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Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From "A" to "Z"

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DATA PRIVACY: EVERYTHING YOU WANTED TO KNOW ABOUT THE MINNESOTA GOVERNMENT DATA PRACTICES ACT—FROM “A” TO “Z”

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PROLOGUE

Data privacy is a spectre that is likely to haunt public policy for the remainder of the twentieth century. The dawning of the Age of Microprocessors has breathed life into formerly hypothetical questions about the extent to which individuals in a democratic society can control the collection, storage, and dissemination of information about them.

Suppose, for example, that some third party had access to the microfilmed copies of your cancelled checks at your local bank: S/he would have a fairly complete picture of your income, your spending habits, the charities to which you contribute, the stores you patronize, your religious affiliation, and your political prefer-

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* This Article is dedicated to the memories of Daniel B. Magraw and Dr. G. Theodore Mitau, public servants, mentors, civil libertarians, and public policy makers. Without the efforts of the former, Minnesota would not have enacted the nation's first comprehensive fair information practices act. Without the efforts of the latter, the full significance of that enactment would not be understood.

ences.¹ Or consider the nature and volume of information stored about you in the files or computers of physicians, life insurance companies, credit bureaus, employers, and the government. On what bases do anonymous decisionmakers rely in deciding whether you should be hired, insured, granted credit, admitted to law school, or appointed to office?

Governmental excursions into the regulation of data practices in the private sector have been modest and cautious. Federal statutes have imposed some guidelines upon banks, creditors, and consumer-reporting agencies, but they grant few substantive rights to individual consumers to control the collection or disclosure of personal information about them.²

Legislative attempts to limit government intrusiveness began, not coincidentally, at the time of the Watergate revelations. The Federal Privacy Act,³ enacted in 1974, prescribes standards for the collection and dissemination of information by federal agencies. As originally drafted, one version of the Act would have applied to the private sector as well,⁴ but the final version confines its reach to the public sector, and only to federal agencies at that.⁵

Much to the chagrin of some governmental entities here, Minnesota was, in 1974, the first American jurisdiction to enact a data privacy statute.⁶ Initially a modest work product of three pages

1. See *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 79-91 (1974) (Douglas, J., dissenting); R. SMITH, *PRIVACY, HOW TO PROTECT WHAT'S LEFT OF IT* (1979).

2. The Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1976), permits the examination of files by consumers and requires purging of obsolete information.

The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1976), and its implementing regulations, 12 C.F.R. §§ 202.1-.1104 (1982), restrict the use of certain kinds of information, particularly that pertaining to race and gender, in making credit decisions, but the collection, storage, and disclosure of such information are not proscribed.

The Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j (1976), provides that within two complete billing cycles and in no event later than 90 days after receipt of notice from the obligor that he believes there is an error, the creditor must inform the obligor why the bill is correct. *Id.* § 1666(a)(3)(B)(ii). After that is done, the creditor must wait until such time has expired pursuant to the credit agreement before taking any action to collect the bill. *Id.* § 1666(a)(3)(B).

The Currency and Foreign Transactions Reporting Act of 1970, often called the Bank Secrecy Act, 31 U.S.C. §§ 1051-1143 (1976), requires banks to maintain records on depositors and to report certain types of transactions to the federal government.

3. 5 U.S.C. § 552a (1976).

4. SENATE COMM. ON GOVERNMENT OPERATIONS & SUBCOMM. ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 94TH CONG., 2D SESS., *LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974*, S. 3418 (Pub. L. No. 93-579)—SOURCE BOOK ON PRIVACY (Joint Comm. Print 1976).

5. 5 U.S.C. § 552(a)(1) (1976).

6. Act of Apr. 11, 1974, ch. 479, 1974 Minn. Laws 1199.

setting forth agency requirements, enumerating some rights of data subjects, and admonishing the Commissioner of Administration to promulgate amplifying rules, the law is now an intricate and prolix document of twenty-nine pages. Its implementing rules comprise another twenty-three pages.⁷

First unofficially referred to as the "Data Privacy Act,"⁸ the statute is now officially denominated the Minnesota Government Data Practices Act (MGDPA)⁹ in recognition that the law attempts to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The Act also attempts to balance those competing rights within a context of effective government operation. This delicate balance among the competing interests of efficient government, the individual's right to privacy, and the public's right to know (the second of which is labeled "fair information practices" and the last sometimes called "freedom of information")¹⁰ has given rise to most of the complexity of the data practices statute.

A practitioner who casually glances at the Minnesota Government Data Practices Act discovers that the legislative scheme can only be inferred after considerable scrutiny. Most of the provisions are comprehensible only when read in conjunction with certain other statutory sections. That insight is less a product of inartful drafting than the result of the statute's legislative history¹¹ and the intellectual difficulty of framing a unitary piece of legislation that comprehensively addresses the complex issues of "freedom of information" and "data privacy."

Rather than provide an elaborate exegesis of the myriad strands of data practices issues, only a few of which may be of interest to any particular reader, the authors have composed (a) an overview of the law and the major issues connected with its implementation

7. 2 MINN. CODE AGENCY R. §§ 1.201-.220 (1982).

8. When enacted in 1974, this legislature did not specifically name the statute, *see* Act of Apr. 11, 1974, ch. 479, 1974 Minn. Laws 1199, but rather when the statute was referred to, its popular name was the "Data Privacy Act."

9. MINN. STAT. § 13.01(2) (1982). The name was changed in the 1979 amendments to the Act. *See* Act of June 5, 1979, ch. 328, § 1, 1979 Minn. Laws 910, 910.

10. The Minnesota statute refers to "access to government data," MINN. STAT. § 13.03 (1982); the federal statute is officially denominated the "Freedom of Information Act," 5 U.S.C. § 552 (1976).

11. For an exhaustive treatment of the legislative history of the statute, *see* Gemberling, *The Minnesota Government Data Practices Act: History and General Operation*, in GOVERNMENT LIABILITY 241 (Minn. Continuing Legal Educ. 1981).

(Part I); (b) an annotated index of important terms, concepts, and phrases (Part II); and (c) a detailed but unannotated “finding tool” index of words and phrases which will point the non-specialist to the appropriate sections of the statute and rules (Part III).

Part I: An Overview of the Minnesota Government Data Practices Act

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Open government and individual privacy are both civil libertarian notions; each plucks chords resonant with suspicions about governmental power. If "informational privacy" and "freedom of information" share any common rationale, it is the long-honored American tradition that one cannot trust the government. Viewed from a constitutional perspective, state fair information practice laws and data privacy statutes are legislative attempts to elaborate the laconic guarantees of substantive due process in the fourteenth amendment to the United States Constitution.¹

1. The United States Supreme Court has discerned the constitutional right of privacy in such cases as *Whalen v. Roe*, 429 U.S. 589 (1977), *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Despite this common rationale, the principles of freedom of information and data privacy collide in the arena of accessibility to information held by the government. The expansion of public access to government information necessarily jeopardizes the protection from disclosure of sensitive, personal information on individuals. Conversely, the amplification of privacy rights will result in a diminution of public accessibility. The news media's lukewarm advocacy of privacy protection efforts stems largely from their apprehension that governmental agencies will hoist the escutcheon of individual privacy to prevent the disclosure of information embarrassing to those agencies' politically-appointed officials.

At the quotidian level of bureaucratic activity, however, civil servants view the issue much more mundanely. Mid-level supervisors and clerks tend to see the "public's right to know" as smooth-tongued camouflage for the reporter's desire to print gossip and to regard claims for "individual rights to privacy" as excessive demands by "clients" to involve the agency in keeping data about them out of the hands of third parties. Significantly, they perceive both sets of "rights" as unwarranted interference with their ability to perform their principal functions of enforcing the law, educating, transferring payments, providing services, or whatever.²

The MGDPA attempts to fashion a coherent scheme reconciling public policy considerations concerning the public's access to government information, individual data subjects' right to have information about them protected from disclosure, and government agencies' need to operate efficiently (and to maintain some data which are not discloseable even to the subjects of those data).

