'*, 8 Wm. MITCHELL L. REV. 573 (1982).

This Article is dedicated to Sen. Gene Merriam of Coon Rapids, who is retiring from the Minnesota Senate after an illustrious career of service to the citizens of Minnesota. Except for the MGDPA's original authors, Senator Merriam, more than anyone else in the Legislature, has shaped the content and direction of Minnesota's public information policy. He will be missed.

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## I. INTRODUCTION

Tilt a kaleidoscope just a bit, and an unmistakable pattern emerges from what previously appeared as a formless jumble. Similarly, if you turn the conceptual focus knob the correct way on the seemingly impenetrable idiom of Minnesota's Government Data Practices Act,<sup>1</sup> the new angle of vision reveals a path through the turgid prose.

Many lawyers and judges throw up their hands in exasperation when they stumble, usually grudgingly, across a data practices claim. Some are put off by the length of the statute, others by what they perceive as its incomprehensibility. Governmental officials are frequently confused by its requirements. Plaintiffs' attorneys and the media complain that the law just doesn't achieve what the Legislature intended.<sup>2</sup>

Some of their complaints have merit: The law is indeed prolix. What started out as a rudimentary, six-page composition in 1974<sup>3</sup> has burgeoned into a seventy-seven-page statute accompa-

1. See MINN. STAT. §§ 13.01-.99 (1994 & Supp. 1995).

2. Comments that the authors have heard or overheard rather consistently over the last 10 years.

3. Act of Apr. 11, 1974, ch. 479, 1974 Minn. Laws 1199 (initially codified at MINN. STAT. §§ 15.162-.43 (1974)).

nied by explanatory administrative rules.<sup>4</sup> Most recently, to assist governmental agencies to comply with (and to facilitate citizen understanding of) statutes and rules, the Legislature has authorized the Commissioner of Administration to issue advisory opinions.<sup>5</sup> Whether the statute has attained its legislative goals, after almost a quarter of a century since its enactment, is still a subject of doubt.

This article comprises three main parts. Part II, *the template*, is a conceptual overlay to help decipher the policies that underlie the seemingly confusing statutory requirements. Part III, *issue resolution*, is a discussion of the "hot button" issues in the early 1980s,<sup>6</sup> whether and how they were resolved, and some of the data practices issues that have surfaced in the late 1990s. Part IV, *the prescription*, is the authors' proposed remedy for the maladies variously described as administrators' confusion, governmental resistance, and lack of practical relief for those whose rights have been compromised as a result of non-compliance with the Minnesota Government Data Practices Act (MGDPA).

## II. THE TEMPLATE

Ten postulates undergird the MGDPA. Understanding these ten axiomatic precepts provides a framework for analyzing almost any data practices problem. Grouped into four categories, the ten postulates are set forth in the chart below.

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4. MINN. R. 1205.0100-2000 (1995).

5. Commissioner opinions are authorized by a 1993 amendment that is codified at Minnesota Statutes § 13.072. As of the spring of 1996, the Commissioner of Administration had issued 140 Opinions.

6. See Donald A. Gemberling & Gary A. Weissman, *Data Practices: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From 'A' to 'Z'*, 8 WM. MITCHELL L. REV. 573 (1982).

CATEGORY	POSTULATE
A. OPEN RECORDS	1. No secret files. 2. Presumptive availability. 3. Free inspection.
B. PRIVACY and DUE PROCESS	4. Disclosural privacy. 5. Informational privacy. 6. Due process.
C. RESTRICTED ACCESS	7. Classification. 8. Dissemination.
D. OPERATIONAL MECHANICS	9. Governmental accountability. 10. Remedies.

### A. *Open Records*

Unlike the federal statutory scheme, which comprises codificationally adjacent but discrete statutes for public access<sup>7</sup> and privacy,<sup>8</sup> the Minnesota "data practices" law fuses notions of freedom of information and fair information practices into a single statute, the MGDPA. The MGDPA's core concept, as the Minnesota Supreme Court has termed it, is that data maintained by governmental agencies are in the public domain.<sup>9</sup>

#### 1. *No Secret Files*

Partly in response to revelations about the secret Army surveillance of citizens project and partly in reliance on the recommendations of the Department of Health, Education, and Welfare report, *Records, Computers, and the Rights of Citizen*,<sup>10</sup> the Minnesota Legislature sought to codify the policy that the government should not have any records whose very existence are unknown outside the government. For reasons of security, privacy, or governmental effectiveness, there might be a justification for not disclosing certain data, but the existence of those data should not be kept secret.

The MGDPA makes the non-secrecy principle operational in two ways. First, it requires the government to inform data subjects, upon their request, that they are the subjects of data, no

7. The Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1994).

8. Federal Privacy Act, 5 U.S.C. § 552a (1994).

9. *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991).

10. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *Report of the Secretary's Advisory Committee on Automated Personal Data Systems* (1973) [hereinafter *Report*].

matter how those data are classified.<sup>11</sup> Second, it obliges the government to publish a list identifying all systems of data it maintains on people.<sup>12</sup>

Of course, the government cannot be accused of keeping files secret if the information concealed is not government data. Some things in governmental offices are obviously not government data, such as the contents of a governmental employee's wallet or purse. Other matters curiously straddle the frontier: a telephone company directory, for example, may sit on a governmental bookshelf for handy reference, but it is not technically a governmental record. Consequently, the home address of a governmental employee maintained in personnel files or in a supervisor's desk drawer, even though it also may be listed in a non-governmental telephone book available at many government counters, is governmental data classified as private and thus forbidden to be divulged to casual requestors.<sup>13</sup>

In 1981, the Legislature amended what by then was formally called the Government Data Practices Act to broadly define "government data" so that it encompassed "all data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or condition of use."<sup>14</sup>

A decade later, in *Keezer v. Spickard*,<sup>15</sup> the Minnesota Court of Appeals interpreted the term "government data" to exclude mental impressions. In *Keezer*, a county social worker stated to the sheriff, in front of two citizens, that a medical assistance recipient was having an episode of serious mental illness. The sheriff replied that he wasn't worried because "crazy or not, I'll shoot him [with my stun gun]."<sup>16</sup> The *Keezer* court deemed the remarks of both the caseworker and the sheriff to be "careless and offensive" but not actionable because the data practices statute does not apply to mental impressions, "if the data are not recorded elsewhere" (an adverbial clause emphasized here because it

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11. MINN. STAT. § 13.05, subd. 4 (1994). Additionally, the administrative rules specify the circumstances under which governmental entities may legitimately claim collection to be necessary. See MINN. R. 1205.0100-2000 (1995).

12. MINN. STAT. § 13.05, subd. 1 (1994).

13. MINN. STAT. § 13.43, subds. 2, 4 (1994). Subdivision 2 lists the kinds of personnel data that are of public record, while subdivision 4 states that all other individual personnel data is private. *Id.*

14. MINN. STAT. § 13.02, subd. 7 (1994).

15. 493 N.W.2d 614 (Minn. Ct. App. 1992).

16. *Id.* at 616.

is so often overlooked by those who expound on the *Keezer* case).<sup>17</sup>

## 2. *Presumptive Availability*

The locus of the freedom-of-information aspect of the MGDPA is the presumption that government data are “public data,” which means that they are available to anyone for the asking.<sup>18</sup> Other jurisdictions employ a balancing test, which weighs a variety of policy reasons that justify<sup>19</sup> for non-disclosure against the requestor’s wish for access.<sup>20</sup> But Minnesota has opted for a less clumsy inquiry: just answer one question—is there a federal law, state statute,<sup>21</sup> or temporary classification that authorizes non-disclosure? If there is not, then the government data are to be treated as public data.<sup>22</sup> This approach is intended to leave no discretionary wiggle room for governmental officials to assert that information sought cannot be made available because the administrators deem it sensitive, embarrassing, or not appropriate for public disclosure. To preemptively preclude litigation about weighing competing interests, the Legislature made clear in the statute’s fourth sentence that the law “establishes a presumption that government data are public.”<sup>23</sup>

The freedom-of-information provision has been the cardinal litigational arrow in the quiver of the media seeking information from governmental entities that balked at providing it. In the late 1970s, the *Catholic Bulletin*, a newspaper, requested from the state Department of Welfare the names of physicians and clinics that received governmental funds to perform abortions on public assistance recipients. A divided supreme court held that the

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17. *Id.* at 618 (emphasis added).

18. MINN. STAT. § 13.02, subs. 14, 15 (1994).

19. For example, the unwarranted invasion of privacy, national security, and criminal investigation.

20. *See, e.g.*, 5 U.S.C. § 552 (1994). Also, the data practices codes of California, Michigan, and New York employ a balancing test.

21. The subtle distinction in terminology (e.g., “federal law” v. “state statute”) is important: Whereas federal regulations can restrict access to data maintained by Minnesota governmental entities, state agencies may not promulgate rules that keep the public from having access to data that those agencies maintain.

22. MINN. STAT. § 13.03, subd. 1 (1994).

23. MINN. STAT. § 13.01, subd. 3 (1994).



data privacy statute<sup>24</sup> mandated the disclosure of the identities of those physicians who were paid with public funds.<sup>25</sup>

The *St. Paul Pioneer Press* used the freedom-of-information provision to obtain security plans for the Mall of America.<sup>26</sup> Its cross-town rival, the *Minneapolis Star Tribune*, also used the provision to successfully intervene in a case in which a teachers' union attempted to enjoin disclosure of data relating to disciplinary actions taken against certain Minneapolis public school teachers.<sup>27</sup>

And most recently, both newspapers joined forces to argue, victoriously, that data maintained about an investigation of a hockey player arrested for an alleged rape should be publicly accessible. In that case,<sup>28</sup> after the Hennepin County Attorney decided not to prosecute, a decision that would have rendered the underlying data to be public,<sup>29</sup> the district court issued an expungement order, which was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court reversed, holding that the clear language of the statute made the data public and precluded the expungement order.<sup>30</sup>

### 3. *Free Inspection*

A noteworthy facet of Minnesota's open government policy is that any citizen may examine government data without charge.<sup>31</sup> The MGDPA expressly forbids governmental agencies from

24. Originally, the law had no official name, but most people referred to it as the data privacy statute. In 1981, the Legislature overhauled the statute, recodified it in Minnesota Statutes chapter 13, and formally bestowed upon it the moniker of the Minnesota Government Data Practices Act.

25. *Minnesota Medical Ass'n v. State*, 274 N.W.2d 84, 94 (Minn. 1978).

26. *Northwest Publications, Inc. v. City of Bloomington*, 499 N.W.2d 509, 510 (Minn. Ct. App. 1993).

27. *Minneapolis Fed'n of Teachers v. Minneapolis Sch. Dist. No. 1*, 512 N.W.2d 107, 109 (Minn. Ct. App. 1994).

28. *In re Quinn*, 517 N.W.2d 895 (Minn. 1994).

29. MINN. STAT. § 13.82, subd. 5(a) (1994). Section 13.82, "Comprehensive Law Enforcement Data," classifies various kinds of information maintained by law enforcement agencies. Subdivision 5 classifies investigative data collected by law enforcement authorities in preparing a criminal case as confidential (or protected nonpublic) while the investigation is active, but transforms most of those data into public information once the investigation is "inactive." *Id.* Minnesota Statutes § 13.82, subdivision 5(a) expressly makes investigative data "inactive" upon the decision by the prosecutorial authority not to pursue the case. *Id.*

30. *Quinn*, 517 N.W.2d at 900.

31. MINN. STAT. § 13.03, subd. 3 (1994).

charging a fee to any person who wishes to inspect public data.<sup>32</sup> Furthermore, the government has an affirmative obligation to make the data available promptly, conveniently, and at reasonable times and places.<sup>33</sup>

At a practical level, a governmental agency that designs forms that contain mixed-classification data has a logistical problem when a citizen seeks public information. Someone has to review the form, find a way to redact the not public data, and authorize the release of the residual public data. The question is who should pay for it.

Governmental agencies, relying on the provision that allows them to charge the requesting person for the "actual costs of searching for and retrieving government data, including the cost of employee time,"<sup>34</sup> contend that the requestor should pay for extra time devoted to that special request, which the agency would not have to expend but for the requestor's demand for the data. Citizens, on the other hand, point to the provision that requires governmental agencies to "keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use."<sup>35</sup> They also cite to language in the public access section that forbids governmental agencies from charging any costs associated with "separating public from not public data."<sup>36</sup>

The Commissioner of Administration, pursuant to administrative authority conferred by the Legislature,<sup>37</sup> has in a number of cases on that subject ruled in favor of the citizens.<sup>38</sup> Governmental agencies that want to avoid spending staff time reviewing and redacting documents can solve many of the problems prophylactically by redesigning their forms so that public and not public data are segregated and designing electronic databases so that public data are readily retrievable.

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32. *Id.*

33. MINN. STAT. § 13.03, subs. 1, 2 (1994).

34. MINN. STAT. § 13.03, subd. 3 (1994).

35. MINN. STAT. § 13.03, subd. 1 (1994).

36. MINN. STAT. § 13.03, subd. 3 (1994).

37. MINN. STAT. § 13.072 (1994).

38. *See, e.g.*, Op. Comm'r Dep't Admin. 95-049 (1995); Op. Comm'r Dep't Admin. 95-036 (1995); Op. Comm'r Dep't Admin. 95-030 (1995); Op. Comm'r Dep't Admin. 94-017 (1994); Op. Comm'r Dep't Admin. 94-014 (1994).

## SYNOPSIS

The upshot of the three Open Government postulates, then, is fourfold:

- ◆ The Legislature requires every governmental entity to disclose the existence of all data it maintains to data subjects and to publish a document that alerts the world at large to the government's data base.

- ◆ One must start with the assumption government data are public.

- ◆ There has to be some federal law, state statute, or temporary classification to justify the restriction of access to government data.

- ◆ Finally, the government must make public information available for free inspection at convenient times and places.

*B. Privacy and Due Process*

Minnesota remains ambivalent about the elusive concept of privacy even in the so-called Information Age, in which amassing and using data about people are forms of political, economic, and governmental power. On one hand, the Minnesota Supreme Court has discerned an independent right to privacy in the Bill of Rights premised on Article I of the Minnesota Constitution.<sup>39</sup> On the other hand, the state's appellate courts have unfailingly declined to recognize any tort for the invasion of privacy.<sup>40</sup>

As a creature of statute, privacy has had limited roles on the legal stage in the private sector. The Legislature has seen fit to protect conversations from wiretapping and from unconsented recording<sup>41</sup> and to guarantee certain rights of privacy to hospital and nursing home patients.<sup>42</sup> Most of the legislative privacy protections, however, inhere in the MGDPA with respect to the collection, maintenance, and dissemination of data in governmental files. In the MGDPA, the Legislature has acknowledged and made policy about two very different kinds of privacy: disclosural privacy, which requires the government to protect in-

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39. *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988).

40. *Hendry v. Connor*, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975); *Markgraf v. Douglas*, 468 N.W.2d 80, 84 (Minn. Ct. App. 1991); *Stubbs v. North Memorial Medical Ctr.*, 448 N.W.2d 78, 80 (Minn. Ct. App. 1989).

41. MINN. STAT. § 626A.02 (1994).

42. MINN. STAT. §§ 144.335, 144.651, subds. 15, 19, 21, 27 (1994).

dividual privacy by not disclosing government information to third parties; and informational privacy, which protects individuals from governmental intrusion.