A. Classification

The statute achieves this reconciliation by regulating accessibility through a classification system unique among legislative efforts to strike such a balance. Unlike the method enacted by Congress for federal agencies to deal with personal information, which permits governmental officials to withhold information they determine to be a "clearly unwarranted invasion of individual privacy,"³ the Minnesota mechanism removes virtually all discretion concerning access from administrative agencies of state and

2. This observation is based on the authors' experience as trainers of government agency staff in data practices.

3. 5 U.S.C. § 552b(c)(6) (1976).

local government.⁴

1. *Categories.* Under Minnesota's statute, all government data⁵ are either "data on individuals"⁶ or "data not on individuals."⁷ Each of these two compartments contains three categories, and, accordingly, every datum in the hands of the government must fall into one of the six categories. The categories are distinguishable by the nature of the data subject and by the degree of accessibility. The categorical scheme is set forth below:

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

The categories are parallel in that each compartment comprises three subsets of correspondingly restrictive discloseability. Public data (categories 1 and 2) are available to anyone for the asking.¹⁷

4. MINN. STAT. § 13.03(1) (1982) (requiring express grant of authority in state statute or federal law to restrictively classify data).

5. *Id.* § 13.02(7).

6. *Id.* § 13.02(5).

7. *Id.* § 13.02(4).

8. *Id.* § 13.02(15).

9. *Id.* § 13.02(14), (15).

10. *Id.* § 13.02(16).

11. *Id.* § 13.02(12).

12. *Id.* § 13.02(9), (12).

13. *Id.* § 13.02(9).

14. *Id.* § 13.02(3).

15. *Id.* § 13.02(3), (13).

16. *Id.* § 13.03(13).

17. *See id.* § 13.02(14), (15).

Private data on individuals and nonpublic data not on individuals (categories 3 and 4) are available to the subjects of those data as well as to government officials who need to know, but not to the public or to other third parties.¹⁸ Confidential and protected non-public data (categories 5 and 6) are not available either to the public or to the data subjects but are accessible only to government officials whose duties necessitate access to them.¹⁹

2. *Presumption of public data.* Because classification determines accessibility (and hence liability for wrongful disclosure) and other rights associated with not public data,²⁰ the linchpin of the system is the mechanism for classifying government data. The legislature has established a presumption that government data are public.²¹ In the absence of a specific state statute or federal law²² classifying data more restrictively, government data are presumed to be accessible to anyone.²³

The legislature enacted this particular mechanism in response to media requests that the general concept of openness in government be incorporated into the legislative plan for data practices.²⁴ This presumption was attractive for two reasons: (1) It put most decisions about whether to open or close types of data in the hands of the state legislature; (2) It put the burden on the government agency to cite the authority upon which it relies to classify a particular datum as not discloseable.²⁵

3. *Temporary classifications.* If an agency desires to deny disclosure of data either to the public or to a data subject, but has no statute or federal law to support its denial, then it must persuade the Commissioner of Administration that there is a compelling need or other good reason for a temporary classification of data as not public.²⁶ If the agency succeeds in convincing the Commissioner of Administration, the agency must persuade the legislature as well, or the temporary classification will expire twenty-four

18. *See id.* § 13.02(9), (12); 2 MINN. CODE AGENCY R. § 1.204(A)(2) (1982).

19. MINN. STAT. § 13.02(3), (13) (1982); 2 MINN. CODE AGENCY R. § 1.206(A)(1) (1982).

20. *See* MINN. STAT. § 13.08 (1982); *see also infra* note 42.

21. *See* MINN. STAT. § 13.03 (1982).

22. *Id.* § 13.03(1); *see also* 2 MINN. CODE AGENCY R. § 1.202(H) (1982).

23. *See* MINN. STAT. § 13.03(1) (1982).

24. *See* Gemberling, *The Minnesota Government Data Practices Act: History and General Operation*, in GOVERNMENT LIABILITY 241 (Minn. Continuing Legal Educ. 1981).

25. *See* MINN. STAT. § 13.03(3) (1982).

26. *See id.* § 13.06.

months after it is granted.²⁷

The temporary classification provision was a safety valve inserted to enable government agencies to obtain restrictive classifications from a neutral party between legislative sessions. The inevitable result has been that dozens of agencies have filed scores of requests for temporary classifications. However the Department of Administration has granted fewer than fifty percent of the temporary classifications requested. The temporary classification section also mandates that the commissioner present, each January, a bill containing all of the temporary classifications still in effect and those granted during the previous year.²⁸ Thus the majority of the MGDPA sections represent codifications of what were formerly temporary classifications.²⁹

4. *Sources of classification.* The classification system in the statute is largely an empty vessel. Although the MGDPA expressly restricts classification of some data,³⁰ many of the "not public"³¹ contents of that vessel pour in from various state statutes and federal laws enacted or promulgated in other contexts. However, as noted above, most data classifications in the MGDPA originated as temporary classifications.³² The collectors of such categories of data obviously had no independent authority for non-disclosure, or they would not have bothered to seek temporary classifications.

Counsel for public agencies may have to consult several authorities outside the MGDPA, including uncodified temporary classifications, to determine whether particular data are protectible from disclosure. A school district must comply, for example, with the privacy policies in the Family Educational Rights and Privacy Act of 1974 (FERPA)³³ and the regulations promulgated thereunder.³⁴ Similarly, records maintained by a county or municipality about a federally funded employment or training program it operates must

27. *Id.* § 13.06(6)-(7).

28. *Id.* § 13.06(7).

29. There are currently 51 separate sections in the statute. Forty-three of those sections classify data, and of those 43, 5 arose from legislative initiative and 38 are codifications, with legislative changes in many cases, of temporary classifications.

30. *See, e.g.*, MINN. STAT. § 13.46 (1982) (welfare data); *id.* § 13.43 (personal data); *id.* § 13.81 (law enforcement data).

31. The term "not public" may become the statutory term for all data classified other than public. This article uses the term "restrictively classified data" to avoid confusion between the terms "not public" and "nonpublic."

32. *See supra* note 29 and accompanying text.

33. *See* 20 U.S.C. § 1232g (1976).

34. *See* 45 C.F.R. § 99 (1982).

comport with the United States Department of Labor regulations.³⁵ Another federal statute prohibits state and local agencies from requiring an individual to provide his or her social security number without express statutory authority to do so,³⁶ violation of this proscription is a federal crime.³⁷

Minnesota statutes are sprinkled with restrictive classifications as well: Tax returns,³⁸ traffic accident reports,³⁹ unemployment insurance data,⁴⁰ child abuse reports,⁴¹ Human Rights Department conciliation efforts,⁴² and expunged criminal records⁴³ are all classified as other than public. None of these classifications appears in the MGDPA.

While a federal regulation promulgated before or after⁴⁴ the enactment of the MGDPA will suffice to restrictively classify data maintained by public agencies in Minnesota, a state agency may not issue rules under the state's Administrative Procedures Act⁴⁵ in an effort to unilaterally classify some of its data as not public.⁴⁶

B. Access Rights

Access is the heart of the MGDPA. Stripped to its essentials, the statute is a device for regulating to whom government information will be accessible and under what conditions.

1. *Public access rights.* Data not expressly classified as restricted⁴⁷ are open for public inspection. Most governmental data, therefore, fall into the public domain: Minutes of meetings of public bodies, employee directories, files of photographs, staff re-

35. See 41 C.F.R. § 29-70.203b-3 (1982). These are regulations issued pursuant to the Comprehensive Employment and Training Act which has been superseded by the Joint Training Partnership Act.

36. 5 U.S.C. § 552a note (1976) (Disclosure of Social Security Number).

37. 42 U.S.C. § 408(h) (1976).

38. See MINN. STAT. § 290.61 (1982).

39. See *id.* § 169.09(13).

40. See *id.* § 268.12(12).

41. See *id.* § 626.556(11).

42. See *id.* § 363.06(6).

43. See *id.* § 364.04(2).

44. See *id.* § 13.05(4)(b).

45. See *id.* § 14.02(4).

46. See *id.* § 13.03. "All government data . . . shall be public unless classified by statute, or temporary classification . . . or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential." *Id.* § 13.03(1). "Federal law" includes federal statutes, regulations, or federal case law. See 2 MINN. CODE AGENCY R. § 1.202(H) (1982).