### 1. *Disclosural Privacy*

The Legislature deals with disclosural privacy by making countless statutory decisions to restrict the disclosure of certain types of sensitive data to the public. What the MGDPA generally attempts to ensure is that individuals about whom governmental agencies keep records ("data subjects") can gain access to much of the information maintained about them, but other people cannot without good reason.<sup>43</sup>

The "good reason" might be that the Legislature has determined that information about the data subjects is available to the public, e.g., the salaries of governmental officials,<sup>44</sup> the identities of donors to the Minnesota Zoo,<sup>45</sup> or the adult inmates of a jail.<sup>46</sup> Additionally, some people in the governmental agency that maintains the data will have access to not public data about data subjects because their jobs require them to have that access.<sup>47</sup>

For example, a taxpayer has the right to see his or her own tax return,<sup>48</sup> and so do certain officials at the Department of Revenue (and other governmental officials authorized by law to have access),<sup>49</sup> but no one else can.<sup>50</sup> The right to have personal information about oneself protected from disclosure to others presupposes a knowledge that a governmental agency actually maintains files with personal information in it. Accordingly, the MGDPA grants every citizen the right to find out if a particular agency does in fact maintain information on him or her and how the data are classified, which in turn, determines who, in general terms, has access.<sup>51</sup>

43. See *infra* parts II.B.3, II.C.1.

44. MINN. STAT. § 13.43, subd. 2(a) (1994).

45. MINN. STAT. § 13.792 (1994).

46. MINN. STAT. § 13.82, subd. 2(j) (1994).

47. MINN. R. 1205.0600, subp. 2(A) (1995).

48. MINN. STAT. §§ 270B.02, subd. 1, 270B.03, subd. 1(1) (1994 & Supp. 1995); MINN. STAT. § 13.02, subd. 12 (1994).

49. MINN. STAT. § 13.05, subd. 9 (1994) (allowing state tax returns, for example, to be shared with the Internal Revenue Service).

50. MINN. STAT. § 13.05, subd. 3 (1994).

51. MINN. STAT. § 13.04, subd. 3 (1994); see *infra* part II.C.1 (discussing the classification system).

## 2. *Informational Privacy*

While the "disclosural privacy" concept is easy to grasp, the "informational privacy" idea is more abstract. This second type of privacy is more directly involved with the legislative policy that attempts to limit governmental intrusion into the privacy of its citizens and clients. Legislative policy in Minnesota, as expressed by the MGDPA concerning informational privacy has two major objectives: (a) to limit the data the government collects; and (b) to control secondary uses of data collected.

### *a. Limited Collection*

The MGDPA limits what government can collect to that information that is "*necessary* for the administration and management of programs" authorized or mandated by federal law, statute, or local ordinance.<sup>52</sup>

### *b. No Secondary Use*

The problem the Legislature intended to ameliorate with the informational privacy postulate called no secondary use is that of governmental agencies collecting information for one purpose and using it for another. Suppose that for your son or daughter to obtain a scholarship to a state post-secondary educational institution, you were obliged to reveal information about your income, child support and spousal maintenance obligations, and assets. You might be quite unnerved if a deputy sheriff suddenly turned up with that information.

The statute contains two separate but related provisions to effectuate the no secondary use limitation. First, it requires that any time an agency asks an individual data subject to provide not public information about himself or herself, the agency must iterate precisely how that information is going to be used and disseminated.<sup>53</sup> This notice is part of a five-point admonition, which has come to be known as the Tennessen Warning.<sup>54</sup> That

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52. MINN. STAT. § 13.03, subd. 3 (1994) (emphasis added). Additionally, the Administrative Rules specify the circumstances under which governmental entities may legitimately claim collection to be necessary. See MINN. R. 1205.0100-2000 (1995).

53. MINN. STAT. § 13.04, subd. 2(a) (1994).

54. Although the term appears nowhere within the MGDPA, "Tennessen Warning" is the commonly-accepted two-word phrase used to abbreviate the statutory notice pursuant to Minnesota Statutes § 13.04, subdivision 2, which agencies subject to the MGDPA must give to individuals from whom they request private or confidential data. The "warning" is analogous to the Miranda Warning notice, which law enforcement

notice includes, in addition to the clear purpose for which the agency is seeking the information, the following:

- ◆ HOW the data will be used within the agency collecting the information;
- ◆ WHETHER the individual can refuse or is legally obliged to furnish the information requested;
- ◆ WHAT the consequences are of either providing or refusing to provide the information requested; and
- ◆ WHO will have access to the data provided.<sup>55</sup>

The purpose of the Tennesen Warning is to facilitate individual data subjects' decision-making as to whether they allow the government to invade their privacy.

The actual enforcement mechanism for the "no secondary use" limitation appears elsewhere in the MGDPA. An agency that does not disclose, or improperly discloses, how it intends to use the data collected is penalized by a proscription against use of the information for any purposes other than those stated to the individual from whom the agency took the information.<sup>56</sup> There are some exceptions to this proscription, but they are few in number and explicitly set forth in the statute:

- (a) data collected before the enactment of the 1975 Tennesen Warning notice;<sup>57</sup>
- (b) use and dissemination of data that are authorized by laws enacted or promulgated after the time of collection;<sup>58</sup>
- (c) with the informed consent of the data subject;<sup>59</sup>
- (d) with the express approval of the Commissioner of Administration because the use is necessary to the public welfare or "necessary to carry out a function assigned by law;"<sup>60</sup> and

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officers must give to individuals whom they take into custody. "Tennesen" is the surname of the former state senator (Robert Tennesen of Minneapolis) who was the Senate sponsor of the bill that included the language that has become Minnesota Statutes § 13.04, subdivision 2.

55. MINN. STAT. § 13.04, subd. 2 (1994).

56. MINN. STAT. § 13.05, subd. 4 (1994).

57. MINN. STAT. § 13.05, subd. 4(a) (1994).

58. MINN. STAT. § 13.05, subd. 4(b) (1994).

59. MINN. STAT. § 13.05, subd. 4(d) (1994). The statute lists seven criteria to hurdle to assure that the consent is "informed" for dissemination to insurance carriers. *Id.* However, many agencies use these criteria for all informed consents.

60. MINN. STAT. § 13.05, subd. 4(a)-(c) (1994).

(e) private or confidential data discussed at a meeting open to the public, to the extent permitted by the Open Meeting Law.<sup>61</sup>

The failure to give a Tennessean Warning means that the agency cannot use or disseminate the data for any purpose.<sup>62</sup>

### 3. *Due Process*

The due process aspect of right to privacy, has four facets. The right to know that somebody is maintaining data on you is one;<sup>63</sup> the right to inspect those records is a second;<sup>64</sup> the right to protect that information from disclosure to other people is a third;<sup>65</sup> and the right to challenge data if you believe the data are wrong or incomplete is the fourth facet.<sup>66</sup>

The Department of Health, Education, and Welfare report<sup>67</sup> included a recommended code of Fair Information Practices. The code's basic concepts appear in every data protection and data privacy statute on the planet.<sup>68</sup> The Fair Information Practices code acknowledges that in an information society, data can have significant effects on individual lives, even if the data have limited disclosure.<sup>69</sup> The code has much more to do with due process than it does with privacy. The MGDPA enumerates these due process rights in the following way.

The MGDPA permits data subjects to contest the accuracy or completeness of data by writing a letter to the Responsible Authority,<sup>70</sup> challenging the data as they are maintained.<sup>71</sup> The

61. MINN. STAT. § 13.05, subd. 4(e) (1994). The Open Meeting Law is codified in Minnesota Statutes § 471.705, subdivision 1d.

62. See Op. Comm'r Dep't Admin., 95-028 (1995). When the Commissioner of Administration renders an opinion on data practices matters, the courts are obliged to give deference. MINN. STAT. § 13.072, subs. 1, 2 (1994).

63. MINN. STAT. § 13.04, subd. 3 (1994).

64. *Id.*

65. See MINN. STAT. §§ 13.02, subd. 12; 13.05, subd. 5(2) (1994).

66. MINN. STAT. § 13.04, subd. 4 (1994).

67. See *Report, supra* note 10.

68. See generally COLIN J. BARNETT, REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES (1992).

69. See *Report, supra* note 10, at 75.

70. Except where the statute expressly designates the responsible authority, every governmental agency is required to appoint a responsible authority to oversee the collection, use, and dissemination of government data. MINN. STAT. § 13.02, subd. 16 (1994).

71. MINN. STAT. § 13.04, subd. 4 (1994).

agency<sup>72</sup> then has thirty days either to correct the data found to be inaccurate or incomplete or to notify the person contesting the data that it finds the records to be accurate or complete.<sup>73</sup> If the agency does not agree to change the data, it must append the data subject's statement of disagreement to its own record whenever it discloses the information. Further, adverse decisions of the agency or responsible authority are appealable to the Commissioner of Administration.<sup>74</sup>

#### SYNOPSIS

Privacy and due process rights with respect to government data comprise the following:

◆ **DISCLOSURAL PRIVACY** means restrictions on the government's disclosure of data to the public.

◆ **INFORMATIONAL PRIVACY** limits the data that the government may collect, and restricts the secondary use of those data.

◆ **DUE PROCESS RIGHTS** include (1) notice (the Tennessee Warning); (2) the right to know what data exist; (3) the right to inspect data; (4) the right to protect data from disclosure; and (5) the right to correct inaccurate or incomplete data.

### C. *Restricted Access*

Having resoundingly proclaimed the presumption that government data are public,<sup>75</sup> the Legislature proceeded to qualify that presumption by creating classifications of certain data as not public. It solved the riddle of how to avoid a case-by-case balancing test for these classifications by categorizing all data definitionally.<sup>76</sup> Access is strictly a function of that classification scheme.<sup>77</sup>

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72. In this article, the term "agency" is used to mean the governmental entity that is subject to the MGDPA, largely because that is how most people think of it. Very technically, however, the statute imposes the obligations on the agency's responsible authority.

73. MINN. STAT. § 13.04, subd. 4 (1994).

74. *Id.*

75. MINN. STAT. § 13.01, subd. 3 (1994).

76. See MINN. STAT. § 13.02, subds. 3-5, 7-9, 12-15 (1994).

77. See Gemberling & Weissman, *supra* note 6, at 603.



## 1. *The Classification System*

### a. *History*

The classification system started out with just three categories: public, private, and confidential data on individuals.<sup>78</sup> The key distinction was between the terms “private” and “confidential,” which many people still think of as synonymous. Private data were accessible to data subjects and governmental officials with a need for access, while confidential data were only accessible to the government.<sup>79</sup>

As administrators grappled with stuffing the vast variety of data into these three categories, the Legislature expanded the number of classifications. It added three analogous categories for information not on individuals (public, nonpublic, and protected nonpublic);<sup>80</sup> coined a generic term, “not public data,” for restrictively classified categories;<sup>81</sup> and, after a rather contentious public debate, created three parallel categories for data on decedents.<sup>82</sup>

### b. *The Classification Scheme*

The current classification system appears in the chart below:

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78. MINN. STAT. § 15.162, subs. 2(a), 5(a), 5(b) (1974) (the numbered sections before recodification in Minnesota Statutes chapter 13).

79. MINN. STAT. § 15.162, subs. 2(a), 5(a) (1974).

80. MINN. STAT. § 13.02, subs. 9, 13, 14 (1994).

81. MINN. STAT. § 13.02, subd. 8(a) (1994).

82. MINN. STAT. § 13.10, subd. 1(a)-(c) (1994).

DATA ON INDIVIDUALS	DATA NOT ON INDIVIDUALS	DATA ON DECEDENTS
Public	Public	Public <sup>83</sup>
NOT PUBLIC <sup>84</sup>		
Private	Nonpublic	Private
Confidential	Protected nonpublic	Confidential

c. "Skyways"

A good deal of the frustration for initial browsers of the data practices statute arises from the fact that the authority for any restrictive classification can be virtually any federal law, statute, or temporary classification.<sup>85</sup> How can the casual reader, or for that matter the veteran management official or attorney, locate the particular federal laws, state statutes outside of Minnesota Statutes chapter 13, and temporary classifications that might not only authorize, but require, restricted access? The answer was through legislative "skyways"—which are bridges to enumerate most of the restrictive classifications by reference within the MGDPA.

i. Federal law

There was no obvious way to refer to all federal laws that might have an impact on the classification of data maintained by

83. For most kinds of information maintained by government, "public data" is the default classification. See MINN. STAT. § 13.03, subd. 1 (1994). It is the presumptive classification absent some federal law, state statute, or temporary classification to the contrary. See *id.*

For data on decedents, however, the classification depends on when the data were created. Data created because the decedent died are presumably public. Data created while the decedent was still alive and which were then classified private or confidential will metamorphose into public data with the Rule of 40 ("ten years have elapsed from the . . . death of the individual and 30 years have elapsed from the creation of the data"). MINN. STAT. § 13.10, subd. 2 (1994) (emphasis added).

84. Note the subtle but crucial difference between "not public data" and "nonpublic data." The former is simply the generic term for all the classifications other than public; whereas the latter is comparable to private data in that both are accessible only to data subjects and to governmental officials with a need to know. See MINN. STAT. § 13.02, subs. 8(a), 9, 12 (1994). "Private data" is a category that applies to data on individuals; "nonpublic data" is a category that applies to data not on individuals. MINN. STAT. § 13.02, subs. 9, 12 (1994).

85. MINN. STAT. § 13.03, subd. 1 (1994).

governmental entities in Minnesota. The Legislature, however, has used federal law to define terms and to authorize the dissemination of educational data<sup>86</sup> and welfare data.<sup>87</sup> In each statutory provision, the Legislature cited the federal statutes and regulations that had an impact on data held by Minnesota governmental agencies.<sup>88</sup>

### *ii. Temporary Classifications*

The temporary classification<sup>89</sup> matter was the easiest: The MGDPA empowers the Commissioner of Administration to grant temporary classifications of data to agencies that make the required statutory showing in support of the proposed, restrictive classification.<sup>90</sup> By requiring the Commissioner to submit all extant temporary classifications in bill form every January,<sup>91</sup> the Legislature may codify the temporary classifications in the MGDPA (and thereby make them readily available to perusers) or allow them to expire after the next legislative session.<sup>92</sup> In the late 1970s and early 1980s, there was a spate of applications for temporary classifications. A substantial number of the provisions in the MGDPA began as temporary classifications. In the last fifteen years, temporary classifications have trickled into the statute at the rate of two to four each year.

### *iii. State Statutes*

The skyway to the various state statutes that classify data as "not public" presented the seemingly largest barrier, until 1991.

86. MINN. STAT. § 13.32 (1994).

87. MINN. STAT. § 13.46 (1994).

88. The educational data provision, for example, cites the Family Educational Rights and Privacy Act (FERPA) and its accompanying regulations in the Code of Federal Regulations concerning "directory information." MINN. STAT. § 13.32, subs. 3(d), 3(e), 5 (1994). The welfare data provision cites the Developmental Disabilities Act. MINN. STAT. § 13.46, subd. 2(11) (1994) (referring to part C of Public Law No. 98-527).

89. MINN. STAT. § 13.06, subd. 1 (1994). Submitting the application itself will give the data a very temporary (45 days, unless rejected earlier by the Commissioner) restrictive classification. *Id.* If the Commissioner grants a temporary classification, it will remain in force until June 1 or the year following its submission to the Legislature. MINN. STAT. § 13.06, subd. 6 (1994), *as amended by* 1995 MINN. LAWS ch. 259, art. 1, § 1.

90. MINN. STAT. § 13.06, subs. 2, 3 (1994). These provisions permit the Commissioner to grant temporary classifications (a) for compelling need; (b) for data that are similar to data already restrictively classified; and (c) where public access would render a program unworkable. *Id.*

91. MINN. STAT. § 13.06, subd. 7 (1994).

92. MINN. STAT. § 13.06, subd. 6 (1994).

In that year, with the assistance of the legislative counsel and the Department of Administration, the Legislature enacted Minnesota Statutes section 13.99, which gives “bullet” summaries of each statute (over 220 statutes as of 1996) outside the MGDPA that classifies government data.<sup>93</sup>

## 2. *Dissemination*

Governments collect data because they intend to use them. The threshold question, then, is how can the government use “not public data” other than sharing them with those governmental officials within the agency whose jobs require access to them?

### a. *Safety Valves*

Agencies have four ways to disseminate “not public information where there is no explicit federal law or state statutory authority to do so.”

(1) **SUMMARY DATA:** An agency can use the data freely by abridging the data so as to remove individual identification. This is called “summary data.”<sup>94</sup> Revealing the race or gender of an individual governmental employee, for instance, would violate the MGDPA’s classification of such information as “private data on individuals.”<sup>95</sup> However, a statistical report setting forth the percentage of women and people of color in various governmental agencies would be summary data and therefore public, unless the summary data allow an individual to be identified.<sup>96</sup>

(2) **INFORMED CONSENT:** Second, an agency can obtain the consent of data subjects to disseminate information about them.<sup>97</sup> Where there are only a few data subjects involved, this would be relatively easy. However, if the agency wanted to contract with a consulting firm to do research that would require access to hundreds or even thousands of files containing private data, obtaining everyone’s informed consent would be impracticable. Agencies often view “informed consent” as a device available to the government, then ignore the fact that individuals,

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93. 1991 Minn. Laws 106, § 6 (codified at MINN. STAT. § 13.99 (1994 & Supp. 1995)). The legislative counsel and the Department of Administration, between them, discover six or seven new ones each year.

94. MINN. STAT. § 13.02, subd. 19 (1994).

95. MINN. STAT. § 13.43, subd. 4 (1994).

96. MINN. STAT. § 13.05, subd. 7 (1994).

97. MINN. STAT. § 13.05, subd. 4(d) (1994).

too, can initiate authorizations for the government to share data with third parties of the data subject's choosing.<sup>98</sup>

(3) **AUTHORIZATION AND NEW DISSEMINATION:** There is an evidently little-known provision that offers agencies a way to lawfully disseminate data that cannot practicably be summarized and where obtaining the informed consent of scores of data subjects would be logistically implausible. That provision is the "new use or dissemination" authority, vested in the Commissioner of Administration.<sup>99</sup> An agency may request authority to initiate a new use or dissemination of data from the Commissioner, who may grant it only if the new use or dissemination is "necessary to carry out a function assigned by law."<sup>100</sup> In the early days of the statute's existence, a number of agencies used this provision to facilitate dissemination of not public data for appropriate reasons that were unknown at the time of collection.

(4) **TRANSFORMATION:** Some data, restrictively classified, will mutate into public data over time by operation of law. If, for example, the data are not on individuals, information previously classified as nonpublic or protected nonpublic will become public information after ten years.<sup>101</sup> Once the data have transformed into public data, the agencies are free to disseminate them.

### *b. Intergovernmental Sharing*

A touchy issue about data dissemination is whether and under what circumstances an agency can disseminate not public information to another agency.<sup>102</sup> The agency can preempt the problem, of course, by including the other agency as an intended recipient in its Tennessean Warning if it has statutory (or federal law) authority to do so.<sup>103</sup> If it discovers that the Tennessean Warning was defective, it must either obtain the data subject's

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98. *Id.*; MINN. R. 1205.0400, subp. 2 (1995).

99. MINN. STAT. § 13.05, subd. 4(c) (1994).

100. *Id.*

101. MINN. STAT. § 13.03, subd. 8 (1994).

102. Minnesota Statutes § 13.05, subdivision 9, prohibits intergovernmental sharing of data unless authorized or required by state statute or federal law. Additionally, even if authorized, the data may not be disseminated if that dissemination had not been disclosed to the data subject at the time of the Tennessean Warning. MINN. STAT. § 13.04, subd. 2(d) (1994).

103. MINN. STAT. § 13.04, subd. 2 (1994).

consent,<sup>104</sup> apply for an authorization for new use,<sup>105</sup> or try to develop legislation to authorize the dissemination.<sup>106</sup>

A number of provisions in the MGDPA reflect legislative amendments to authorize exchanges of information among agencies. For example, local health boards may disclose private or confidential health data to a data subject's physician to identify persons at risk of illness.<sup>107</sup> Officials in county welfare agencies may share information with county medical examiners for the specific purpose of locating relatives of a decedent.<sup>108</sup> State auditors may have access to data maintained by community mental health centers, but not patient information.<sup>109</sup> Finally, the State Committee of Blind Vendors has access to data maintained by the Department of Economic Security on blind individuals licensed to operate concessions in governmental commissaries.<sup>110</sup> The "welfare data" section of the MGDPA contains twenty separate provisions about the dissemination of welfare data.<sup>111</sup>

#### SYNOPSIS

With respect to Restricted Access:

- ◆ The classification system determines access.
- ◆ The classification system is a legislative taxonomy to prevent bureaucratic discretion about access.
- ◆ Dissemination, which is distinct from classification, refers to whether governmental agencies can share not public data.

### D. Operational Mechanics

#### 1. Governmental Responsibility

Definition-bound and wordy, the MGDPA is not self-executing. Even though the statute constitutes a series of legislative restrictions on executive branch agency discretion, the law makes the very agencies it seeks to regulate accountable for the operational mechanics.

104. MINN. STAT. § 13.05, subd. 4(d) (1994).

105. MINN. STAT. § 13.05, subd. 4(c) (1994).

106. *Id.* (permitting a subsequent statute to apply retroactively with respect to authorizing the dissemination of private and confidential data previously collected).

107. MINN. STAT. § 13.38, subd. 2(b) (1994).

108. MINN. STAT. § 13.46, subd. 2(b) (1994).

109. MINN. STAT. § 13.46, subd. 8 (1994).

110. MINN. STAT. § 13.791, subd. 3 (1994).

111. MINN. STAT. § 13.46, subd. 2 (1994 & Supp. 1995).

*a. Affirmative Obligations*

The MGDPA, its accompanying rules, and related statutes impose eighteen principal and discrete obligations upon governmental entities to comply with the procedural requirements of the statute. The following chart summarizes those obligations:

CHART I

Authority	Topic	Specific Obligation	Purpose
1 MINN. STAT. § 13.03, subd. 2	Customer service	Establish procedures to ensure that officials respond <b>PROMPTLY</b> to requests for government data.	(a) To facilitate public access (b) Accountability
2 MINN. STAT. § 13.05 subd. 8	Access procedures	Prepare a public document setting forth the rights of data subjects and access procedures for public and private data.	To formalize a guide for citizens through the maze of government data.
3 MINN. STAT. § 13.05, subd. 5(1); MINN. R. 1205.1500	Data quality	Procedures to make sure that data on individuals are accurate, complete, and current.	To protect against the use of erroneous data to make decisions.
4 MINN. STAT. § 13.05, subd. 5(2)	Data security	Establish procedures to ensure "security safeguards" for data on individuals.	(a) To protect individual privacy; (b) To keep handlers from altering the data.
5 MINN. STAT. § 13.05, subd. 1; MINN. R. 1205.1500, subp. 3	Inventory of records	Create and <b>ANNUALLY UPDATE</b> the inventory of categories of records (including data collection forms).	(a) A single repository of classifications (b) Notice to the world of the data that the agency maintains
6 MINN. STAT. § 13.05, subd. 6	Contract provisions	Insert into contracts that require access by the contractor to data on individuals a provision obliging the contractor to comply with the MGDPA.	Extend protection into the private sector where the government is sharing not public data and to prevent governmental agencies from concealing data in the private sector.

Authority	Topic	Specific Obligation	Purpose
7 MINN. STAT. § 13.05, subd. 7; MINN. R. 1205.0700, subp. 3	Summary data	Prepare summary data upon the written request of any person; procedures for gaining access to summary data.	To provide reasonable access to data for research purposes while protecting individual identities.
8 MINN. STAT. § 13.05, subd. 9, 10	Non-dissemination to other governmental agencies	One governmental agency may not share "not public" information on individuals with another governmental agency, unless required by state statute or federal law.	To assure public policy bases for dissemination of not public data; also protects individual privacy against the government.
9 MINN. STAT. §§ 138.163; 15.17, subd. 3	Disposition of records	Dispose of and transfer records in accordance with statutory procedures.	Make certain of the proper disposition of records preserved for legal or historical purposes.
10 MINN. R. 1205.1500, subp. 1	Plan for periodic review	Agency must formulate a plan for reviewing the administration of data practices.	To actualize an agency's periodic review of which data are necessary to maintain.
11 MINN. R. 1205.1500, subp. 4, 5	Modification	Modify data collection and maintenance procedures to eliminate unnecessary data.	Appropriate step following review.
12 MINN. R. 1205.0400, subp. 3; 1205.0600	No unauthorized access	Publish procedures for ensuring no unauthorized access to private and confidential data.	Security.
13 MINN. R. 1205.0500, subp. 3	Parental access and notice to minors	Procedures for parents to gain access to information about their minor children.	Reify the idea of parental rights while protecting minors' interests concerning access.
14 MINN. R. 1205.1300, subp. 4	Authorized uses of data	Enumerating the authorized uses of data by category.	(a) Enable administrators to know how to respond to requests for data; (b) Facilitate answers to questions about dissemination.
15 MINN. R. 1205.1600	Informed Consent Forms	Designing the forms.	Guidance for the content of Informed Consent forms.



Authority	Topic	Specific Obligation	Purpose
16 MINN. R. 1205.1000	Responsible Authority	Each governmental agency was supposed to have appointed a Responsible Authority by Sept. 30, 1981.	Identify the principal decision maker about data practices.
17 MINN. R. 1205.1200, subp. 2; MINN. STAT. § 13.03, subd. 2	Designees	Posting the names of data practices Designees, if appointed.	Identify the other key data practices and officials in each agency for citizens and the media.
18 MINN. R. 1205.1300, subp. 5	Training	Responsible Authority must train designees and other staff.	Ensure compliance and avoid liability.

### *b. Disincentives*

In addition to these affirmative obligations presented in Chart I, the statute contains fifteen disincentives for a governmental entity's failing to use the data as prescribed by statute or rule. Chart II summarizes these disincentives.

#### CHART II

Authority	DISINCENTIVE against governmental temptation to:
1 MINN. STAT. § 13.05, subd. 4	IGNORE THE TENNESSEN WARNING: Cannot use the information for any purpose not disclosed in the warning (this is the MGDPA's version of the "Exclusionary Rule").
2 MINN. STAT. § 13.05, subd. 3	DATA GLUTTONY: Government may not collect data that is not "necessary" for the administration of its programs.
3 MINN. STAT. § 13.30	HIDE THE POTATO: Transferring the data to the agency's attorney to avoid either public access or data subject access.
4 MINN. STAT. § 13.03, subd. 8	"COBWEB" DATA: After ten years, nonpublic and protected nonpublic data may become public.
5 MINN. STAT. § 13.03, subd. 3	BE INTENTIONALLY INCOMPETENT: Agencies may not charge data requestors for the effort to segregate public from not public data.
6 MINN. STAT. § 13.03, subd. 3	BLUFF: If an agency contends that data are not discloseable to a requestor, it must cite the specific statutory section or federal law that classifies those data as not public.
7 MINN. STAT. §§ 13.03, subd. 10; 13.05, subd. 4(d)(7), final paragraph	OVERCHARGE: An agency may only charge for the actual cost incurred in compiling and photocopying. (The negative pregnant of MINN. STAT. § 13.03, subd. 10 is that charges levied in excess of actual cost must be returned to the data subject.)

Authority	DISINCENTIVE against governmental temptation to:
8 MINN. STAT. § 13.04, subd. 3	DRAG ITS FEET: The agency has five days (ten days with special dispensation, if immediate compliance is not plausible) to provide individual data subjects with public or private data about them.
9 MINN. STAT. § 13.04, subd. 4; MINN. R. 1205.1600	REFUSE TO CORRECT ERRORS: If an agency declines to correct an error, the data subject may appeal to the Commissioner of Administration (and pay for the ALJ).
10 MINN. STAT. § 13.05, subd. 4(d)(1); MINN. R. 1205.1400, subp. 4	WRITE INCOMPREHENSIBLY: An informed consent is invalid if it is not written in plain language; further, an agency must explain the meaning of data upon request.
11 MINN. STAT. §§ 13.08, subd. 1, 2, 4; 13.072	THUMB ITS NOSE AT THE LAW: Civil remedies include compensatory damages, injunctions, orders to compel compliance, and punitive damages. Administrative remedies include eliciting Commissioner's Opinions to interpret the law.
12 MINN. STAT. § 13.03, subd. 2	DESIGN UNLAWFUL COMPUTERIZED INFORMATION SYSTEMS: Agencies will have to allocate large sums of money to reprogram or redesign computerized systems that comply with the MGDPA.
13 MINN. STAT. § 13.09	AVOID INDIVIDUAL RESPONSIBILITY: Governmental agents who willfully violate the law are subject to criminal prosecution and personnel sanctions.
14 <i>Carradine v. State</i> , 511 N.W.2d 733, 737 (Minn. 1994), construing M.S., ch. 13.	DEFAME: Lower-level officials, and their governmental employers, may lose their qualified immunity against lawsuits if they make defamatory statements that are "not essential to the performance of their duties."
15 MINN. STAT. § 13.072	MAKE ANTI-CONSUMER INTERPRETATIONS: The Commissioner of Administration can issue opinions, at the request of any citizen, on how the law in certain circumstances should be applied to particular facts.

## 2. Remedies

At first blush, the statute's remedial design should rattle governmental cages so as to attain the broader statutory purpose, namely compliance. However, governmental entities have managed to dodge most of the more serious remedial bullets owing to a judiciary relatively disinclined to enforce the MGDPA's remedial provisions. Additionally, those who do litigate to enforce their rights encounter the problem of having to prove damages.

### a. Problems That the Legislature Contemplated Needed Remedies

The statute reveals the problems that the Legislature anticipated it could ameliorate legislatively: (1) governmental agencies refusing to release public information; (2) governmental agencies divulging not public information; (3) individual gov-

ernmental employees violating the MGDPA despite agency policies; (4) administrative interpretations of the MGDPA that a data requestor does not want to undertake expensive litigation to challenge; (5) a governmental agency's refusal to correct data which a data subject asserts are inaccurate; and (6) general refusal to pay attention to the statute.

### b. Statutory Remedies

Chart III displays the remedial provisions embedded in the statute to deal with each of the six problems the Legislature contemplated.

CHART III

Problem	Provision	Remedy
(1) Non-release of public data	MINN. STAT. § 13.08, subd. 2, 4	Action to compel compliance; injunction.
(2) Disclosure of not public data	MINN. STAT. § 13.08, subd. 1	Action for damages (plus attorney fees, costs, and possible punitive damages up to \$10,000).
(3) "Rogue elephant" employees	MINN. STAT. § 13.09	Criminal prosecution; suspension or dismissal.
(4) Administrative interpretation	MINN. STAT. § 13.072	Commissioner of Administration will render an opinion interpreting the statute, to which interpretation courts are to give deference.
(5) Refusal to correct data	MINN. STAT § 13.04, subd.4(a), second paragraph; MINN. R. 1205.1600	Appeal of the responsible authority's decision to the Commissioner of Administration, using the Administrative Procedure Act.
(6) General non-compliance	MINN. STAT. § 13.08, subd. 4	Action to compel compliance.

### c. Analysis

Although the array of remedies seems impressive, they seldom attach in actuality.

(i) *Impunity*: The authors are aware of only one instance in which a governmental employee has ever been prosecuted for

violation of the law in the first twenty-one years of the statute's existence.

(ii) *Mootness*. Many judges deem cases alleging governmental refusal to release public data to be "moot" once the governmental entity tardily releases them, notwithstanding the tight, five-day statutory deadline for responding to requests for private data from data subjects<sup>112</sup> and the legislative command for governmental entities to be "prompt" when responding to requests for public information.<sup>113</sup>

(iii) *Immunity*. Minnesota courts have given agencies the benefit of the doubt on the issue of whether an agency should be liable for its employees' "unauthorized" misconduct under the data practices statute. The Minnesota Court of Appeals recently upheld a trial court's determination of no liability on the part of a county for the disclosure of private data (for non-governmental purposes) by a deputy sheriff using private data available only on the computer in the law enforcement center.<sup>114</sup>

(iv) *Standing*. The Minnesota Court of Appeals, in an unpublished decision, has narrowed who has standing to bring an action under the MGDPA by affirming a district court's holding that status as taxpayer, data subject, employee, or one who was denied access to public information for over a year was insufficient to make the plaintiff an "aggrieved person" under the statute.<sup>115</sup>

(v) *Summary judgment*. Few reported cases deal with remedies, either because plaintiffs' claims have trouble surviving summary judgment, or because those that do are generally unreported.

(vi) *Expense*. The cost of the Administrative Law Judge in an appeal to the Commissioner from a Responsible Authority's decision not to correct data is borne by the governmental entity,<sup>116</sup> but the absence of reimbursement of attorney fees for the appeal keeps many data subjects from appealing.<sup>117</sup>

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112. MINN. STAT. § 13.04, subd. 3 (1994).

113. MINN. STAT. § 13.03, subd. 2 (1994).

114. *Walker v. Scott County*, 518 N.W.2d 76 (Minn. Ct. App. 1994). The result in *Walker* might have been different if the claim had been framed as the responsible authority's failure to keep data secure from unauthorized use and dissemination, pursuant to Minnesota Statutes § 13.05, subdivision 5.