47. See *supra* note 31.

ports, most agency procedures, contents of computerized magnetic tapes, budgets, the identities of contractors, and internal memoranda suggesting policy modifications may be stamped “top secret” or “eyes only” or even “confidential,” but in the absence of a state statute, federal law, or temporary classification expressly authorizing non-disclosure, all those data are public.⁴⁸

Some data collected or stored by an agency constitute private or confidential data on individuals; but if the administering agency compiles the data in synoptical form such that the individuals about whom the data are stored cannot be identified, then the synoptical information becomes “summary data” and is, in most cases, publicly accessible.⁴⁹ For example, the race of individual public employees is classified as private data and is therefore protected from public disclosure.⁵⁰ However, the *number* of minority group members employed by particular agencies—a figure derived from private personnel data but not identifying individuals—is summary data and consequently public information.⁵¹ Subject to certain limitations, an agency is obliged to compile summary data from various private and confidential files upon the written request of anyone willing to pay for the cost of compilation.⁵²

Anticipating ingenious bureaucratic roadblocks, the statute contains several anti-gamesmanship provisions to ensure easy public access. To preclude the artifice of making inquirers run the gauntlets of multiple storage locations or obscure agency filing practices the statute requires agencies to “keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use.”⁵³ To prevent agencies from interposing technology as a barrier to access, the legislature defined the term “government data”⁵⁴ comprehensively and expressly made “[p]hotographic, photostatic, microphotographic, [and] microfilmed records” accessible.⁵⁵ Researchers evidently have *carte blanche* access to public data,⁵⁶ and agencies are arguably

48. See MINN. STAT. § 13.03(1) (1982).

49. See *id.* §§ 13.02(19), .05.

50. Race is not one of the specifically enumerated items made public and, therefore, is classified as private data on individuals. See *id.* § 13.43.

51. See *id.* § 13.05(7).

52. See *id.*

53. *Id.* § 13.03(1).

54. *Id.* § 13.02(7).

55. *Id.* § 13.03(1). Such data are available regardless of their “physical form, storage media or conditions of use.” *Id.* § 13.02(7).

56. The provision reads: “Full convenience and comprehensive accessibility shall be

obliged to translate jargon and computer symbols for those who do not understand them.⁵⁷

2. *Data subjects' access rights.* Both individuals and non-human entities (such as corporations and nonprofit organizations) are entitled to examine data that an agency maintains about them, so long as the data are not classified to proscribe access.⁵⁸ In the case of individual data subjects, this examination is at no cost to the subject.⁵⁹ Thus data classified either as "public," "private," or "nonpublic" are available to the subjects of those data. Only if the statute expressly labels the data as "confidential" or as "protected nonpublic" may an agency deny a data subject access.⁶⁰ The label "confidential" may be insufficient to bar access, however, if the context of the statute or federal regulation embodying the classification "reasonably indicates the data [are] accessible by the data subject"⁶¹ or if the agency has unrestricted discretion to divulge the data.⁶² Lastly, victims of crimes may, upon written request to a prosecutor, have access to data which are otherwise confidential because they are part of a law enforcement investigation.⁶³

3. *Governmental agency access.* An agency may disclose restrictively classified data on individuals to another agency only when a state or federal law authorizes such disclosure.⁶⁴ Without express authority, state agencies may not share private or confidential data with other state agencies or with county or municipal governments, nor are counties or cities free to exchange such data among themselves. County welfare boards, community mental health boards, and the state Department of Public Welfare, however, may all share data with impunity because they are all components

allowed to *researchers* including historians, geneologists and other scholars to carry out extensive research and complete copying of all records containing government data except as otherwise expressly provided by law." *Id.* § 13.03(2) (emphasis added).

57. *See id.* §§ 13.03, .04(3).

58. *See id.* § 13.02(9), (12).

59. *Id.* § 13.04(3).

60. *Id.* § 13.02(3), (13).

61. 2 MINN. CODE AGENCY R. § 1.202(c)(2) (1982).

62. *See id.*

63. MINN. STAT. § 13.82(6) (1982). The prosecutor may decline to release such data to the crime victim if s/he reasonably believes that disclosure of the data might interfere with the investigation or that the information sought will be used to engage in unlawful activities. *Id.*

64. *See id.* § 13.05(9).

of the "welfare system."⁶⁵ Similarly, law enforcement agencies and the Bureau of Criminal Apprehension may also legally share restrictively classified data which are part of the Bureau's Criminal Justice Information System for valid criminal justice purposes because they are all part of a statewide law enforcement system.⁶⁶

However, even if there is statutory authorization for dissemination of private or confidential data, the government agency may not in most instances disseminate private or confidential data collected from an individual unless the individual has been given prior notice of the disclosure.⁶⁷

Within an agency, restrictively classified data are available only to those staff "whose work assignments reasonably require access."⁶⁸ While the "responsible authority"⁶⁹ for an agency⁷⁰ generally determines which work assignments require access to restrictively classified data,⁷¹ there are instances when the Attorney General has limited the discretion of the responsible authority by prohibiting one division of any agency from disclosing certain data to other divisions within the same department.⁷²

C. Rights of Individual Data Subjects

In addition to the access rights described above, individual data subjects enjoy certain other rights not enjoyed by non-natural data subjects.⁷³ Individuals have a right to know what kind of data an agency maintains on them, a right to contest the accuracy of data, and a right to notice when an agency collects data.

1. *The right to know.* An individual may ask any public agency

65. *See id.* §§ 13.05(4), .46(2).

66. *Id.* §§ 13.02(18), 299C.46.

67. *Id.* §§ 13.05(4), .04(2); *see also infra* notes 81-88 and accompanying text.

68. *See* MINN. STAT. § 13.46(2)(d), (e), (g) (1982); 2 MINN. CODE AGENCY R. § 1.202(G)(3)(a) (1982).

69. MINN. STAT. § 13.02(16) (1982).

70. 2 MINN. CODE AGENCY R. § 1.204(A)(2) (1982).

71. The implied powers of the responsible authority are enumerated at 2 MINN. CODE AGENCY R. § 1.209 (1982); *see also* MINN. STAT. §§ 13.02(16), .05 (1982). In addition, *see Responsible Authority* in the Annotated Index in Part II of this article.

72. *See, e.g.*, Memorandum Opinion of Mar. 3, 1978, from Assistant Attorney General Peter Andrews to the then Deputy Commissioner of Economic Security (proscribing sharing of certain data maintained by Vocational Rehabilitation Division with other divisions of Department of Economic Security (relying on MINN. STAT. § 129A.05 (1982), and 45 C.F.R. § 1361.47 (1982))).

73. The statute's section entitled "Rights of Data Subjects" addresses only the rights of individual data subjects, MINN. STAT. § 13.04 (1982), and the scope of the rules is limited to data on individuals. *See* 2 MINN. CODE AGENCY R. § 1.201(A) (1982).

subject to the statute if that agency maintains any data about him or her; the agency must reply within five working days,⁷⁴ disclosing whether the requestor is a subject of data maintained by the agency and if so, how data on the requestor are classified.⁷⁵ Because an agency must also cite the authority for denying access,⁷⁶ a data subject may often discern the nature of any confidential data maintained on him or her.

2. *The right to contest accuracy.* A data subject may challenge the accuracy or completeness of public or private data stored on him/her simply by notifying the responsible authority in writing of the nature of the disagreement.⁷⁷ The agency must, within thirty days, either correct the data whose accuracy (or completeness) the data subject has contested or inform the data subject that the agency regards the data currently on file as accurate (or complete).⁷⁸ As long as the dispute continues, the agency is required to include the statement of disagreement with the disputed data each time they are disseminated.⁷⁹ Also, the data subject may appeal the agency's determination of completeness and accuracy to the Commissioner of Administration,⁸⁰ the only such administrative remedy in the MGDPA.