115. *Zissler v. Tierney*, No. C6-95-332, 1995 WL 507616 (Minn. Ct. App. Aug. 29, 1995).

116. MINN. R. 1205.1600, subp. 5 (1995).

117. Comments from clients to co-author Weissman.

#### d. Commissioner's Opinions

Surely the most practical remedy enacted since the inception of the statutory scheme is the authority of the Commissioner of Administration to issue opinions interpreting the MGDPA.<sup>118</sup> Either citizens or agencies can request an opinion, but only governmental agencies pay a fee for the cost.<sup>119</sup>

Before 1994, if a data subject or any requesting citizen sought government data, and the government refused, the result was either that the tie favored the government, or a lawsuit. The former was hardly consistent with the legislative goals and the latter made it too expensive for most citizens. So, Minnesota legislators Gene Merriam and Tom Pugh introduced a bill, enacted in the 1993 legislative session, which authorized the Commissioner to interpret the law in connection with certain issues and where the government and the requestor read the law differently.<sup>120</sup>

That the requests for opinions averaged six or seven per month during the initial two years since the enactment of the amendment is a measure of how both governmental officials and individual citizens view the usefulness of a quick and inexpensive administrative interpretation. Most of the opinions requested have concerned (a) accessibility of government data, (b) the costs of photocopying data, and (c) timeliness of governmental response.<sup>121</sup>

In recognition of political sensibilities, the amendment allows the Attorney General to issue opinions that take precedence over Commissioner's opinions.<sup>122</sup> Although these opinions are not binding on the agencies whose compliance or noncompliance prompted the request for the opinion, courts are obliged to give deference to the opinions.<sup>123</sup> The statute also immunizes agencies that rely on Commissioner's opinions from liability for damages, attorney fees, or costs.<sup>124</sup>

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118. MINN. STAT. § 13.072, subd. 1 (1994).

119. MINN. STAT. § 13.072, subd. 3 (1994).

120. See Donald A. Gemberling, *Opinions! Opinions! Opinions!*, (legislative history at page 2 of those materials, MILE, *The Minnesota Data Practices Act* (Dec. 9, 1994)).

121. This statement is based on the authors' analysis of the opinions.

122. MINN. STAT. § 13.072, subd. 1(c) (1994).

123. MINN. STAT. § 13.072, subd. 2 (1994).

124. *Id.*

### SYNOPSIS

The lubricant for the machinery of the data practices statute is a mixture of governmental responsibility and a list of remedies available to anyone who "suffers damages" or who is an "aggrieved person."<sup>125</sup>

- ◆ The responsible authority in each governmental agency must undertake to comply with eighteen discrete tasks set forth in the MGDPA and its accompanying rules.

- ◆ Embedded in the statute are fifteen separate consequences for non-compliance.

- ◆ Remedies range from injunctions, actions to compel compliance, money damages, attorney fees and costs, punitive damages, criminal prosecution of governmental employees, disciplinary actions, an administrative appeal to the Commissioner of Administration, and Commissioner's opinions.

However, legislative remedies are authentic only to the extent that courts will compel their enforcement, which to date most have been reluctant to do.

### III. OLD ISSUES RESOLVED BUT NEW ISSUES EMERGE UNRESOLVED

The Legislature that first enacted the "data privacy act" in 1974 had little personal experience to draw on in establishing policies to deal with the individual and social consequences of the "information revolution."<sup>126</sup> To compensate for that lack of experience, the Legislature drew largely on two sources: the results of the study of information systems and their effects on individuals that were published in the Health, Education, and Welfare Report<sup>127</sup> and the experience of the government of Sweden in administering the Swedish Data Privacy Act of 1946. Since that somewhat cautious beginning, based on some careful study and some analysis of realistic approaches to information-related problems, the growth and evolution of the MGDPA and other laws related to information have been driven primarily by "legislative anecdotes." The anecdotes are often, short, sometimes entertaining, accounts of an occurrence involving govern-

125. MINN. STAT. § 13.08, subs. 1, 4 (1994). Neither "suffers damages" nor "aggrieved person" is defined or explained in the statute.

126. Minnesota was the first state to enact a data privacy statute. Act of Apr. 11, 1974, ch. 479, 1974 Minn. Laws 1199; see Gemberling & Weissman, *supra* note 6, at 574-75.

127. See *Report, supra* note 10.

ment data in which something happened, did not happen, or might happen to someone or something because of the dissemination of (or the refusal to hand over) government data.

In some instances, the anecdotes take the form of constituent stories that prompt legislators to draft amendments. Occasionally, they come as directives from the federal government prescribing how Minnesota should handle certain governmental information.<sup>128</sup> Periodically, those anecdotes take the form of stories told to attorneys who bring suit under the MGDPA. Now and then, these anecdotes *cum* cases evolve into appellate decisions, which in turn become a species of "super" anecdote that is communicated to the Legislature and that provokes a legislative reaction that takes the form of amendments.

Often these anecdotes take the form of a discussion between those who monitor data practices compliance and the Legislature. Out of the discussion comes an understanding of a new way that governmental agencies have found to avoid what the Legislature had previously thought was a clear policy directive. In this respect, the real and functioning governmental information system is in some ways a living system that appears to be subject to the theory of evolution.

This organic character manifests itself as follows: The Legislature states a policy that governmental entities do not like. They exercise their creativity to find a way to avoid the policy. The Legislature learns of the problem anecdotally and establishes new policy to control the exercise of creative circumvention. In response to the new policy, governmental entities once again call upon resources of ingenuity to evade the legislative mandate, and the Hegelian pattern of "act-react-act" continues.

The authors' 1982 article described six significant issues, which were at the time still in evolutionary disequilibrium.<sup>129</sup> Either the anecdotes had not yet been communicated, or they had not yet been found sufficiently compelling for legislative action. With two exceptions, the Legislature has, since 1982, addressed those issues with legislative enactments.

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128. *E.g.*, Driver's Privacy Protection Act of 1994, Pub. L. 103-322, 108 Stat. 2099 (codified as amended in 18 U.S.C. §§ 1, 2721, 2722-25 (1994)).

129. Gemberling & Weissman, *supra*, note 6, at 594-98.

### A. *Old Issues Mostly Resolved*

The then-unresolved issues discussed in 1982 comprised the following:

(1) **DISCOVERY:** What is the relationship of the MGDPA to discovery in litigation or other dispute resolution forums? In other words, does the fact that certain data are classified as not public make them nondiscoverable?

(2) **OPEN MEETING LAW:** What is the relationship of the MGDPA to the "Open Meeting Law"?<sup>130</sup> In other words, does the fact that certain data are classified as not public mean that a body subject to the Open Meeting Law has to close any meeting at which that data will be discussed?

(3) **ADMINISTRATIVE PROCEDURE ACT:** Must the policies and procedures state agencies develop to comply with the MGDPA be published as rules in compliance with Minnesota Statutes chapter 14?

(4) **DATA ON DECEDENTS:** For whom are data about decedents accessible? Do the classifications of data assigned to data about living individuals change once those individuals die?

(5) **CLASSIFICATION EXPANSION:** Are there really only six classifications of data as suggested in the definitions set forth in Minnesota Statutes section 13.02?

(6) **VIABILITY OF THE STATUTORY SCHEME:** Can the conceptual statutory scheme established by the MGDPA, which combines a mini-ombudsperson approach with the principles of "fair information practices" and a healthy dose of Madisonian and "mediasonian" presumption of the openness of government, survive?

The issues associated with discovery, the Open Meeting Law (OML), and data on decedents appear to have been resolved by legislation, litigation, or a combination of both. The classification expansion and viability issues are still alive and well. No one yet has used the Administrative Procedure Act to challenge state agency policies.

#### 1. *Discovery and the MGDPA*

Whether the classification of data as not public barred discovery of those data in civil actions where governmental entities were parties received contradictory responses by Minnesota

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130. MINN. STAT. § 471.705 (1994).



Courts in the 1970s.<sup>131</sup> In 1985, the Legislature attempted to clarify this issue by enacting an amendment explicitly addressing discovery.<sup>132</sup> This provision regulates discovery requests in instances where either a governmental entity is a party to a legal dispute or where a litigant seeks government data, but the governmental agency is not joined as a party.<sup>133</sup> When it is a party, the governmental entity may have a number of reasons to oppose discovery.<sup>134</sup> When it is not a party, the governmental entity's primary interest is in avoiding a claim by a data subject that the agency, in response to a discovery request, improperly disclosed not public data.<sup>135</sup>

The discovery provision only begins to operate when a governmental entity refuses to honor a discovery request.<sup>136</sup> Realistically, there is seldom any statutory authority, other than Minnesota Statutes section 13.03, subdivision 6 (the discovery provision itself), for a governmental entity to disseminate "not public data" to a member of the public for litigation or for other dispute resolution processes. Consequently, it is unlikely that a governmental agency that is trying to comply with the MGDPA's limitations on the disclosure of not public data will decide to release the data without requiring that the person seeking discovery go through the process of seeking a court order.

A party whose discovery request has been denied by a governmental agency may bring before the appropriate judicial officer, arbitrator, or administrative law judge an action to compel discovery or an "action in the nature of an action to compel discovery".<sup>137</sup> This curious language was inserted to ensure that an arbitrator has the power to determine whether a party will be able to obtain government data it believes necessary to press its claims.

Once the action to compel discovery (or the action in the nature of an action to compel discovery) is before the presiding officer, that officer must conduct a two-step inquiry.<sup>138</sup> First, the

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131. See Gemberling & Weissman, *supra* note 6, at 594 (describing cases).

132. Act of June 4, 1985, ch. 298, § 2, 1985 Minn. Laws 1372, 1373 (codified at MINN. STAT. § 13.03, subd. 6 (1994)).

133. MINN. STAT. § 13.03, subd. 6 (1994).

134. *Id.*

135. *Id.*

136. *Id.*

137. MINN. STAT. § 13.06, subd. 6 (1994 & Supp. 1995).

138. *Id.*

officer must determine whether the data are discoverable pursuant to the various rules of procedure and evidence that are applicable to the action.<sup>139</sup> If the officer determines the data are not discoverable, the inquiry ends, and the party seeking the data will not be able to obtain the information.<sup>140</sup>

However, if the officer determines the data are discoverable, then the officer must then decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality and privacy interests of the governmental entity maintaining the data or to individuals who provided the data in dispute or who are subjects of the data.<sup>141</sup> The presiding officer may also determine if anyone is entitled to notice and, if so, the content of the notice. If the presiding officer determines that the interests of the party seeking release of the data outweigh the privacy or confidentiality interests of governmental entities or data subjects, then the officer can order the release of the data and fashion any protective orders as may be necessary.<sup>142</sup>

To the extent that data are released pursuant to the discovery subdivision, the governmental entity will enjoy immunity from any liability for release in conformance with the court order.<sup>143</sup>

Minnesota's appellate courts have endorsed the statutory provision as a way of harmonizing discovery needs of parties in disputes with the privacy and confidentiality considerations implicit in the legislative classification of various types of data as not public. The Minnesota Supreme Court first considered the application of the statutory provision in a 1987 case involving a discovery request for certain data maintained by the police department of a city.<sup>144</sup> Because the trial court judge had not performed the two-part balancing test required by Minnesota statutes section 13.03, subdivision 6, the supreme court remanded the case for the application of the balancing test.<sup>145</sup> Three years later, in a case involving attempts by the Montgomery Ward Company to discover certain data in a dispute concerning a tax assessment levied against the company, the Minnesota Supreme Court held that the tax court's refusal to apply the two

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. MINN. STAT. § 13.08, subd. 5 (1994).

144. *Erickson v. MacArthur*, 414 N.W.2d 406 (Minn. 1987).

145. *Id.* at 408-09.

part test was an abuse of discretion.<sup>146</sup> The statute itself and the two reported cases appear to have settled the general issue of the relationship of the MGDPA and issues of discovery.<sup>147</sup>

## 2. *Open Meetings, Closed Data*

The second issue described as unresolved in the 1982 article involved the relationship between the "Open Meeting Law" (OML)<sup>148</sup> and the MGDPA. The primary unresolved issue was the following: "What happens when it is necessary to discuss data classified as private by the [Minnesota Government] Data Practices Act at a meeting required to be open under the Open Meeting Law?"<sup>149</sup>

Initially, the Legislature took no action on this particular issue, and the matter appeared to be settled by the 1985 Minnesota Court of Appeals case *Itasca County Board of Commissioners v. Olson*.<sup>150</sup> In that case, a county governmental administrator, whose personnel evaluation was to be conducted by the county board of commissioners, argued that because personnel evaluation data were classified as private by the MGDPA's personnel data section (Minnesota Statutes section 13.43), the meeting at which the evaluation was to be conducted had to be closed to the public.<sup>151</sup> The Minnesota Court of Appeals, however, held that discussion of not public data at a meeting did not provide a basis under the OML for closing the meeting, and, therefore, the meeting had to be open.<sup>152</sup> Further, the court decided that the discussion of not public data at an open meeting had the practical and legal effect of changing the classification of the data discussed from not public to public.<sup>153</sup>

That the OML wins in any contest with the MGDPA was the law for only four years until the Minnesota Supreme Court, in

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146. *Montgomery Ward & Co. v. Hennepin County*, 450 N.W.2d 299, 308 (Minn. 1990).

147. In issues relating to discovery and the MGDPA, the presiding judicial officer must apply the two-part balancing test required by Minnesota Statute § 13.03, subdivision 6, in determining whether to compel discovery. See *supra* notes 138-142 and accompanying text.

148. MINN. STAT. § 471.705 (1994).

149. As framed by the Minnesota Supreme Court in *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 30 (Minn. 1989).

150. 372 N.W.2d 804, 809-10 (Minn. Ct. App. 1985).

151. *Id.* at 805-06.

152. *Id.* at 808-09.

153. *Id.* at 809.

another case involving public employee issues, decided the issue of the relationship between the OML and the MGDPA.<sup>154</sup> *Annandale Advocate v. City of Annandale* involved allegations made about the work performance and behavior of the City of Annandale's Chief of Police.<sup>155</sup> The city council scheduled time on its agenda at a regular meeting to hear the report of a private investigator it had hired to look into these allegations.<sup>156</sup> When the council reached that agenda item, the council closed the meeting and asked all members of the public to leave.<sup>157</sup> Following the closed meeting, the city announced it was taking disciplinary action against the chief.<sup>158</sup> In response to requests for access to the investigator's report by the local newspaper, *The Annandale Advocate*, the City took the position that the report was private personnel data.<sup>159</sup> *The Advocate* sued to gain access to the report, contending that it was public information under the MGDPA.<sup>160</sup>

The district court reviewed the disputed data *in camera* and ordered that portions of the report be released because there had been a final disposition of the disciplinary action against the chief. Accordingly, the fact of the action and the supporting documentation for the action were public data under the MGDPA's personnel data section (Minnesota Statutes section 13.43).<sup>161</sup>

On appeal, the Minnesota Court of Appeals affirmed the district court ruling.<sup>162</sup> However, during oral argument the court of appeals raised the issue of whether the investigator's report, because it was discussed at a meeting that should have been open to the public, became public data by operation of the rule adopted by the court of appeals in *Itasca County Board of Commissioners v. Olson*.<sup>163</sup> After additional briefing by the parties on this issue, the court of appeals held that because the city council

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154. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24 (Minn. 1989).

155. *Id.* at 25.

156. *Annandale Advocate v. City of Annandale*, 418 N.W.2d 522, 523 (Minn. Ct. App. 1988), *rev'd*, 435 N.W.2d 24 (Minn. 1989).

157. *Id.* at 523.

158. *Id.* (stating the chief would be discharged and suspended with pay); *see also Annandale Advocate*, 435 N.W.2d at 25.

159. *See Annandale Advocate*, 418 N.W.2d at 523.

160. *Id.*

161. *Id.* at 523-24.

162. *Id.* at 526.

163. *Id.* at 525 (citing *Itasca County Bd. of Comm'rs v. Olson*, 372 N.W.2d 804, 807 (Minn. Ct. App. 1985)).

meeting could not have been legally closed, the *Itasca* case converted the classification of the investigator's report from private to public.<sup>164</sup>

On review, the Minnesota Supreme Court considered issues of standing, interpretations of the MGDPA, and the OML.<sup>165</sup> The supreme court concluded that the police chief had standing to appeal an order to release the investigative report.<sup>166</sup> Reversing the court of appeals, the Minnesota Supreme Court decided that the city council's decision to terminate the chief of police was *not* a final disposition for purposes of the MGDPA because of his right to appeal under the Veterans Preference Act. Therefore, the report and the details of the action taken against the chief were private.<sup>167</sup> The supreme court also decided that the operation of the MGDPA required meetings at which not public data were going to be discussed be closed to the public.<sup>168</sup> The court concluded that any other holding would make not public classifications of data established by the MGDPA meaningless.<sup>169</sup> The court was quite straightforward in discussing some of the problems inherent in the conclusions it had reached in its interpretations of the OML and the MGDPA.<sup>170</sup> The court specifically called on the Legislature to "clarify these statutes."<sup>171</sup>

Although the Legislature took no action in response to the supreme court in the 1989 "short" session, a bill developed in consultation with the representatives of local governmental associations, the media, and public employee unions was introduced in the 1990 session.<sup>172</sup> After some refinement, this bill, which amended both the OML and the MGDPA, was enacted into law.<sup>173</sup>

These amendments to the MGDPA modified the "Personnel Data" section of the MGDPA.<sup>174</sup> First, the Legislature clarified

164. *Id.* at 526.

165. *Annandale Advocate*, 435 N.W.2d at 25.

166. *Id.* at 27.

167. *Id.* at 29.

168. *Id.* at 32.

169. *Id.*

170. *Id.* at 32-34.

171. *Id.* at 34.

172. 1990 Minn. Laws ch. 550, §§ 1, 2 (amending MINN. STAT. §§ 13.43, subd. 2, 471.705 (1988)).

173. MINN. STAT. § 13.43, subd. 2 (1994 & Supp. 1995); MINN. STAT. § 471.075 (1994).

174. MINN. STAT. § 13.43 (1994 & Supp. 1995).

the meaning of the use of the term “final disposition” in the provision that made public data associated with “the final disposition of any disciplinary action.”<sup>175</sup> The term “final disposition” is critical because it is the triggering event for the reclassification, from private (or confidential) to public data, of detailed information about the disciplinary action taken against most public employees.<sup>176</sup>

Once there has been a final disposition in a disciplinary action, the detailed data that describe the disciplinary action, data that document the basis for the disciplinary action, and data that describe the reasons for the action all become public.<sup>177</sup> Until a disciplinary action attains its final disposition, all of these detailed data about the employee remain not public.<sup>178</sup>

Second, to pinpoint precisely when a “final disposition” has occurred, the Legislature adopted a complex set of policies that look to the status of a public employee in terms of (a) coverage by a collective bargaining agreement, (b) employment by state or local government, and (c) occurrence and timing of a resignation by the employee.<sup>179</sup> The following chart outlines the permutations and their effects.

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175. MINN. STAT. § 13.43, subd. 2(a), (b) (1994 & Supp. 1995).

176. MINN. STAT. § 13.43, subd. 2(a) (1994). The “final disposition” also reclassifies as public any data that documents what a governmental entity has done in response to the allegations that prompted the disciplinary action.

177. *Id.*

178. MINN. STAT. § 13.43, subd. 4 (1994).

179. MINN. STAT. § 13.43, subd. 2(b) (1994).

## CHART IV

Type of governmental employee	Action taken	Effect on detailed data
1. Any local governmental employee and any state government employee who is not a public official.	Resigns before final decision of employer, or, in case of employees covered by collective bargaining agreement, before decision by arbitrator.	Remains private. <sup>180</sup>
2. Local or state government employee covered by a collective bargaining agreement.	Does not grieve a proposed disciplinary action.	Becomes public <sup>181</sup>
3. Local or state government employee covered by a collective bargaining agreement.	Grieves a proposed disciplinary action.	Does not become public unless some form of disciplinary action upheld. <sup>182</sup>
4. Local government employee not covered by a collective bargaining agreement.	Employer decides to impose disciplinary action.	Becomes public once decision is made. <sup>183</sup>
5. Local government employee or a state employee covered by a collective bargaining agreement.	Resigns after employer or arbitrator makes a decision about proposed disciplinary action.	Becomes public. <sup>184</sup>
6. State public official (as defined in MINN. STAT. § 13.43, subd. 2(e))	Is the subject of a complaint or charge.	All data become public no matter what the outcome, unless release of the data would jeopardize an active investigation or identify confidential sources. <sup>185</sup>

The supporting data become public even if the employee has additional rights, for example those under the Veterans Preference Statute,<sup>186</sup> to appeal a disciplinary action.<sup>187</sup> This is a function of the language in Minnesota Statutes section 13.43, subdivision 2(b), that says that a final disposition has occurred

180. *Id.*181. *Id.*182. *Id.*183. *Id.*184. *Id.*

185. MINN. STAT. § 13.43, subd. 2(e) (1994 &amp; Supp. 1995).

186. MINN. STAT. § 197.46 (1994).

187. *Id.*

after the final decision of the public employer in the case of non-union employees and after a final decision of the arbitrator in the case of union employees “regardless of the possibility of any later proceeding or court proceeding.”<sup>188</sup>

In summary, after *Annandale* and its legislative reaction, data generated by public employers in response to complaints or charges against public employees are treated as follows: The name of the employee, the fact that a complaint or charge has been made against the employee (but not the nature or substance of the complaint or charge), and the status of the governmental entity’s processing of that complaint or charge are always public.<sup>189</sup> If disciplinary action is taken against the public employee, and the disciplinary action has reached its final disposition, then data that describe the nature of the action, as well as the reasons for it, and data that document the basis for the action are also public.<sup>190</sup>

Given this result, it should not be surprising to know that a number of cases have been brought under the MGDPA whose basic contention is that there was premature disclosure of detailed data in violation of an employee’s privacy rights under Minnesota Statutes section 13.43. A particularly fascinating case in this regard is *Kortz v. City of Albert Lea*,<sup>191</sup> a district court case that was ultimately resolved through settlement. In *Kortz*, a city terminated a police officer for allegedly taking drugs improperly from the department’s evidence locker.<sup>192</sup> A few days later, and, most significantly, before the time had run for the officer to grieve his firing under the collective bargaining agreement, a city official disseminated the details of the firing to the local newspaper.<sup>193</sup> Thereafter, the officer grieved the action and then sued under the MGDPA, arguing that the release of data about his firing violated Minnesota Statutes section 13.43 because there had not been a final disposition of his disciplinary action, and, therefore, no details could be made public.<sup>194</sup> After considerable negotiation, the city settled the case.

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188. *Id.*

189. MINN. STAT. § 13.43, subd. 2(a) (1994).

190. *Id.*

191. No. 24-C-89-1086 (Minn. 3rd Jud. Dist.).

192. *Id.*

193. *Id.*

194. *Id.*



In addition to the MGDPA amendments enacted in response to the *Annandale* case, the Legislature also made substantial and detailed changes to the OML to harmonize the public policy relationship between these two statutes.<sup>195</sup> First, the Legislature decided that the general rule would be that most meetings of bodies subject to the OML should not be closed to the public just because of the need to discuss data that are classified as not public.<sup>196</sup> In an excepting clause, the Legislature did acknowledge that there are some types of data that members of a public body may have to discuss that should not be discussed in a meeting open to the public.<sup>197</sup> In those instances, the OML specifically authorizes, and in most instances even requires, the body to close its meeting so that data that are not public will not be disseminated to the public.<sup>198</sup>

The 1990 amendments to the OML authorize bodies subject to the OML to close meetings to discuss the following kinds of data:

(a) Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, and maltreatment of minors or vulnerable adults;<sup>199</sup>

(b) Active criminal investigative data, as defined in the comprehensive law enforcement data section of the MGDPA;<sup>200</sup>

(c) Internal affairs data relating to allegations of law enforcement personnel misconduct;<sup>201</sup> and

(d) Educational data, health data, medical data, welfare data, or mental health data.<sup>202</sup>

The OML also prescribes very detailed treatment for two situations involving a public body's discussion of personnel data.<sup>203</sup> First, a public body may close one or more meetings for the purpose of giving preliminary consideration to allegations or

195. 1990 Minn. Laws ch. 550, §§ 2, 3 (codified at MINN. STAT. § 471.705 (1994)).

196. MINN. STAT. § 471.705, subd. 1d (1994).

197. MINN. STAT. § 471.705, subd. 1d(b)-(c) (1994).

198. *Id.*

199. MINN. STAT. § 471.705, subd. 1d(b)(1) (1994).

200. MINN. STAT. § 471.705, subd. 1d(b)(2) (1994) (citing MINN. STAT. § 13.82, subd. 5 (1994), for the definition of active criminal investigative data).

201. MINN. STAT. § 471.705, subd. 1d(b)(2) (1994).

202. MINN. STAT. § 471.705, subd. 1d(b)(3) (1994). In the OML, each of these types of data is specifically cross referenced to the MGDPA provision that defines it.

203. MINN. STAT. § 471.705, subd. 1d(c)-(d) (1994).

charges against an employee “*subject to its authority*.”<sup>204</sup> It appears that a body could not close a meeting to discuss an employee who is not subject to its authority.<sup>205</sup> If the members of the body conclude that disciplinary action of any nature is warranted as a result of the specific charge or allegations discussed in the closed meetings, further meetings or hearings related to the charges or allegations must be open to the public.<sup>206</sup> An individual who is subject to the authority of the body must be given the opportunity to request that meetings to consider allegations or charges against the individual be open.<sup>207</sup> If the individual so requests, the meetings must be open.<sup>208</sup>

The second situation involving personnel data given special treatment by the OML involves instances where a public body wants to close a meeting to conduct an evaluation of an individual subject to its authority.<sup>209</sup> In contrast to the requirement to close a meeting to discuss allegations or charges against the employee, the provision regarding evaluative discussions is permissive.<sup>210</sup> If the entity decides to close the meeting to conduct the evaluation, it must identify the employee being evaluated before the meeting is closed.<sup>211</sup> At its next open meeting, the entity is required to summarize its conclusions regarding the evaluation.<sup>212</sup> The employee being evaluated has the right to ask that the meeting be open, and, if the employee so requests, the meeting must be open.<sup>213</sup>

The 1990 amendments intended to harmonize the OML and the MGDPA also dealt with other issues in the OML.<sup>214</sup> The amended OML provides that data that are not public may be discussed at a meeting subject to the OML without liability or penalty.<sup>215</sup> However, in recognition that such broad immunity to members of public bodies might encourage irresponsible

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204. *Id.* (emphasis added).

205. *See id.*

206. MINN. STAT. § 471.705, subd. 1d(c) (1994).

207. *Id.*

208. *Id.*

209. MINN. STAT. § 471.705, subd. 1d(d) (1994).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. 1990 Minn. Laws ch. 550, § 2 (amending MINN. STAT. § 471.705, subd. 1d (1988)).

215. MINN. STAT. § 471.705, subd. 1d(a)(1994).

statements and disseminations of not public data, the Legislature limited this immunity to instances where the disclosure of the data "relates to a matter within the scope of the public body's authority and is reasonably necessary to conduct the business or agenda item before the public body."<sup>216</sup> There are no reported cases that spell out the relationship between the immunity provision and its limitation. However, in the "zoo case" (involving an employee at the Minnesota Zoo), the Minnesota Court of Appeals addressed a collateral issue, holding that one cannot transform private data into public information by slipping the private data into a public discussion where disclosure of the private data is not required.<sup>217</sup>

Finally, the 1990 amendments dealt with the complicated issue of what is the status of not public data that are actually and appropriately discussed at an open meeting.<sup>218</sup> Does discussion of data at a meeting mean that the data in question are now public wherever they may be recorded? On that point, the OML provides that not public data discussed at an open meeting retain their original classification.<sup>219</sup> "[H]owever, a record of the meeting regardless of form, shall be public."<sup>220</sup> In practical terms, that means if a city council, for example, discusses income property assessment data that are classified as not public by Minnesota Statutes section 13.51, subdivision 2, any summary or description of the income property assessment data that appeared in the minutes of the meeting, or that is captured on an audio or video tape recording of the meeting, is public data.<sup>221</sup> Nevertheless, the income property assessment data maintained by the city assessor would continue to be classified as private or nonpublic.<sup>222</sup>

In 1994, the court of appeals decided *Unke v. Independent School District No. 147*,<sup>223</sup> involving allegations of dissemination of data relating to a disciplinary action at a public meeting in violation of MGDPA.<sup>224</sup> In *Unke*, the court of appeals appeared to

216. *Id.*

217. *McDevitt v. Tilson*, 453 N.W.2d 53 (Minn. Ct. App. 1990), *rev. denied* (Minn. May 23, 1990).

218. MINN. STAT. § 471.705, subd. 1d(a) (1994).

219. *Id.*

220. *Id.*

221. *See id.*

222. *Id.*

223. 510 N.W.2d 271 (Minn. Ct. App. 1994), *rev. denied* (Minn. March 15, 1994).

224. *Id.*

ignore the OML amendments authorizing dissemination of data about allegations or charges against an employee once a public body determines to take disciplinary action against the employee.<sup>225</sup> In response to *Unke*, the Legislature amended the OML again to clarify that more than one meeting can be closed to discuss allegations or charges.<sup>226</sup> During the same session, the Legislature also amended the MGDPA to expressly authorize discussion of private or confidential data at meetings open to the public to the extent provided in the OML.<sup>227</sup>

New issues have emerged relating to the effect of technology on the OML and possible implications for the electronic transfer and use of data subject to the MGDPA. What is the classification, for example, of e-mail among members of a governmental body participating in an electronic "chat-box"? Except for technology nuances, the major unresolved issues involving the relationship between the OML and the MGDPA appear to have been resolved by the actions of the Legislature and the judiciary in response to the *Annandale* "anecdote."

### 3. Administrative Procedure Act

There appears to be no instance in which a state agency's data practices policies and procedures have been attacked because they fit the definition of a rule in Minnesota Statutes chapter 14 but have not been formally promulgated pursuant to the Administrative Procedures Act (this could be, in part, because some agencies have still not developed policies and procedures, and, therefore, there is nothing in existence to attack).<sup>228</sup>

### 4. Data on the Dead

#### a. Classification of Data on Deceased Individuals Collected While They Were Alive

At the time of the authors' 1982 article, the issue of how to treat data on decedents was just emerging. Work by the Legislature in the early 1980s produced extensive regulation and classification of numerous types and quantities of data on individuals by the MGDPA. One of the newly-regulated types of data on individuals was medical examiner data. Although most medical

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225. See *id.* at 274.

226. MINN. STAT. § 471.705, subd. 1d(c) (1994).

227. MINN. STAT. § 13.05, subd. 4(c) (1994).

228. See *infra* part III.A.6.a (relating to the issue of compliance).

examiner data were classified as either private or confidential, the question was ultimately asked: Can data on decedents be classified the same as data on living beings? At that time the only definitive guidance that existed on this point was a definition in a rule of the Department of Administration which interpreted the term "individual" to mean a living human being.<sup>229</sup>

The contending parties in this dispute over medical examiner data on decedents decided not to litigate the issue but to bring their respective viewpoints to the Legislature. As this policy discussion evolved, the major issue that emerged was: Having decided to treat various types of data on individuals as private or confidential data, how should those types of data be treated after the individual who is the subject of the data dies? Most of the legislative discussion of this issue focused on sentimental narratives involving deceased relatives of legislators and of witnesses appearing before the Legislature who argued that to have all government data about decedents public would not be fair to survivors.

Less sentimental witnesses, particularly those representing media interests, urged the Legislature to adopt conventional tort principles to resolve this issue, i.e., to look at the right to have private or confidential data not disclosed to the public as a personal right that expires with the data subject. Ultimately, in 1984, the Legislature informally asked a group of interested parties to negotiate a solution and to bring a proposal to the 1985 session. This group, consisting of governmental representatives, a medical examiner, representatives of the media, and the Department of Administration did in fact bring a proposal to the Legislature in the 1985 session, which the Legislature enacted into law.<sup>230</sup>

The underlying public policy basis for the fundamental operation of the data on decedents provision<sup>231</sup> is the cliché, "Time heals all wounds." The section implements this bromide by providing that data about individuals which were private or confidential before the individual's death will be reclassified as private or confidential data on decedents after the death of the individual. Once data become private or confidential data on decedents, they remain not public for a specified period of

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229. MINN. R. 1205.0100 (1995).