3. *Notice: The "Tennessen Warning".* Arguably the single most affirmative right accorded to data subjects, even more significant than the right of access, is the right to notice when an agency collects private or confidential data.⁸¹ Referred to in data privacy circles as the "Tennessen Warning"⁸² (because of its analogue in criminal procedure, the Miranda warning⁸³), the notice is named after the senate author of the original Data Privacy Act, State Senator Robert Tennessen. The required notice comprises five dis-

74. See MINN. STAT. § 13.04(3) (1982). If the responsible authority cannot comply within the five days, he shall inform the individual and may have an additional five working days. *Id.*

75. *Id.*

76. See *id.* § 13.03(3).

77. See *id.* § 13.04(4).

78. *Id.*

79. See *id.*

80. See *id.*; MINN. CODE AGENCY R. § 1.215 (1982).

81. MINN. STAT. § 13.04(2) (1982).

82. The term "Tennessen Warning" appears nowhere in the statute or rules, but it is employed regularly as a handy abbreviation for what would otherwise have to be labeled, rather clumsily, as the "five-point notice requirement pursuant to section 13.04(2)."

83. *Miranda v. Arizona*, 384 U.S. 436 (1966).

crete pieces of information which an agency must communicate to an individual from whom it seeks private or confidential data:

- Why* the data are being collected;
- How* the data will be used within the agency collecting the data;
- Whether* the individual can refuse or is legally required to provide the data being requested;
- What* the consequences are of either supplying or refusing to supply the information requested; and
- Who* will have access to the data provided.⁸⁴

Because so many government forms contain questions seeking information extraneous to the agency's programmatic responsibilities or for which there is no legal authority, the Tennesen Warning will impel many agencies to revise their forms or, if not, to concede to individuals from whom they elicit the answers that no consequence will attach to their refusing to provide answers to many of the questions.

Recognizing the temptation for agencies to ignore the Tennesen Warning, the legislature fashioned severe penalties for an agency's failure to comply with it. First, an agency is forbidden to maintain, disclose, or even use confidential or private data supplied by a data subject for any purpose other than those purposes enumerated in the Tennesen Warning.⁸⁵ Second, even if some other state or federal law authorizes a particular use or disclosure, failure to advise an individual before the data were collected that such use or disclosure would be made neutralizes that authority.⁸⁶ Logically, therefore, failure to give a Tennesen Warning bars any use or dissemination of private or confidential information.

Failure to give a Tennesen Warning or the dissemination of private or confidential information beyond the scope of the notice provided in the Tennesen Warning could give rise to liability for civil damages.⁸⁷ Further, if the data subject can demonstrate that the conduct giving rise to the liability was willful, s/he can seek exemplary damages of up to \$10,000 per violation.⁸⁸

D. Duties of Agencies

The statute and its implementing rules impose several affirma-

84. MINN. STAT. § 13.04(2) (1982).

85. *Id.* § 13.05(4).

86. *Id.*

87. *Id.* § 13.08(1).

88. *Id.*

tive obligations upon each agency subject to the law.⁸⁹ In addition to giving Tennessee Warnings,⁹⁰ a public agency must, *inter alia*, compile and annually update an inventory of records describing "each category of record, file, or process relating to private or confidential data on individuals [which it] maintain[s]." ⁹¹ It must also develop a variety of procedures including: procedures setting forth the rights of data subjects;⁹² procedures particularizing access to public information;⁹³ and procedures ensuring access to summary data⁹⁴ and non-access to confidential data.⁹⁵ There are additional requirements for appointing a responsible authority,⁹⁶ for updating files as a check on their completeness and accuracy,⁹⁷ and for training staff to comply with the law.⁹⁸

E. Safety Valves

In balancing public access and data privacy objectives, the legislature located the policy fulcrum so that doubts will be resolved in favor of access.⁹⁹ The implicit assumption in that decision is that those who would propose to restrict the release of certain kinds of data should have the burden of ensuring that the statute or federal law authorizing the collection of such data contains a provision protecting the data from disclosure. Notwithstanding the burden it purposefully created in the abstract, the legislature realized that circumstances would arise that it could not possibly anticipate in which there might be sound reasons for disclosing restrictively classified data or for not divulging public data. Therefore it created safety valves.

Some of the safety valves comprise express grants of discretionary power to executive agency officials. For example, school officials can convert otherwise private data (such as students' addresses and telephone numbers) into public data by declaring

89. Agencies subject to the law include "state agencies," "political subdivisions," and "statewide systems." All these terms are defined in MINN. STAT. § 13.02(11), (17), (18) (1982).

90. *See supra* notes 81-88 and accompanying text.

91. MINN. STAT. § 13.05(1) (1982).

92. *Id.* § 13.05(8).

93. *Id.* § 13.03(2).

94. 2 MINN. CODE AGENCY R. § 1.207(B) (1982).

95. *Id.* § 1.206(B).

96. *Id.* § 1.210. This is not true of the state department of which the commissioner is automatically the responsible authority. *See* MINN. STAT. § 13.02(16) (1982).

97. MINN. STAT. § 13.05(5) (1982).

98. 2 MINN. CODE AGENCY R. § 1.211(B) (1982).

99. MINN. STAT. § 13.03 (1982).

them to be "directory data";¹⁰⁰ or the state Department of Health may divulge confidential information collected pursuant to an investigation of communicable disease upon a determination that disclosure would "diminish a threat to public health."¹⁰¹ Similarly, the chief legal officer of an agency can decide when confidential (or protected nonpublic) data collected during a civil investigation should be made public simply by deciding whether a legal action is "pending."¹⁰² Law enforcement agencies may, under certain conditions, refuse to divulge otherwise public data if the revelation would disclose the identities of crime victims or witnesses,¹⁰³ and they may release confidential investigative data if doing so would promote public safety or dispel widespread rumor or unrest.¹⁰⁴

But the key safety valves are not the substantive ones listed above; they are, rather, the procedural vents which are significant precisely because of their elasticity. The potential "glitches" they were enacted to address include the following: (1) How to protect from disclosure information which a reasonable person would agree should not be available either to the general public or to a data subject but for which no statute or federal law exists to authorize non-disclosure; (2) How to disclose private data to a third party (such as an auditor or an evaluator) not identified as a data recipient when the Tennessean Warning was administered; or (3) How to handle the use and dissemination of data that is not public when such use or dissemination is authorized by statute, ordinance, or federal regulation enacted or promulgated subsequent to data collection.¹⁰⁵

For the first situation, the statute provides the possibility of temporary classifications,¹⁰⁶ for which an agency must apply to the Commissioner of Administration.¹⁰⁷ The commissioner is also the

100. *Id.* § 13.32(5) (incorporating by reference Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(a)(5) (1976)). However, the school district's or educational institution's discretion is limited by a requirement that parents of students may "veto" an attempt to designate information about the student as "directory information."

101. *Id.* § 13.38(2).

102. *Id.* § 13.39(2).

103. *Id.* § 13.82(10).

104. *Id.* § 13.82(8).

105. The legislature provided no safety valve, other than consent by a data subject, for a fourth kind of problem—that of how to use or to disseminate data which the agency collected without ever (or inadequately) administering a Tennessean Warning.

106. MINN. STAT. § 13.06 (1982).

107. *See supra* notes 26-29 and accompanying text.

source of the remedy for the second situation in that s/he is empowered to approve a new use or dissemination of data if the requesting agency can demonstrate that the proposed new use or dissemination is "necessary to public health, safety or welfare" or is "necessary to carry out a function assigned by law."¹⁰⁸ The safety valve in the third situation operates automatically without need for application to the Commissioner of Administration or to anyone else.¹⁰⁹ New law or rules expanding the use or dissemination of previously collected data supplant the previous restrictions.

The biggest safety valve of all is "informed consent"—the authorization by the individual data subject to divulge private data. Such an authorization may not be coerced but must be freely granted, in writing, knowingly and voluntarily by the data subject.¹¹⁰ An agency seeking to disclose private data to a third party for purposes not enumerated to the data subjects at the time of collection may choose to invoke the "new use" application rather than attempt to elicit the informed consent of each separate individual when there are numerous data subjects involved.¹¹¹

F. Enforcement and Sanctions

The statute creates no new agency to enforce its provisions, nor

108. MINN. STAT. § 13.05(4)(a), (c) (1982).

109. *Id.* § 13.05(4)(b).