230. 1985 Minn. Laws ch. 298, § 8 (codified at MINN. STAT. § 13.10 (1986)).

231. MINN. STAT. § 13.10 (1994).

time.<sup>232</sup> Once that period of time has elapsed, any private or confidential data on decedents still in existence become public data.<sup>233</sup>

There is no intent in this language, as has been suggested by some commentators, to confer a privacy right upon dead people. What is intended by the underlying policy is to acknowledge that governmental entities often collect, create, and maintain sensitive data on individuals and that preventing release of those kinds of data to the public for some reasonable time after a data subject's death is a legitimate way to protect the feelings of the decedents' survivors.

To determine whether a given set of private or confidential data has become public requires reference to three dates: the date of the decedent's death; the lapsed time since the decedent's death; and the age of the data.<sup>234</sup> If readily available data do not clearly state when the decedent died, the governmental entity can presume the individual has died if either ninety years have elapsed since the data in question were created, or ninety years have passed since the date of the individual's birth.<sup>235</sup> The presumption of death does not operate if readily available data indicate the individual is still living.<sup>236</sup> Once the governmental agency determines the decedent's date of death, it must determine whether ten years have elapsed since the actual or presumed death of the decedent.<sup>237</sup> Only if ten years have elapsed must the entity consider the age of the data in question.<sup>238</sup> If those data are more than thirty years old, then the data have become public.<sup>239</sup> The chart below sets this information out in a clearer way.

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232. MINN. STAT. § 13.10, subd. 2 (1994).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

CHART V CALCULATING DATA ON DECEDENTS			
Status of Data Subject:	Elapsed Years:	Age of Data:	Classification:
1. Dead	< 10 years since death	—	Not Public
	> 10 years since death	< 30 years	Not Public
		> 30 years	Public
2. Uncertain	< 90 years since birth	—	Not public
	> 90 years but evidence that s/he is still alive	—	Not Public
	> 90 years and no evidence that s/he is living	< 30 years	Not Public
		> 30 years	Public

Although it is not expressly stated in Minnesota Statutes section 13.10, a governmental entity can avoid these computations, and the resulting complex dating and handling of data on decedents, by properly following the requirements of the state Records Management Act.<sup>240</sup> Under that statute, the governmental entity can properly dispose of data on decedents and thereby obviate having to worry about processing requests for access to data on decedents.<sup>241</sup>

#### *b. Accessibility of Data on Decedents*

In addition to addressing the issue of access to data on decedents, Minnesota Statutes section 13.10 also confers the rights which the individual had before death upon a “representative of the decedent.”<sup>242</sup> The representative of the decedent means (a) the personal representative of the decedent during estate administration; (b) the widow(er) of the decedent if a personal representative has not been appointed, or after discharge of the representative; (c) any child of the decedent *or* the parents of the decedent if there is neither a surviving spouse nor a personal representative.<sup>243</sup>

#### *c. Data on Decedents Collected After They Die*

The representative of the decedent also has access to nonpublic data created after the decedent’s death.<sup>244</sup> Consistent with

240. MINN. STAT. §§ 138.161-.25 (1994).

241. MINN. STAT. § 138.17, subd. 1(a) (1994).

242. MINN. STAT. § 13.10, subd. 3 (1994).

243. MINN. STAT. § 13.10, subds. 1(c), 3 (1994).

244. MINN. STAT. § 13.10, subd. 3 (1994).

the Department of Administration rule defining "individual" to mean a living being,<sup>245</sup> the MGDPA now treats data created or collected about human beings after death as data not on individuals.<sup>246</sup> Therefore, the classifications of nonpublic and protected nonpublic are proper classifications for not public data collected after the death of data subjects. Minnesota Statutes section 13.10 also authorizes court actions for any person who seeks to gain access to not public data on decedents, it further, clarifies that adoption records<sup>247</sup> fall outside the ambit of the dat-on-decedent provision.<sup>248</sup>

*d. Remedy in Doubt*

As with most provisions of the MGDPA, the nondisclosure protection for not public data on decedents relies to a great extent on the perception by governmental agencies that improper disclosure will subject them to liability. The MGDPA tries to provide the remedy of a civil action for improper disclosure of data on decedents by assigning the rights the decedent had before his or her death to the representative of the decedent.<sup>249</sup> This important measure, designed to encourage governmental entities to protect data on decedents from public disclosure, was dealt a crippling blow by the court of appeals in *Estate of Benson v. Minnesota Board of Medical Practice*,<sup>250</sup> decided in January 1995.

Dr. Benson was one of two physicians publicly identified as having HIV. After Dr. Benson's death, his widow brought an action as the representative of the decedent, alleging that the Minnesota Board of Medical Practice and the Minnesota Department of Health had disseminated private data on decedents about Dr. Benson in violation of his rights under the MGDPA.<sup>251</sup> The district court dismissed the case on the ground that the suit was foreclosed by the statute that specifies which legal causes of action survive an individual's death.<sup>252</sup> The court of appeals affirmed the decision of the district court.<sup>253</sup> Both

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245. MINN. R. 1205.0100 (1995).

246. See MINN. STAT. § 13.10, subd. 3 (1994).

247. See MINN. STAT. §§ 259.21-89 (1994) (regulating adoption records).

248. MINN. STAT. § 13.10, subd. 4 (1994).

249. MINN. STAT. § 13.10, subd. 3 (1994).

250. 526 N.W.2d 634 (Minn. Ct. App. 1995).

251. *Id.* at 635.

252. *Id.*; MINN. STAT. § 573.01 (1994).

253. *Benson*, 526 N.W.2d at 635.



courts essentially adopted the argument that the media lobbyists had advanced in 1985, and that the Legislature theoretically rejected when it enacted Minnesota Statutes section 13.10 namely that data about deceased individuals should not be protected from public disclosure because the protection of those data represents a personal right that expires with the decedent.

Attempts to reinstate greater protection for data on decedents by legislative action in the 1995 legislative session were not successful. Absent legislative action in the future, protection of not public data on decedents must depend upon the good faith and forbearance of agencies not to release those kinds of data to the public. If agencies do not act in good faith and release the data, the rule in *Benson* seems to indicate that there is no way to hold them accountable for those acts.

### 5. *Classification Expansion*

Learning how to sort through the maze of classification is fundamental to understanding how the MGDPA works at both macro and micro levels and how the policies enunciated in the statute affect data classified or otherwise treated outside of the confines of Minnesota Statutes chapter 13. Successful navigation of the maze is also essential for governmental agencies to protect themselves from liability and crucial for citizens to effectively exercise and enforce their rights.

The central objective of the data classification system was to eliminate self-serving "balancing tests" by the very governmental agencies the statute had been enacted to regulate. The idea was to design a system so that every piece of government data fit into one and only one category.

In the 1970s there were only three classifications: public, private, and confidential.<sup>254</sup> As the Legislature has confronted increasing complexity about how to cram unanticipated kinds of information into the categories, it has expanded the number of classifications: three more (public, nonpublic, and protected nonpublic data not on individuals) were added in the 1980s for data about organizations and entities.<sup>255</sup> The Legislature cre-

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254. See MINN. STAT. § 15.162, subds. 2a, 5a, 5b (1978) (former Data Privacy Act).

255. 1979 Minn. Laws ch. 328, § 7; 1980 Minn. Laws 603, §§ 1-7 (codified at MINN. STAT. § 13.02, subds. 3-5, 9, 12-15 (1994)).

ated another three (though they bear the same names as data on individuals) for classifications of data on decedents.<sup>256</sup>

The Legislature has added a metamorphic aspect to the system whereby data are transformed in their classification because of the passage of time or because of the occurrence of some event. Examples of data that transform over time include ten-year-old nonpublic data on individuals<sup>257</sup> and natural resources mineral data.<sup>258</sup> Examples of data that transform because of the occurrence of an event comprise (a) not public state auditor data, which become public data as soon as the audit has been completed;<sup>259</sup> (b) civil investigative data, which begin as not public data during the pendency of civil actions, may transmute into public data once they are presented in court or once the civil action has come to an end;<sup>260</sup> (c) and criminal investigative data, which begin as not public data during the pendency of an active investigation but transform into public data when the investigation is no longer active.<sup>261</sup> However, genuine expansion of the nine-category classification system takes place when the Legislature deviates from using the statutory structure of the MGDPA. Whether the current classification system can survive the stresses and strains of legislative tinkering, not to mention the racing technological advances of the Information Age, is one of the new issues confronting the data practices act in the 1990s.

## 6. Viability

### a. Compliance

It would be hyperbolic to assert that governmental agencies subject to the MGDPA have embraced the statute as an affirma-

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256. MINN. STAT. § 13.10, subd. 1 (1994).

257. MINN. STAT. § 13.03, subd. 8 (1994). Data on individuals may not become public under operation of this rule if the responsible authority for the data reasonably determines that if the data were made available to the public or to the data subject, the harm to the public or to the data subject would outweigh any benefit to the public or to the data subject. A determination of this nature by a responsible authority may be challenged by any person by bringing an action in district court. *Id.*

258. MINN. STAT. § 13.793, subd. 2 (1994). Under that statute, documentation of private analyses of state-owned or state-controlled drill cores become public 90 days after the Commissioner of Natural Resources receives the report. *Id.* Written recommendations about which state lands should be offered for public lease or sale become public three years after the lease or sale was held or scheduled. *Id.*

259. MINN. STAT. § 13.644(a) (1994).

260. MINN. STAT. § 13.39, subds. 2, 3 (1994).

261. MINN. STAT. § 13.82, subd. 5 (1994). Certain inactive investigative data (e.g., informant identities and information about victims) remain not public data.

tive duty to the citizenry or that they have rushed joyously into full compliance with its requirements. Some have voluntarily made efforts to be in compliance; more have grudgingly sought to come into compliance in the face of lawsuits or adverse publicity. More than two decades after the enactment of the MGDPA, a substantial number of governmental agencies have chosen to ignore their data practices obligations, evidently deciding to risk being sued rather than making the effort, or spending the money, to comply.

*b. Prognosis*

The basic conceptual design survives. The Legislature's work with this scheme has produced a statute that is the "mother of all statutes" of this type on the globe in terms of its size, details, and complexity. And the basic scheme continues to be subject to criticism and vulnerable to the possibility of major overhaul, if not abandonment, by the Legislature.

In evaluating the size and density of the policies enunciated in the MGDPA, it is important to remember that this is the statute to which all governmental entities in this state, with the exception of townships, are supposed to look for guidance on the handling of a major part of what gives existence and form to the activities government, namely, all of the information it maintains. After the year 2000, the statute will very likely exceed 100 pages. Nonetheless, even though criticism abounds at the sheer girth of the law and the impenetrability of the policies that underlie the statute, there have not been, with the exception of the occasional introductions of the Uniform Information Practices Code (UIPC),<sup>262</sup> any serious suggestions of how to alter the statutory scheme. As complicated as the MGDPA's structure appears, so far, it is the best alternative for managing public information policy.

*c. Practical Analysis*

Although the MGDPA is complicated, basic analysis of an issue presented by the statute should be simple. From a practical per-

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262. See generally 13 U.L.A. 171-203 (Supp. 1983). The bill to adopt the UIPC in Minnesota, S.F. 198, was introduced in the 1981 Legislature. The Senate voted it down at the end of the 1982 session. Although it has been reintroduced periodically, the Legislature has never taken any action on it. See Gemberling & Weissman, *supra* note 6, at 597 n.167.

spective, a person presented with an MGDPA issue should follow this analytical sequence:

- (1) Under what definition of data do the data in question fall?
- (2) How is that type of data classified?
- (3) What are the agency's duties concerning the data?
- (4) What substantive and procedural rights of individuals are implicated?

For examples, suppose a citizen requests the salary of a particular governmental employee:

- (1) This is a request for personnel data.<sup>263</sup>
- (2) The data are classified as "public data on individuals."<sup>264</sup>
- (3) The agency has a duty to make the requested data available at convenient times and places.<sup>265</sup>
- (4) The only substantive right the employee has with respect to the data about his or her salary is that the agency keep the salary data accurate, current, and complete.<sup>266</sup>

#### SYNOPSIS

Big ticket issues from the 1980s have largely been resolved.

◆ **DISCOVERABILITY** of governmental data is addressed statutorily (MINN. STAT. § 13.03, subd. 6 (1994)).

◆ **WHAT CAN AND CANNOT BE DISCUSSED AT MEETINGS OF GOVERNMENTAL BOARDS AND COUNCILS** is governed by cross-referenced provisions in the MGDPA and the Open Meeting Law and by reported judicial decisions.

◆ **WHETHER STATE AGENCIES' POLICIES ARE SUBJECT TO THE ADMINISTRATIVE PROCEDURE ACT** has disappeared as an issue for lack of interest.

◆ **DATA ON DECEDENTS** have had their own, special classifications enacted (codified at MINN. STAT. § 13.10 (1994)).

◆ **THE MGDPA CLASSIFICATION SCHEME NOW HAS NINE DISCRETE CATEGORIES OF DATA**, but more are possible.

◆ **THE DATA PRACTICES SCHEME** continues to be viable because there is no simple scheme to manage the governmental data in an age of informational complexity.

263. MINN. STAT. § 13.43, subd. 1 (1994).

264. MINN. STAT. § 13.43, subd. 2(a) (1994).

265. MINN. STAT. § 13.03, subd. 3 (1994).

266. MINN. STAT. § 13.05, subd. 5 (1994).

## B. *New Issues About Basic Policies*

The 1982 article suggested growing criticism of the basic method by which the Legislature had chosen to deal with the three essential policy legs of the MGDPA construct: (1) retention by the Legislature of the authority to make detailed decisions about what data will be classified as not public and to authorize uses and dissemination of not public data; (2) fair information practice principles regarding privacy and due process consideration in the retention, use, and dissemination of data on individuals; and (3) the presumptiveness of public data.<sup>267</sup> Despite the criticism, the MGDPA continues to operate using the same three policy legs on which it has stood since it assumed its fully-developed personality in 1981.

### 1. *The Role of the Legislature*

#### a. *Caloric Policy Making*

The policy making and operational implications of legislative authority over accessibility have become the most critical. This particular policy leg is the major component that drives the complexity and the sheer physical size of the MGDPA. The Legislature has taken seriously the challenge it took on itself to be responsible for virtually all decisions about classifications of government data. During the last fifteen years, that assignment has mainly involved reacting to numerous requests from governmental agencies, to classify data as not public. The result, however, has been textually fattening.

As published in Minnesota Statutes, the 1995 version of the MGDPA is approximately eighty pages in the main volume and the pocket part supplement combined.<sup>268</sup> The primary sources of this bulk are codifications within the MGDPA of governmental requests to classify various data as not public data, authorizations for governmental agencies to disseminate not public data, and the addition, in Minnesota Statutes section 13.99, of more than 240 cross-references to statutes outside the MGDPA that classify data maintained by governmental agencies.<sup>269</sup>

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267. Gemberling & Weissman, *supra* note 6, at 597.

268. See MINN. STAT. §§ 13.01-13.99 (1994 & Supp. 1995).

269. See MINN. STAT. § 13.99 (1994 & Supp. 1995)

*b. How the Legislature Makes Information Policy*

For several years both houses of the Legislature have had subcommittees to deal with public information policy issues. In their current incarnations, they constitute the Data Privacy Subcommittee of the Judiciary Committee in the House of Representatives, and the Joint Senate Subcommittee on Data Privacy, which comprises members of both the Senate Judiciary and Crime Prevention Committees.

Information policy bills that the Legislature refers for review and action to these two subcommittees tend to use language consistent with the definitional terms in the MGDPA. However, because these two subcommittees do not have exclusive authority over issues impacting on information policy, bills originating in other committees, and amendments offered on the floor of the House or Senate, often use nomenclature that does not quite fit into the linguistic framework of the MGDPA. Three examples illustrate the problems created by unconventional language in which the Legislature has made information policy without the benefit of the expertise of the privacy subcommittees:

(1) **AQUACULTURE:** In its regulation of fish farming (a/k/a “aquaculture”), the Minnesota Department of Agriculture is statutorily obliged to maintain a data base of aquaculture research and statistics.<sup>270</sup> Normally, these data would be public unless otherwise classified.<sup>271</sup> Legislation never reviewed by either of the privacy subcommittees produced this terminological situation:

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270. MINN. STAT. § 17.49, subs. 2, 3 (1994).