110. MINN. STAT. § 13.05(4)(d) (1982) states:

Private data may be used by and disseminated to any person or agency if the individual subject or subjects of the data have given their informed consent. Whether a data subject has given informed consent shall be determined by rules of the commissioner. Informed consent shall not be deemed to have been given by an individual subject of the data by the signing of any statement authorizing any person or agency to disclose information about him or her to an insurer or its authorized representative, unless the statement is:

- (1) In plain language;
- (2) Dated;
- (3) Specific in designating the particular persons or agencies the data subject is authorizing to disclose information about him or her;
- (4) Specific as to the nature of the information he or she is authorizing to be disclosed;
- (5) Specific as to the persons or agencies to whom he or she is authorizing information to be disclosed;
- (6) Specific as to the purpose or purposes for which the information may be used by any of the parties named in clause (5), both at the time of the disclosure and at any time in the future;
- (7) Specific as to its expiration date which should be within a reasonable period of time, not to exceed one year except in the case of authorizations given in connection with applications for life insurance or noncancelable or guaranteed renewable health insurance and identified as such, two years after the date of the policy.

111. 2 MINN. CODE AGENCY R. § 1.213(A)(2), (B)(1) (1982).

does it empower any existing agency to redress violations. The Commissioner of Administration may promulgate rules,¹¹² approve requests for temporary classifications,¹¹³ authorize new uses of data,¹¹⁴ and hear appeals from determinations by public agencies that contested data are accurate or complete;¹¹⁵ but s/he is without power to initiate action against transgressors. The Department of Administration does operate a Data Privacy Division which provides information on the MGDPA and which assists both citizens and agencies.¹¹⁶

The primary remedy is a civil action against the offending agency.¹¹⁷ Any aggrieved data subject may sue to recover compensatory damages,¹¹⁸ to ask a court to fashion an appropriate remedy to deal with an actual or proposed practice which may contravene one or more statutory provisions,¹¹⁹ or to compel compliance with the law.¹²⁰ A prevailing plaintiff may recover costs, reasonable attorney's fees, and—in the case of a willful violation—exemplary damages of up to \$10,000 per violation.¹²¹ A willful violation may not only trigger exemplary damages in a civil action but additionally could lead to prosecution for a misdemeanor and suspension or dismissal of the offender from public service.¹²²

G. Case Law

Unlike the federal Freedom of Information and Privacy Acts, whose provisions gave rise to a cascade of litigation almost immediately following their enactment, the MGDPA has induced only a

112. MINN. STAT. § 13.07 (1982).

113. *Id.* § 13.06(5).

114. *Id.* § 13.05(4)(c). "Private or confidential data may be used and disseminated to individuals or agencies subsequent to the collection of the data when . . . specifically approved by the commissioner as necessary to carry out a function assigned by law." *Id.*

115. *Id.* § 13.04(4).

116. 2 MINN. CODE AGENCY R. § 1.216(B) (1982).

117. MINN. STAT. § 13.08(1) (1982).

[A] political subdivision, responsible authority or state agency which violates any provision of this chapter is liable to a person who suffers any damage as a result of the violation, and the person damaged may bring an action against the political subdivision, responsible authority, statewide system or state agency to cover any damages sustained, plus costs and reasonable attorney fees.

Id.

118. *Id.*

119. *Id.* § 13.08(2).

120. *Id.* § 13.08(4).

121. *Id.* § 13.08(1).

122. *Id.* § 13.09.

trickle of lawsuits in its first nine years. The Minnesota Supreme Court has interpreted the statute only seven times:

(1) In 1975, in its maiden voyage into data practices, the Minnesota court held that a previously enacted statute containing non-disclosure provisions which irreconcilably conflicted with the MGDPA had to yield to the data practices statutes.¹²³ The substantive issue in that case, *County of Sherburne v. Schoen*,¹²⁴ was whether any portions of pre-sentence investigation reports had to be disclosed to prisoners, parolees, and probationers. The supreme court construed the statute to require disclosure of all but the expressly classified confidential portions.¹²⁵

(2) *In re R.L.F.*¹²⁶ was one of three privacy cases decided by the Minnesota Supreme Court in 1977.¹²⁷ The court held that trial courts have inherent power to expunge arrest records if a statute permits the expungement of "criminal records" or if the "[p]etitioner's constitutional rights may be seriously infringed by the retention of records."¹²⁸ The court stated that it "need not reach the . . . right to privacy issue" to decide the case, but rationalized its holding by citing the MGDPA as authority for finding that arrest records were public information and therefore merited expungement.¹²⁹

(3) The second 1977 case, *C.M.C. v. A.P.F.*,¹³⁰ was not technically a case which construed the MGDPA, but it did settle a peripheral privacy issue not specifically addressed in the MGDPA. As noted earlier, the data practices statute must be read together with several other state statutes which classify data. The paternity statute¹³¹ mandates the non-disclosure of files generated pursuant to the entire paternity action,¹³² but the *C.M.C.* court held that the privacy provision did not warrant the concealment of the names of

123. *County of Sherburne v. Schoen*, 306 Minn. 171, 175-76, 236 N.W.2d 592, 594-95 (1975).

124. 306 Minn. 171, 236 N.W.2d 592 (1975).

125. *Id.* at 176-77, 236 N.W.2d at 595.

126. 256 N.W.2d 803 (Minn. 1977).

127. A fourth 1977 case presented the question whether a law enforcement agency's failure to give a Tennessee Warning would bar the admission as evidence of data so collected. The court declined to decide the issue because it had not been raised at trial. *See AAMCO Indus. v. DeWolf*, 312 Minn. 95, 250 N.W.2d 835 (1977).

128. 256 N.W.2d at 808.

129. *Id.* at 805.

130. 257 N.W.2d 282 (Minn. 1977) (per curiam), *appeal dismissed*, 434 U.S. 1029 (1978).

131. MINN. STAT. §§ 257.51-.74 (1982).

132. *Id.* § 257.70.

the parties to the action.¹³³ Whether this case means that judicial records not expressly exempt from disclosure are public records is unclear.

(4) *Northwest Publications, Inc. v. Anderson*¹³⁴ was the third of the 1977 privacy decisions. The Minnesota Supreme Court issued writs of prohibition restraining two district courts from enforcing orders which would have sealed court records pertaining to two murder trials from public inspection. The court based its decision on first amendment free press grounds and on the fact that the records were public information, citing the MGDPA's sibling statute, the Official Records Act.¹³⁵

(5) In 1978 the court in *Minnesota Medical Association v. State*¹³⁶ construed the classification scheme to deprive district courts of the power to classify data, declaring that government data about physicians reimbursed with public funds for performing abortions were public records because Minnesota Statutes contained no provisions classifying those data as anything other than public.¹³⁷

(6) In 1982 the court reversed a jury verdict in favor of a defamation plaintiff, holding that the MGDPA imposed a duty upon a public official, here the Commissioner of Public Welfare, to release the contents of an allegedly defamatory termination letter. In *Johnson v. Dirkswager*,¹³⁸ the court held that the requirement to release the data gave rise to an absolute privilege from liability. "In this instance," said the court, "the legislature, too, in balancing the public's right to know with the individual's right to privacy, has struck the balance in favor of the public."¹³⁹

(7) In a second 1982 decision, the supreme court in *Koudsi v. Hennepin County Medical Center*¹⁴⁰ overturned a district court verdict in favor of the plaintiff. The plaintiff had been awarded damages because the defendants released information, against plaintiff's express wishes, about the birth of her child whom she intended to place for adoption. The supreme court held that neither the Patient's Bill of Rights nor the MGDPA classified the data concern-

133. 257 N.W.2d at 283.

134. 259 N.W.2d 254 (Minn. 1977).

135. *Id.* at 256-57.

136. 274 N.W.2d 84 (Minn. 1978).

137. *Id.* at 89; *see also* *State v. C.A.*, 304 N.W.2d 353 (Minn. 1981), *noted in* 8 WM. MITCHELL L. REV. 984 (1982).

138. 315 N.W.2d 215 (Minn. 1982).

139. *Id.* at 221.

140. 317 N.W.2d 705 (Minn. 1982).

ing the birth of the child as private data on individuals.¹⁴¹

H. Current Data Privacy Issues

1. *Interaction of the MGDPA with other laws.* The kinds of issues which arise from the intersection of the data practices act and other statutes and rules include:

a. *Discovery.* What is the impact of the MGDPA on discovery results? The issue has been litigated a number of times with varying results. Two cases are illustrative: In *Smith v. Hennepin County*,¹⁴² the district court held, in 1978, that the discovery rules take precedence over the MGDPA. The Minnesota Tax Court, however, in the 1979 case of *Neiderlucke v. Hennepin County*,¹⁴³ decided that the classification of all assessor's field cards as private precluded their discovery by the adverse party. A 1980 amendment to the MGDPA which requires an agency to alter the classification of data it holds when required to do so by court or administrative rules does not clarify the matter.¹⁴⁴ A 1979 amendment, at first glance, appears to answer the question by providing that nothing in the Law Enforcement Section of the MGDPA should be interpreted as expanding or limiting the scope of discovery available to a party in a civil, criminal or administrative proceeding.¹⁴⁵ This amendment actually clouds the issues further by limiting itself to the Law Enforcement Section of the MGDPA, thus leaving the question open where other areas of the Act are involved.

b. *Open meetings.* As a practical matter, how can a city council or a county board debate and consider the qualifications of candidates for executive positions if closing the meeting will violate the Open Meetings Law¹⁴⁶ but opening the meeting will disclose private data about the applicants, in contravention of the MGDPA?¹⁴⁷ There is presently no easy answer to this question.¹⁴⁸

141. *See id.* at 707-08.

142. *Smith v. Hennepin County*, No. 739819 (Minn. 4th Dist. Ct. May 5, 1978).

143. No. 0126 (Minn. Tax Ct. Mar. 30, 1979) (order compelling answers to interrogatories).

144. Act of Apr. 23, 1980, ch. 603, § 7, 1980 Minn. Laws 1144, 1145 (codified at MINN. STAT. § 13.03 (1982)).

145. Act of June 5, 1979, ch. 328, § 20, 1979 Minn. Laws 910, 921 (codified at MINN. STAT. § 13.81(4) (1982)).

146. MINN. STAT. § 471.705 (1982).

147. *Id.* § 13.43(3), (4).

148. For some illumination on this issue, see letter opinion from Minnesota Attorney

*c. Administrative Procedure Act (APA).*¹⁴⁹ The state APA requires all state agencies to publish, pursuant to APA procedural rules, all policies affecting the public.¹⁵⁰ APA procedural rules require, among other things, publication of notice of proposed rules in the State Register and the holding of a public hearing.¹⁵¹ Does that mean that policies mandated by the MGDPA which affect the public (for example, the inventory of records, or procedures for public access to records) are to be published in the State Register and must otherwise conform to the requirements of the APA?

2. *Decedents.* What is the law with respect to the accessibility of records about people who are deceased? The rules define "individual" to mean a living human being.¹⁵² The 1981 amendments to the MGDPA make clear that data collected on human beings because they have died, namely coroner data¹⁵³ and data about patients who die in hospitals,¹⁵⁴ are accessible only to the decedents' immediate families.¹⁵⁵ Do the two statutory provisions, when read with the rules, indicate legislative intent that private or confidential data on individuals collected when they were alive automatically become public upon the data subjects' deaths? Or did the legislature mean to imply that a data subject's demise converts the classification from private to nonpublic because the data subject is no longer an "individual"? Whichever interpretation more reasonably reflects legislative intent, who has access to law enforcement photographs of dead people if the photographs are clearly offensive? They are classified as private;¹⁵⁶ but who may exercise the data subject's access rights? Since the Minnesota Senate and the House of Representatives have not been able to agree about the public policy considerations on this subject for the last four sessions, the actual legislative intent is difficult to infer.

3. *The classification system.* The cornerstones of the MGDPA data practices scheme are the six discrete data classifications into

General's Office to Jerome Schrieber, Wabasha County Attorney, No. 125-a64, Dec. 24, 1972.

149. MINN. STAT. ch. 14 (1982).

150. *See id.* § 14.04.

151. *Id.* §§ 14.13, .14.

152. 2 MINN. CODE AGENCY R. § 1.202(I) (1982).

153. MINN. STAT. § 13.83 (1982).

154. *Id.* § 13.42(3).

155. *See id.* §§ 13.42(3), .83.

156. *Id.* § 13.82.

one and only one of which every government datum must fit. Recent legislative attempts to stretch the rubberband of accessibility to reach unanticipated problems appear to have created additional classes. For example, in the case of a decedent, if access to private data is limited to data subjects, their authorized representatives, and government officials whose jobs reasonably require access,¹⁵⁷ are data to which undesignated representatives such as next of kin or the attorney for a decedent's estate have access,¹⁵⁸ really "private data" under the definition, or do they actually fall into an unofficial seventh category of "data on decedents"?

Many grants of discretionary power also stretch the classification categories. A responsible authority, for instance, has the power to deny a license applicant access to a copy of his/her graded examination on the ground that such access might compromise the integrity of the examination process.¹⁵⁹ Does the exercise of that discretionary power, effectively converting nonpublic data into protected nonpublic data, create an undefined eighth classification of "floating nonpublic, protected nonpublic" data? Would such a floating category also include labor relations information which the agency's management views as relating to a specific labor organization?¹⁶⁰ What about informant reward data?¹⁶¹ For another example, the rules provide that data described as "confidential" in a statute which provides standards for divulging the data to the data subject are to be considered "private data on individuals."¹⁶² But the rules make no provision expanding the classification from "confidential" to "private data on individuals." The law enforcement portion of the MGDPA provides precisely such standards;¹⁶³ does the statute in effect create yet a ninth classification of "floating public, confidential" data?

Some private data can be withheld from the data subject. The family income data supplied by the parents of a loan-seeking student can be withheld from the student;¹⁶⁴ and health data, the disclosure of which to the data subject would be detrimental to the

157. *Id.* §§ 13.05(4)(d), .43; 2 MINN. CODE AGENCY R. §§ 1.202(D)(1)(b), .204(A)(2) (1982).

158. *See* MINN. STAT. § 13.83 (1982).

159. *Id.* § 13.34.

160. *Id.* § 13.37(1)(c), (2).

161. *Id.* § 13.81(1)(d).

162. 2 MINN. CODE AGENCY R. § 1.202(D)(1)(d) (1982).

163. MINN. STAT. § 13.82(8) (1982).

164. *Id.* § 13.32(4).

data subject's health, can be withheld upon such a determination by a medical provider.¹⁶⁵ Are such data truly private data—a term whose own definition means “accessible to the data subject”¹⁶⁶—or do they fall into still another, a tenth classification of “semi-private” or “confidential/private” data?

4. *The feasibility of the statutory scheme.* That the statute seems to grow geometrically and that it has been so seldom litigated are separate outward signs, according to some observers, of the same inner defects. The defects in the statute, say these critics, are the rigidity of the classification system and the need to perentially increase the amount of data to be classified. No matter how comprehensively the legislature attempts to classify data, there will be innumerable situations in which agencies discover programs or conditions requiring more restricted access than that which attaches under the present law. To avoid disclosure or litigation, those agencies will seek (a) temporary classifications and (b) amendments to the statute. Accordingly, reason these observers, the maintenance of the MGDPA in its present form necessarily means that the legal focus will remain legislative, and the annual pilgrimages to House and Senate hearings will grow more lengthy and populous.

Chief among these critics is the author of the original data privacy statute, State Senator Robert Tennesen who in 1981 introduced the bill which would have replaced the MGDPA with the Uniform Information Practices Code (UIPC).¹⁶⁷ The UIPC, if enacted, would change the forum from the legislature to the courts by granting discretion to government officials to decide the critical issue of whether divulging a particular personal record would be an “unwarranted invasion of personal privacy.”¹⁶⁸ Spokespersons for governmental advocacy groups generally favor the bill, contending that the present system is unworkable.¹⁶⁹ The media op-

165. Compare *id.* § 13.46(5) with *id.* § 144.335.

166. *Id.* § 13.02(14).