271. MINN. STAT. § 13.03, subd. 1 (1994).

## CHART VI—AQUACULTURAL INFORMATION POLICY

Statute	Classification	Data
MINN. STAT. § 13.645	Private or nonpublic data	Names and addresses of aquaculture customers acquired by the Department.
MINN. STAT. § 17.498	Nonpublic data	Information <sup>272</sup> about aquatic farming processes or formulas—if requested by the applicant or permittee to be not public.
MINN. STAT. § 17.4984, subd. 7	Nonpublic information <sup>273</sup>	Production, sales, and harvest data maintained by the private sector business entity authorized to carry on an aquaculture enterprise.

Because there is no definition in the MGDPA for “nonpublic information,” does this nomenclature evidence a legislative intention to create yet another classification, or to hint that information and data are synonymous, or to make aquaculture not subject to the MGDPA at all? And does the Legislature’s classification of data in private hands represent a deliberate decision to extend the reach of the MGDPA to the private sector (notwithstanding the title of the statute as the “Minnesota *Government Data Practices Act*”)?

(2) **POLLUTION AND SOLID WASTE DATA:** Two statutory provisions that deal with pollution data and solid waste data exemplify another, and more troubling, aspect of the problem of comprehending a statement of legislative policy that in principle and in nomenclature bears little relationship to the conventions followed in Minnesota Statutes chapter 13.

The records provision of the statute concerning the Pollution Control Agency (PCA) contains the following language:

*Any records or other information* obtained by the [PCA] or furnished to the agency by the owner or operator of one or more air contaminant or water or land pollution sources which *are certified* by said owner or operator, and said certification, as it applies to water pollution sources, is approved in writing by the commissioner [of the PCA], to relate to (a)

272. Note the use of the term “information” instead of the term “data.”

273. See *supra* note 272.

sales figures, (b) processes or methods of production unique to the owner or operator, or (c) information which would tend to affect adversely the competitive position of said owner or operator, shall be only for the *confidential use of the agency* in discharging its statutory obligations, unless otherwise specifically authorized by said owner or operator.<sup>274</sup>

No one would cite this sentence as a model of legislative elegance. Additionally, the unconventional data practices nomenclature used in this sentence engenders some confusion: What constitutes a certification? What criteria should the Commissioner use to approve the certification? Does “only for confidential use” really mean confidential, which under the MGDPA refers only to individuals?;<sup>275</sup> or does it mean “nonpublic,” which would mean the owners could have access to the data?;<sup>276</sup> or “protected nonpublic,”<sup>277</sup> which is the proper analogue to “confidential” for data not on individuals but which would preclude the owners from having access to the data that they submitted?<sup>278</sup>

An even more interesting policy twist on this language is that the data are evidently to be treated as public until and unless (a) an owner or operator makes a request, accompanied by a certification, that they be classified as not public and (b) the Commissioner of the PCA approves the request in writing.

Other than the division of labor in legislative policy development, it is unclear why the Legislature would adopt this very complicated way of describing and classifying certain government data as not public. Nor is it clear why the Legislature would surrender the power to classify data either to a private business owner or to an executive branch appointee when it has consistently resisted efforts over the last twenty-two years to relinquish to any other entity the authority to classify government data, particularly those entities that have an interest in withholding certain data disclosed to the public.

Besides the inconsistency, the result of this tortured statutory prose makes it difficult for a citizen wanting to check on whether certain data maintained by the PCA have been properly classified. Instead of just looking up the statute that governs the

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274. MINN. STAT. § 116.075, subd. 2 (1994) (emphasis added).

275. MINN. STAT. § 13.02, subd. 3 (1994).

276. MINN. STAT. § 13.02, subd. 9 (1994).

277. MINN. STAT. § 13.02, subd. 13 (1994).

278. MINN. STAT. § 13.02, subd. 13(b) (1994).



data's classification (which is all one has to do under the MGDPA), anyone inquiring about PCA data must also review the owners' certifications and the corresponding written approvals by the PCA.

(3) HAZARDOUS WASTE: A provision in the Metropolitan Government chapter of Minnesota Statutes requires that generators of hazardous waste make certain reports to the PCA, to the Metropolitan Council, and to the seven metro area counties.<sup>279</sup> The recipients of the reports are required to "act in accordance with the provisions of section 116.075, subdivision 2, with respect to information for which confidentiality is claimed."

This language seems to require the governmental recipient of the report to treat the data in accordance with the records provision of the pollution and solid waste reports statute—if the PCA has approved the certifications by the owners or operators that the data should be not public. However, any data provided to the PCA under that statute<sup>280</sup> is only for "the confidential use of the [PCA]."<sup>281</sup> Accordingly, it is evidently unlawful for the PCA to be able to tell other governmental entities that they are receiving data that have been certified and approved under Minnesota Statutes section 116.075.

This classic catch-22 is a perfect illustration of why a more disciplined approach to legislative decision-making about data classifications and information policy could play a significant role in making the topic of governmental information policy far less obtuse and complex.

## 2. *The Effectiveness of Privacy Protection in the MGDPA*

Much of the work of the Legislature over the last twenty-two years has focused on developing policy to advance both informational and disclosural privacy. However, as the Legislature has continued to juggle privacy policies with the public access and governmental effectiveness imperatives, it has made two policy judgments that adversely affect both informational and disclosural privacy. Whether the Legislature takes action to cure those adverse effects is yet to be seen.

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279. MINN. STAT. § 473.151 (Supp. 1995).

280. MINN. STAT. § 116.075 (1994).

281. MINN. STAT. § 115B.24, subd. 5 (1994).

a. *Informational Privacy*

The public policy discussions in the early 1970s about how to protect individual privacy from the data collection and dissemination practices of government (and other large institutions) were essentially a public policy dialogue going nowhere until 1973. In that year, the Health, Education, and Welfare Report of the Secretary's Advisory Committee on Automated Personal Data Systems proposed the establishment of a "Code of Fair Information Practices."<sup>282</sup> The report and the code it recommended became the basis for data protection and fair information practices laws all over the world.

The code contained specific recommendations that (a) data collectors inform individuals from whom data were sought precisely how the collected data would be used; and (b) data collectors be limited in their uses and disseminations of the collected data to those purposes communicated to the subjects of the data unless the data subjects consented to different uses or disseminations.<sup>283</sup> Minnesota enacted these provisions of the code into the data practices statute as the Tennessen Warning<sup>284</sup> and the no secondary use provision.<sup>285</sup>

The theory undergirding the code was that with these two restrictions in place, individuals could protect their privacy either by refusing to provide the data the governmental agency sought or by enforcing the restrictions against unconsented secondary use. However, the informational privacy protections afforded to individuals by the actual language of the MGDPA have proven to be more illusory than real.

(1) TENNESSEN WARNING REMEDY: First, most governmental agencies do not provide the benefits or services of their programs to individuals who refuse to provide data from which the government can make decisions about program or service eligibility. Consequently, the privacy represented by the idea that you can "just say no" to the government's request for data may be meaningless for most people except for those fortunate enough to need no governmental services.

Second, the actuality of prosecuting a claim against an offending governmental agency, either for not administering the Ten-

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282. See *Report*, *supra* note 10.

283. *Id.* at xxvi.

284. MINN. STAT. § 13.04, subd. 2 (1994).

285. MINN. STAT. § 13.04, subd. 4 (1994).

nessen Warning or for contravening the no secondary use proscription, is time-consuming, expensive (where the adverse party has public funds to litigate), and involves an abstract principle which may be lost on the trier of fact. Further, the measure of damages is enigmatic, and the burden of proof is onerous. Although the remedies to compel compliance and seek to damages are supposedly available, the authors know of no instance in which a citizen has yet prevailed on either a theory of a Tennesen Warning violation or of a secondary use violation as a matter of final judgment in a court of law where the claim was for damages.

(2) ANOTHER PROBLEM WITH SECONDARY USE: An individual from whom a governmental agency collects data presumably relies on the restricted dissemination promised to him or her in the Tennesen Warning. However, what the individual may not know is that the Legislature has reserved to itself the right to change the rules at any time by authorizing new uses and disseminations. This reservation provides as follows: “[P]rivate and confidential data may be used and disseminated to individuals or agencies specifically authorized access to th[ose] data by state, local or federal law enacted or promulgated after the collection of the data.”<sup>286</sup>

Reading the “new uses” language into the admonitional notice should oblige a governmental agency to add to its Tennesen Warning a tagline something like the following:

The data we are collecting from you will only be used and disseminated in the ways set out in this paragraph. However, you need to know that if at any time in the future, the Legislature, a local governing body, or the Federal Government decides to authorize a new or different use or dissemination of these data, we shall be able to use and disseminate the data consistent with that authorization without your consent.

This reservation of authority by the Legislature, and its further extension to changes in local or federal law, effectively gut the meaningful implementation of the no secondary use principle.

#### *b. Disclosural Privacy*

Since the enactment of the original data privacy statute in 1974, the law has had as one of its cornerstones, the protection of the elusive concept we call “disclosural privacy.” Initially, the

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286. MINN. STAT. § 13.05, subd. 4(b) (1994) (emphasis added).

data privacy act limited the government's collection, maintenance, use, and dissemination of data about individuals and gave individuals an opportunity to learn certain things about the government's attempt to collect data from them before having to make a decision to actually provide personal data to the government.<sup>287</sup>

However, since the late 1970s, a good deal of legislative effort has focused on the disclosure of government data and has classified various types of data as not public, sometimes for privacy protection and sometimes for other considerations. Citizens and governmental officials alike came to rely on these classifications.

Then, in 1991, a seemingly innocuous amendment, authored by State Sen. Gene Merriam, cast into doubt all of the expectations about disclosural privacy protections that the MGDPA and other statutes had supposedly induced. The amendment states that, unless otherwise expressly provided by statute, the classification of any government data "[i]s determined by the law applicable to the data at the time a request for access to the data is made, regardless of the data's classification at the time it was collected, created, or received."<sup>288</sup>

In other words, no matter how long certain data may have been classified as not public, an act of the Legislature can later make those data public, and that change will apply retroactively to all of the data affected by the change in existing governmental databases.

For instance, decades of agreements entered into by governmental agencies and their employees that settled a variety of disputes arising out of the employment relationship often contained confidentiality clauses in which the parties agreed that the terms of the settlement would not be disclosed to the public. But in 1993 the Legislature made the terms of all settlements of employment disputes public data.<sup>289</sup> The 1993 classification amendment makes the terms of the old settlement agreements public.<sup>290</sup>

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287. This was originally codified at Minnesota Statutes §§ 15.1641(b), 15.165(a), but it is now codified at Minnesota Statutes §§ 13.05, subdivisions. 3, 4, 13.04, subdivision. 2.

288. 1991 Minn. Laws ch. 319, § 2 (codified at MINN. STAT. §13.03, subd. 9 (1994)).

289. See 1991 Minn. Laws ch. 351, § 6 (adding to the language of MINN. STAT. § 13.43, subd. 2 (1994)).

290. MINN. STAT. § 13.43, subd. 2(a) (1994).

Any individual who was a party to a settlement agreement with a government agency, and who entered into the agreement partly to avoid sensitive data being disclosed to the public, will have lost that privacy expectation even though it was a clearly enforceable expectation at the time the agreement was executed.

### 3. *Presumptively Public Data*

#### a. *Vital Balance*

Once it reached its full maturity in the early 1980s, the MGDPA sought to create a vital balance among three competing public information policy objectives: protecting privacy rights, ensuring convenient access to public data, and enabling governmental agencies to collect, create, use, and disseminate data to carry out effective governmental functions.

#### b. *Exceptions*

Although the presumption that government data are public is still good law, the exceptions threaten to swallow the rule. Precisely because the Legislature has responded affirmatively to agency efforts to confer "not public" classifications on scores of specific categories of government data, the deviations from the presumption are legion. But it is not just the quantum of not public classifications that makes this third policy leg an important issue: The consequential, intricate structure of classifications has produced a complexity that makes it difficult for governmental agencies to administer the statute, maddening for requestors of public data, and disheartening for data subjects who want their privacy protected.

#### c. *Upshot*

From a requestor's perspective, obtaining public data may become more and more difficult. As the straightforward analytical framework breaks down because of the definitional complications the Legislature has engrafted onto the MGDPA, or elsewhere in Minnesota statutes, governmental officials confronting perplexing questions about proper classifications tend to resolve doubts against release of data. Ironically, by codifying the hodgepodge of transformative classifications of data, the Legislature has thereby become responsible for sabotaging the very stat-

utory presumption it has enshrined—that government data are public.

#### 4. *Dealing With Complexity*

A common response from the novice who first confronts the MGDPA is a reasonable facsimile of “How does anyone possibly understand this thing?” Part of the complexity is attributable to the fact that the Legislature has not adopted any particular convention to follow in actually constructing definitional language. The chart below illustrates how the Legislature has varyingly shaped the methods for defining data.

CHART VII  
VARYING DEFINITIONAL STRUCTURES

Statutory section	Type of data	Definitional structure
MINN. STAT. §§ 13.43,13.32	Personnel data; Educational data	About the data subjects
MINN. STAT. §§ 13.46, 13.54	Welfare data Housing Agency data	Defined by the government agency holding the data
MINN. STAT. § 13.36	Firearms data	Defined by the collection and use of the data
MINN. STAT. § 13.34	Examination data	Defined by the nature of the data—here testing materials and scoring keys

Virtually all of the new issues are a result of the seemingly bewildering, arcane, and inscrutable complexities of the statute itself. The fact is that any scheme to manage government data is inherently complicated. The MGDPA may be pockmarked with imperfections, but all of the alternatives seem worse.

#### IV. A PROPOSAL FOR REFORMING THE MINNESOTA GOVERNMENT DATA PRACTICES ACT

##### A. *Overview*

Examination of some of the old and some of the emerging public information policy issues reveals problems with the underlying policy articulated by the Legislature in the MGDPA.

The Legislature has appropriately focused its effort on policy development that juggles the conflicting interests of a strong commitment to public access to governmental data, establish-

ment of disclosural and due process privacy rights for governmental data subject, and regulation of data sharing and other effective use by the government of collected information. A democratic information society, must manage these issues if public information policy is to be effective. However, even though the Legislature has focused on the appropriate issues, a number of the solutions that it has articulated have proven to be less than effective.

The persistent complaints from public access advocates, from privacy advocates, and from frustrated governmental officials about the complexity of the MGDPA, the difficulty of attaining agency compliance, and the risks the MGDPA presents to governmental entities are often valid. Nevertheless, effective public information policy will, by virtue of its very subject matter, be complex and must, if governmental agencies are to be held accountable, present adverse consequences to entities' noncompliant behavior. Without adverse consequences, the policies associated with public access and privacy and due process protections would be meaningless because there would be no incentive for governmental agencies to establish or to properly administer the required policies and procedures that give effective operational substance to privacy protections and to public access requirements. Much of the public policy developed by the Legislature struggles to deal with the existential reality that the information being regulated is always held within the physical and organizational boundaries of governmental entities.

Although a system of adverse consequences for noncompliant behavior is a vital component to assure that governmental entities will do the work necessary to carry out the Legislature's public policy decisions, the current primary mechanism that seeks to impose those adverse consequences is not particularly effective. In the final analysis, an entity that chooses to ignore the law will comply only if it is forced to do so by a citizen who chooses to sue and actually wins the lawsuit. This "private attorney general" concept, the notion that anyone should be able to bring a lawsuit to force governmental compliance with the MGDPA, is a noble ideal.

However, when stripped of its nobility, the "private attorney general" concept requires citizens of this state to incur the financial and other risks of bringing suit against their government funded by their taxes. In lawsuits brought to require compliance, citizens must not only win on the substance of their claims

to bring about compliance but must also be able to deal with difficult and unfriendly procedural issues such as standing and proof of damages. At least one Minnesota Court of Appeals case takes the position that for an individual to be an aggrieved person who can bring an action to compel compliance under the MGDPA, the individual must show how an agency's failure to establish any or all of the legislatively-required procedures has directly affected some personal or property interest of the individual.<sup>291</sup> If hardly anyone has standing to sue agencies to require them to develop and put into force the statutorily-required policies and procedures, how can the private attorney general concept actually work?