167. The bill in the Minnesota Senate was S.F. 198 and was introduced and read for the first time on February 2, 1981. The Uniform Information Practices Code (UIPC) was drafted by a committee of the National Conference of Commissioners on Uniform State Laws, on which committee Sen. Tennesen was the liaison from the American Bar Association. See generally U.I.P.C., 13 U.L.A. 171-203 (Supp. 1983). The bill was defeated in the Senate at the end of the 1982 session. No UIPC bill is currently active in the Minnesota legislature.

168. U.I.P.C. § 16B.3-102, 13 U.L.A. 186-87 (Supp. 1983).

169. See, e.g., Nelson, *News groups see 'privacy' danger*, Minneapolis Tribune, Mar. 19, 1981, at 3B, col. 4.

pose the UIPC by arguing that denial of access on invasion of privacy grounds provides discretion to hide embarrassing information from public scrutiny.¹⁷⁰

The legislature failed to enact the UIPC into law during either its 1981 or 1982 session. With the retirement of State Senator Robert Tennesen, its chief sponsor, the UIPC is unlikely to replace the MGDPA in the near future.

I. Conclusion

To date, no other jurisdiction has adopted the Minnesota statutory model for informational privacy. It is an imperfect mechanism to deal with an extremely complex issue which, onion-like, reveals layer after layer of intricacy and subtlety the closer one approaches the problem. As a matter of public policy, the protection of personal data privacy must compete with other legitimate social objectives, particularly public access to data that describes governmental operations. The balance struck will, of necessity, be delicate and ephemeral. The Minnesota Government Data Practices Act is a salutary effort to grapple with the question of maintaining both informational privacy and openness in government during the post-industrial era. It is a first-rate illustration of Reinhold Niebuhr's dictum that "democracy is a method of finding proximate solutions for insoluble problems."¹⁷¹

170. *Id.*

171. R. NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 118 (1960).

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Access

Access is a philosophical cornerstone of the MGDPA. Most of the statute and its implementing rules constitute attempts to prescribe who shall have access to government data and under what conditions. The classifications scheme,¹ which is unique to Minnesota, is significant primarily because it determines access to government information. The legislative bias, expressly articulated in the freedom-of-information provision,² is that government data are presumed to be accessible to the public. Only a specific state statute, federal law, or temporary classification unambiguously classifying data restrictively will authorize a public agency subject to the MGDPA to limit access.³

Data subjects—individuals or other entities⁴ about whom or which public agencies maintain data—have access not only to all public data but also to private (in the case of individuals) and non-public (in the case of corporations, organizations, and other non-natural persons) data maintained about them.⁵

Individual data subjects have additional statutory prerogatives⁶ which they may exercise to enforce or amplify their access rights. An individual, for example, may ask any governmental agency whether s/he is the subject of stored data. The agency must re-

1. See **Classification** this index.
2. The freedom-of-information provision is formally entitled "Access to Government Data." MINN. STAT. § 13.03 (1982).
3. *Id.* § 13.03(1); 2 MINN. CODE AGENCY R. §§ 1.204, .206 (1982).
4. "Person" includes corporations, partnerships, associations. MINN. STAT. § 13.02(10) (1982).
5. *Id.* § 13.02(9), (12).
6. Only individuals may exercise these additional rights; a non-individual data subject, though it has access to data about itself, is not entitled to anything more than access. *Id.* § 13.04.

spond to such an inquiry within five working days by telling the individual whether s/he is a data subject and, if so, the classification of the data.⁷ An individual may inspect, without charge, any public or private datum about him or her; upon request, the individual must be informed of the meaning of unclear information; and the individual may copy, at cost, any documents in his or her file.⁸ Further, each agency must prepare a public document that enumerates the rights of data subjects, including the right to access, and sets forth agency procedures for exercising those rights.⁹

Benefit Data

Benefit data are classified as private data on individuals.¹⁰ Excepted from this classification are the names and addresses of applicants for and recipients of certain housing program services offered by the housing and redevelopment authorities of the cities of Minneapolis, St. Paul, and Duluth, which are public data.¹¹

The term "benefit data" means "data on individuals collected or created because an individual seeks information about becoming, is, or was an applicant for or a recipient of benefits or services provided under various housing, home ownership, and rehabilitation and community action agency programs."¹² The benefit data section began as a provision in the 1981 temporary classification bill submitted to the legislature to codify various temporary classifications granted by the Commissioner of Administration.¹³ In 1979 and 1980 the commissioner had approved temporary classifications based on applications from the housing authorities of Minneapolis, St. Paul, and Duluth requesting restrictive classifications of various types of data which those agencies maintained.

Because of a quirk in the law the section also pertains to data maintained by community action agencies which are not government agencies. In 1974 the legislature had expressly extended the applicability of the data privacy law to the more than two dozen private, nonprofit, community action agencies in Minnesota because they collected so much personal data on poor Minnesotans.¹⁴

7. *Id.* § 13.04(3).

8. *Id.*; 2 MINN. CODE AGENCY R. § 1.204 (1982).

9. MINN. STAT. § 13.05(8) (1982).

10. *Id.* § 13.31(3).

11. *Id.* § 13.31(2).

12. *Id.* § 13.31(1).

13. Act of May 29, 1981, ch. 311, §§ 29, 39, 1981 Minn. Laws 1427, 1437, 1445.

14. Act of Apr. 11, 1974, ch. 479, § 1, 1974 Minn. Laws 1199, 1200.

However, state statutes failed to provide protection from public disclosure for any of the personal data collected by community action agencies. Furthermore, the federal funding agency, the Community Services Administration,¹⁵ failed to promulgate regulations which would have classified the data stored on program beneficiaries as private. With the enactment of the benefit data section, all community action agency program data on applicants or beneficiaries are private.

Boards

The term "Board" has two important but different meanings under the MGDPA. The first meaning is important for purposes of determining whether a given multi-member agency is subject to the statute. The MGDPA provides that various boards (or commissions) are either political subdivisions or state agencies, both of which are subject to the data practices law.¹⁶ The Board of Medical Examiners,¹⁷ the Peace Officers Standards and Training Board,¹⁸ the State University Board,¹⁹ and the Indian Affairs Board²⁰ are examples of such boards.

For purposes of determining how data on individuals who are members of boards should be administered, the term "board" can also mean an advisory board (or commission) of a public agency. Individuals who are members of such advisory boards, even though they may receive no salary, are treated as employees for purposes of administering the MGDPA.²¹ The following information about advisory board members is public data: names, emoluments arising from board membership, cities and counties of residence, work telephone numbers, educational background, and previous work experience.²² Conversely, board members' home addresses, home phone numbers, and all other data about them maintained by the agencies they serve, which are not specifically enumerated as public in the Personnel Data section, are private data.²³

15. Formerly the Office of Economic Opportunity.

16. See MINN. STAT. § 13.02(11), (17) (1982).

17. *Id.* § 147.01.

18. *Id.* § 626.841.

19. *Id.* § 136.03.

20. *Id.* § 3.922.

21. *Id.* § 13.43(1).

22. *Id.* § 13.43(2).

23. *Id.* § 13.43(3).

Children

Children present a special problem in data practices because their parents or legal guardians have all the rights to their records. The MGDPA confers these rights by defining the term “individual” to include the parent or guardian of a minor.²⁴

As a safety valve, the legislature has authorized agencies to withhold private data from parents on the concurrence of two conditions: (1) the child must request that the information be withheld; and (2) the responsible authority must make a determination that withholding the information would be in the best interest of the child.²⁵ Both conditions must be met. To ensure that children are aware that they can request such withholding, the rules oblige agencies to notify children from whom they collect data of their right to ask that certain data about them not be shown to their parents or guardians.²⁶ If the agency fails to appoint a responsible authority, it has no way of granting a child’s request to deny parental access.²⁷ Note that governmental agencies may not, consistent with federal law, even upon the child’s request, deny a parent access to data on a minor child which constitutes an “educational record.”²⁸

Occasionally, a custodial parent will ask that the noncustodial parent be denied access to information in the child’s record. However, absent a court order, a legally binding instrument, or a state statute to the contrary, the noncustodial parent is presumed to have the same rights as the custodial parent with respect to access, to challenging the accuracy of records, and to authorizing third-party disclosure of private data.²⁹

Classification

The data classification system in the MGDPA is unique among data practices statutes. Unlike the federal mechanism which addresses questions about data subject privacy on a case by case basis,³⁰ the Minnesota system prescribes decisions about privacy or

24. *Id.* § 13.02(8).