Governmental officials cite liability concerns when they complain that the MGDPA limits their ability to use and disseminate government data in the effective administration of governmental programs. The reality is that, except for certain kinds of cases that involve disclosural privacy, it is extremely rare for governmental agencies to have to pay compensation to individuals either because of an award of damages or as part of a negotiated settlement. The barrier to proving damages for violations of the procedural rights of either data subjects or persons seeking access to public data extremely difficult to hurdle. However, this is an instance where, to a large extent, perception is reality. Agencies will often justify a failure to use or to disseminate data in a situation where it appears to be appropriate to do so because of the perception that it is less risky to refuse to disclose data than it is to honor a request for disclosure.

Lastly, part of what the Legislature has attempted in the MGDPA is to require that each governmental entity develop and support its own public information policy specialist, i.e., responsible authorities and designees, who the Legislature intended to play an important role in assuring the governmental entity complies with the policy imperative of the statute. The responsible authority concept is another example of a noble idea that has proven to be impractical and ineffective. Some governmental entities do have active and effective responsible authorities. In many other instances, though, governmental entities either have not appointed responsible authorities or have not appropriately supported the person appointed. Often the person required by

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291. *Zissler v. Tierney*, No. C6-95-332, 1995 WL 507616 (Minn. Ct. App. Aug. 29, 1995).



law to be the responsible authority has, by the very nature of duties associated with managing the affairs of the governmental entity, very obvious and persistent conflicts with their MGDPA duties as responsible authority. For example, the responsible authority is a assistant city attorney.

The practical reality of liability concerns among governmental officials often dictates that the entity's attorney becomes its real public information policy specialist. However, by nature of the role expected of the attorney, including ethical requirements, the public attorney must focus on zealous advocacy of the governmental client's interest and not advocacy of the policy imperatives of the MGDPA.

Any proposed reform must deal with realities and the criticisms that are detailed here. Policy development will continue to be complex, but any policy that is developed must find more effective ways to do the following: motivate compliance by governmental entities; replace the private attorney general concept with more effective and creative dispute resolution techniques; control the negative effects of self-limiting actions by governmental entities because of the real and perceived fear of liability; and, in the age of specialization, make better use of specialists in carrying out legislative policy.

To accomplish those objectives, the basic decisions the Legislature has made about public information policy in the MGDPA, including many of the detailed decisions about data classifications, need not be scuttled. Rather, any practical reform must continue to acknowledge the complexity of information policy but must seek to find solutions to the problems as obstacles to reifying the statute's underlying goals.

To maintain the vital balance among the three major policy objectives (privacy, public information, and governmental efficiency), the Legislature must do the following: (a) ensure policy and terminology consistency in its decisions; (b) enable citizens and governmental agencies alike to obtain quick resolution to unclarities, ambiguities, and disputes; (c) facilitate enforcement of public access policies and of disclosural and informational privacy rights; and (d) acknowledge that the complexity of the policies that the Legislature expects citizens to understand and governmental entities to carry out requires that both citizens and agencies have access to assistance from skilled public information policy specialists. The suggested reforms propose a method

to assure legislative consistency and measures that would involve both minor and major surgery.

### *B. Legislative Consistency*

The Legislature needs to establish a Joint Legislative Commission on Information Policy (or at least establish standing information policy committees in both the Senate and the House). Most of the work of the current subcommittees on data privacy is limited by the fact they are ad hoc subcommittees. The subcommittees are not given regularly-assigned times for their hearings and they are not even guaranteed space within the halls of the Legislature to meet. Establishing a joint commission, or giving the existing subcommittees the status and authority of standing committees, would go a long way toward overcoming the existing problems with authority and scheduling that limit the ability of the current subcommittees to effectively handle a workload that grows larger and more complex every year.

The commission (or standing committees) would assume primary responsibility for development of uniform public information policy. All bills containing any issue involving information policy would be referred for action to the commission or standing committees. The commission (or committees) would, *inter alia*, strip old statutes of the confusing mix of nomenclature and policy that is so mind-boggling and review new bills to assure consistent language and policy results. As the state's financial investment in electronic information systems continues its rapid growth, the commission (or committees) would also exercise an oversight role of those investments.

### *C. Minor Surgery*

It is absolutely clear that quarrels over data practices matters will continue to thrive as governmental entities joust with representatives of the media, with other citizens, and with each other. What the quarrelsome system needs is some machinery for solving public information policy issues that is faster, less expensive, and more user-friendly. Currently, rules of the Minnesota Supreme Court require that litigants attempt to resolve their differences using dispute resolution mechanisms before proceeding to trial.<sup>292</sup>

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292. MINN. GEN. R. PRAC. 114.

However, that rule attaches only after pleadings have been filed in court.<sup>293</sup> Alternative Dispute Resolution (ADR) models should be made available to disputants before anyone feels compelled to file a lawsuit. To more effectively use ADR, the MGDPA should be amended to do the following: expand the subject matter of opinions the Commissioner of Administration may issue to include any question that may arise under the MGDPA and related statutes; make opinions of the Commissioner binding on both governmental entities and citizens; and authorize the Commissioner to establish and to manage a dispute resolution program, available both to governmental entities and to citizens, that would afford them the opportunity to use mediation and arbitration to resolve information policy disputes. Although these forms of ADR would be far less expensive than the current methods of enforcement, their establishment and successful operation must be properly funded.

#### D. Major Surgery

##### 1. Other Worldly Experience

Issues of public information policy are not unique to Minnesota. As other states and the rest of the world grapple with the broad range of issues of information policy, these issues are topics of universal discussion or at least, of discussion in our small part of the Milky Way. If the Legislature and other policy makers are willing, a major surgical reform to the MGDPA would involve amending the statute to create the ultimate public information policy specialist whose role would be to assure maximum compliance with the statute through provision of assistance to governmental entities and citizens to deal with issues, confusions, and disputes including the power to resolve disputes in a non-litigious fashion.

Over the last twenty years, member countries of the European Community, Canada, New Zealand, and Australia have enacted legislation to establish privacy, data protection and freedom of information commissioners. In addition to a federal privacy and freedom of information commissioner, some of the Canadian provinces have adopted a commissioner system.

The province of British Columbia (B.C.) set up its commissioner system with the enactment of the Freedom of Information

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293. MINN. GEN. R. PRAC. 114.03(a), 114.04(a).

and Protection of Privacy Act in 1992.<sup>294</sup> The B.C. statute is for two reasons. First, it is of recent and is based on the practical experience of other jurisdictions.<sup>295</sup> Second, the B.C. population is fairly comparable to the population of Minnesota; and therefore, it is reasonable to expect that the number and kinds of issues comparable.<sup>296</sup>

## 2. *A Freedom of Information and Privacy Commissioner*

After presenting general public information policies that address many of the same issues of public access, data sharing, and fair information practices as those incorporated in the MGDPA, the B.C. statute provides for the creation of an Information and Privacy Commissioner.<sup>297</sup> The Commissioner is appointed by the Lieutenant Governor of the province based on a recommendation of a special committee of the Legislature.<sup>298</sup> The Commissioner serves one six year term and is not eligible to be reappointed.<sup>299</sup> The salary is the same as that of the chief judge of B.C. provincial court.<sup>300</sup> The Commissioner may appoint staff who are provincial civil servants.<sup>301</sup> Both the limited term of the Commissioner and the civil service status of the Commissioner's staff provide a strong foundation for independence from partisan political consideration and encourage the use of expertise and innovation and boldness in dealing with issues.

## 3. *Powers and Duties of the B.C. Commissioner*

The Freedom of Information and Privacy Act authorizes the Commissioner to do the following:

- (1) Monitor administration of the Act.<sup>302</sup>

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294. *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1979, amended by PUBLIC ACT, S.B.C. 1992, ch. 61.

295. See, e.g., *Privacy Act*, R.S.C. 1985, ch. P-21, § 53 (establishing a Privacy Commissioner to monitor and enforce the Privacy Act).

296. See THE WORLD ALMANAC AND BOOK OF FACTS 1995 at 379, 753 (stating British Columbia's population to be 3,282,061 and Minnesota's to be 4,375,099).

297. *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1979, amended by PUBLIC ACT, S.B.C. 1992, ch. 61, § 37.

298. *Id.* § 37(1).

299. *Id.* § 37(3),(4).

300. *Id.* § 40(1)(a).

301. *Id.* § 41(1).

302. *Id.* § 42(1).

(2) Conduct investigations and audits to ensure compliance.<sup>303</sup>

(3) Inform the public about the Act.<sup>304</sup>

(4) Engage in research into anything affecting the achievement of the legislative purposes.<sup>305</sup>

(5) Comment on the implications for access to information or protection of privacy of proposed legislative schemes or programs of public bodies.<sup>306</sup>

(6) Comment on the implications of governmental information systems.<sup>307</sup>

(7) Authorize the collection of personal information from sources other than the individual data subject.<sup>308</sup>

(8) Bring to the attention of other governmental officials any failure to meet certain standards for assisting citizens in accessing information.<sup>309</sup>

The Act also authorizes the Commissioner to investigate and to attempt to resolve the following complaints: duties imposed by the Act have not been performed; agencies taking too much time to respond or charging excessive fees for copies of governmental information; improper refusal to correct a record; and the collection, use, or disclosure of information which violates the privacy protections of the Act.<sup>310</sup> The Commissioner can authorize agencies to disregard certain requests for information because of the nature of the request.<sup>311</sup> The Commissioner has broad powers of inquiry and investigation to carry out these various duties.<sup>312</sup>

The B.C. Statute also empowers the Commissioner to receive and to take action on requests for the review of decisions of governmental agencies that affect rights the Act confers on citizens.<sup>313</sup> The Commissioner may arrange mediation of disputes

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303. *Id.* § 42(1)(a).

304. *Id.* § 42(1)(c).

305. *Id.* § 42(1)(e).

306. *Id.* § 42(1)(f).

307. *Id.* § 42(1)(g).

308. *Id.* § 42(1)(i).

309. *Id.* § 42(1)(j).

310. *Id.* § 42(2).

311. *Id.* § 43.

312. *See id.* § 44 (giving the Commissioner broad powers to require public bodies to produce any record within 10 days or allow examination of records on site).

313. *Id.* § 52(1).

and may attempt to broker settlements.<sup>314</sup> If a request for review is not referred for mediation or otherwise settled, the Commissioner is authorized to fully review the issues and to make appropriate orders to resolve the dispute.<sup>315</sup> Governmental agencies that are the subject of a Commissioner's order must, within thirty days, comply with the order or seek judicial review.<sup>316</sup>

To deal with the reality that the Commissioner is also a collector of governmental information, the Lieutenant Governor of the province is given the authority to review complaints about the Commissioner's records.<sup>317</sup> In other words, in British Columbia, all governmental entities are accountable to someone for their collection, use, and dissemination of governmental information.

#### 4. *A Minnesota Commissioner?*

A proximate solution, patterned after the B.C. model, offers a significant opportunity to correct the primary, and some of the lesser, negative realities of the Minnesota experience. The B.C. model creates a staff of specialists with broad authority to deal with public information policy issues. While relying on agency personnel for proper compliance with the detailed objectives of the B.C. Act, the statute give agency personnel significant formal and informal access to the specialized expertise of the Commissioner and the Commissioner's staff.

As opposed to imposing a burden on citizens to enforce an act of their Legislature, the B.C. statute gives the Commissioner broad enforcement powers. In the B.C. scheme, a citizen who is confronted with governmental noncompliance does not file a lawsuit. Instead, the citizen seeks the assistance of the Commissioner. This assistance is available to resolve individual disputes. More significantly, the Commissioner is given the charge to use his or her authority to deal with issues of access and privacy at the policy and conceptual level and to head off problem before they become public controversies.

As opposed to paying damages to citizens after spending public money to defend lawsuits, agencies of B.C. government know that they are accountable to the Commissioner. The broad au-

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314. *Id.* § 55.

315. *Id.* §§ 56, 58.

316. *Id.* § 59(1).

317. *Id.* §§ 60-65.

thority given to the Commissioner must have a very motivating effect on governmental agencies in terms of their willingness to comply with the policies adopted by the parliament of British Columbia. Far too often, the MGDPA dispute resolution process in Minnesota leaves citizens feeling like they have been bullied by the government. Given the authority of the B.C. Commissioner, citizens of that province have a powerful ally in dispute with their government.

However, the Commissioner is also given authority to help governmental agencies resolve the dilemmas that those agencies often find themselves in while trying to juggle the often-conflicting imperatives of freedom on information, privacy, and governmental effectiveness. A number of features of the B.C. statute would go a long way to help resolve many of the sincere complaints that Minnesota governmental agencies have about demands and implication of the MGDPA.

### *5. Too Large a Leap Forward?*

Although the adoption of a Commissioner approach and other features of the B.C. statute as a new, proximate solution for Minnesota information policy issues has much appeal, it is not clear that either the legislative or executive branches of Minnesota government would be willing to leap quite as far forward in dealing with these issues as they would have in adopting the B.C. model. Part of the appeal of the B.C. model is that, unlike some of the data protection statutes of western Europe, it functions in the context of the shared legal tradition of Anglo-American common law. The B.C. model presents a very different way to resolve dispute than the traditional private attorney general model that Minnesota has adopted.

An additional dimension is that successful operation of the B.C. model requires a much greater investment in the development and authoritative use of information policy expertise than anything that the Minnesota Legislature has been willing to support in the past. One of the current realities of the cost of the administration of the MGDPA, including litigation expenses, is that, with the exception of the budget of the Department of Administration, most of those costs are hidden away in the budgets of governmental agencies and, in the case of the hundreds of agencies that are represented by private counsel, in the invoices they receive from those law firms. A legislature asked to appro-

priate money to support a staff of information policy experts will find it difficult to compare the very visible costs of that staff with the mostly concealed current cost of administration.

Traditional American distrust of government and persistent questions about the effectiveness of governmental programs pose significant obstacles to the adoption of the B.C. model. A significant part of what makes the B.C. model work is that it establishes an overriding policy that assuring public access to government data and protecting individual privacy are legitimate objectives of the government itself. The B.C. statute then assigns major responsibility for assuring attainment of those objectives to the Commissioner, who is a part of the government.<sup>318</sup> Even though Minnesota policy makers have consistently acknowledged the importance of access to governmental information and of data practices compliance, it is doubtful they will support the creation of a new governmental agency whose mission it is to protect individual rights.

## V. CONCLUSION

### A. Policy

Public information policy is complex and is becoming more complex. In addition to the many items discussed in this article, issues such as copyright of government data and the monitoring of citizen use of governmental electronic databases will be before the Legislature in the near future.

### B. Statute

The MGDPA is elongated, complicated, and often difficult to comprehend. The reality that many other provisions of Minnesota Statutes contain information policy inconsistent with the terminology and policies articulated in the MGDPA exacerbates those complications. The template explained in Part II should enable the reader to decode riddles inherent in the statute.

### C. Conflicting Goals

The MGDPA endeavors to achieve a vital balance among three conflicting objectives: (a) government data are presumptively public; (b) disclosural privacy and informational privacy rights of individuals will be respected and enforced; (c) governmental

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318. *Id.* § 37(2).



agencies will be able to collect, maintain, use, and disseminate governmental data to carry out their statutory responsibilities.

#### *D. Issues*

The Legislature and the appellate courts have resolved a number of old issues, including the discoverability of governmental data, the interplay of the MGDPA and the "Open Meeting Law;" and the handling of data on decedents. However, some of both the legislative and judicial branch decisions have produced new issues yet to be resolved, including the primary issue of the lack of consistency in the development and statement of public information policy. The difficulty of administering information policy statutes (for governmental agencies), and the burden of enforcing disclosural and informational privacy rights (for citizens and the media), have intensified.

#### *E. Proposals for Reform*

The authors suggest three major reforms, requiring legislative action, that would change how the Legislature makes information policy and how that policy is administered and enforced. The reforms call for the following: (1) the creation of a legislative commission on information policy to ensure statutory consistency; (2) minor surgery to graft a variety of alternative dispute resolution processes onto the current litigation-based enforcement; (3) major surgery to establish an independent Commissioner for Freedom of Information and Privacy, modeled on that of the province of British Columbia, which would have sufficient authority and political independence to address issues of administration enforcement, implementation, and dispute resolution.