25. *Id.*

26. 2 MINN. CODE AGENCY R. § 1.205(C)(1)(a) (1982).

27. *See id.* § 1.205(C)(2)(a).

28. *Id.* § 1.205(C)(3).

29. *Id.* § 1.205(B)(2)(a).

30. *See* 5 U.S.C. § 552(b)(6) (1976); *Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *Rural Hous. Alliance v. United States Dep’t of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974).

confidentiality in detail and leaves little or no discretion to the bureaucrat. All data collected, created, stored, or disseminated by an agency subject to the MGDPA are denominated "government data."³¹ Government data are either "data on individuals"³² or "data not on individuals,"³³ and each of these categories comprises three discrete classifications.

Thus, there are only six classifications of government data in Minnesota: public data on individuals;³⁴ private data on individuals;³⁵ confidential data on individuals;³⁶ public data not on individuals;³⁷ nonpublic data not on individuals;³⁸ and protected nonpublic data not on individuals.³⁹ Every government datum necessarily falls into one and only one of these classifications.⁴⁰

The salient point about classification is that it determines accessibility. The statute presumes that data are public, being available to anyone upon request; disclosure may be restricted only if the data are expressly put into one of the four restrictive classifications by state statute, temporary classification, or federal law.⁴¹ It is inaccurate to assert that agencies classify data. Although agencies are required to determine the correct classifications for the data they maintain,⁴² only a statute, federal law, or temporary classification can actually classify data.⁴³ Even courts have no power to classify information,⁴⁴ except in the form of orders pursuant to specific grants of statutory power.⁴⁵

31. MINN. STAT. § 13.02(7) (1982).

32. *Id.* § 13.02(5).

33. *Id.* § 13.02(4).

34. *Id.* § 13.02(5).

35. *Id.* § 13.02(12).

36. *Id.* § 13.02(3).

37. *Id.* § 13.02(14).

38. *Id.* § 13.02(9).

39. *Id.* § 13.02(13).

40. Anomalously, it is a common occurrence for a specific datum to be classified differently depending on which agency maintains it. For example, public employee home addresses are private in personnel files but public in the Department of Public Safety vehicle registration files.

41. MINN. STAT. § 13.03 (1982).

42. 2 MINN. CODE AGENCY R. § 1.208(B) (1982).

43. MINN. STAT. § 13.03(1) (1982).

44. *Minnesota Medical Ass'n v. State*, 274 N.W.2d 84, 89 (Minn. 1978); *Minneapolis Hous. & Redev. Auth. v. Hinniker*, No. 440932 (Minn. 2d Dist. Ct. Feb. 5, 1980) (order dismissing complaint).

45. *See, e.g.*, MINN. STAT. § 260.161 (1980) (juvenile court records); *id.* § 259.31 (adoption records).

Confidential Data

Although data subjects are generally presumed to have access rights to data collected or stored about them,⁴⁶ the MGDPA authorizes the withholding of data, even from the data subjects themselves, in certain rare instances. The MGDPA defines such data as “confidential data on individuals.”⁴⁷ In order for data to be classified as confidential, a state statute or federal law must “provide substantially” that the data subject may not have access to the data⁴⁸ or must enumerate standards limiting the exercise of discretion of government officials to withhold the information from the data subject.⁴⁹ Accordingly data *described* as “confidential” in Minnesota statutes enacted before the word became a term of art in the MGDPA or in federal law may in fact be *classified* as “private data on individuals.”⁵⁰

Confidential data are available only (1) to individuals within the data-storing agency “whose work assignments reasonably require access” to the data and (2) to other agencies specifically authorized to have access to such data by state statute or federal law.⁵¹ Examples of data classified as confidential are active criminal investigative data,⁵² names of individuals who register complaints about the illegal use of property,⁵³ medical data (when the public health care provider reasonably determines that disclosure would be detrimental to the patient/data subject’s health),⁵⁴ and domestic abuse data.⁵⁵

Although access to confidential data may be withheld from the data subject, the fact that confidential data are being maintained about an individual must be made known to that individual upon his or her request.⁵⁶

Data

This term is not defined anywhere in the MGDPA and is de-

46. *Id.* § 13.04(3).

47. *Id.* § 13.02(3).

48. 2 MINN. CODE AGENCY R. § 1.202(C)(1)(a) (1982).

49. *Id.* § 1.202(C)(1)(c).

50. *Id.* § 1.202(C)(2).

51. *Id.* § 1.206(A).

52. MINN. STAT. § 13.82(5) (1982).

53. *Id.* § 13.44.

54. *Id.* § 144.335(2).

55. *Id.* § 13.80.

56. *Id.* § 13.04(3).

defined tautologically in the rules⁵⁷ to mean "data on individuals." Nevertheless, it is the key word in the Act. Forty-four of the fifty-one sections in the statute⁵⁸ and ten of the nineteen terms defined in the definitional section⁵⁹ contain the word "data" in their titles.

Given the comprehensive definition of the term "government data,"⁶⁰ it may be reasonably inferred that the word "data" is intended to have the broadest possible meaning, including all forms of information received, created, retained, or communicated by an agency subject to the MGDPA. The expansive meaning of "data" encompasses not only traditionally recorded information, such as paper files and forms, but photographs and electronically recorded information as well.⁶¹ The Minnesota Supreme Court has stated that the MGDPA "seems to have in mind more than data in physical form, since it not only permits public data to be inspected and copied, but, also, 'if the person requests, he shall be informed of the data's meaning.'"⁶²

Decedents

Data created or collected about dead people pursuant to an investigation or inquest by a county coroner or medical examiner⁶³ are confidential during the pendency of such an investigation.⁶⁴ Except for forty-five specifically enumerated items classified as public, such as name, date of birth, age, scars, and cause of death, data maintained by county medical examiners⁶⁵ which are no longer part of an investigation are "private" but are accessible to next-of-kin or legal representatives.⁶⁶

Medical examiner data are collected after and because a human being has died. Data collected or stored about a living individual apparently becomes public upon that individual's death. The qualifier "apparently" is derived from a reasonable inference

57. 2 MINN. CODE AGENCY R. § 1.202(B) (1982).

58. MINN. STAT. ch. 13 (1982).

59. *Id.* § 13.02.

60. "[A]ll data collected, created, received, maintained, or disseminated by any state agency, political subdivision, or statewide system, regardless of its physical form, storage media, or conditions of use." *Id.* § 13.02(7).

61. *See, e.g., id.* §§ 13.02(7), .69(2), .82(5).

62. *Johnson v. Dirkswager*, 315 N.W.2d 215, 222 n.10 (Minn. 1982).

63. *See generally* MINN. STAT. § 390.11 (1982).

64. *Id.* § 13.83(4).

65. The term "medical examiners" as used here includes both medical examiners and coroners.

66. MINN. STAT. § 13.83(8) (1982).

rather than an express statement in the statute. The MGDPA authorizes non-disclosure of information on individuals when such information is expressly classified as “confidential data on individuals” or as “private data on individuals” by state statute or federal law.⁶⁷ The definition of “individual” excludes non-natural “persons” such as corporations, trade unions, and nonprofit organizations from its ambit;⁶⁸ the statute is silent about the applicability of the term to individuals who have died. The rules define “individual” to mean a *living* human being.⁶⁹ When read in conjunction with the MGDPA, the rules indicate that non-coroner data on decedents are public.

Support for the contrary view—that such data do not become public at death—can be found in the statutory exception to the section entitled “Medical Data”⁷⁰ which authorizes the non-disclosure of most medical information. The exception permits disclosure of private data to the decedent’s next of kin.⁷¹ The questions raised by this view are whether the existence of such an exception implies a right of privacy that survives the data subject, and, if so, whether such a right applies only in the case of medical data. This confusion most probably reflects the legislature’s ambivalence on this subject.⁷²

Educational Data

An entire section of the MGDPA is devoted to data on individuals maintained by public educational agencies or institutions or by persons acting for agencies or institutions “which relates to a student.”⁷³ Adopting the pattern of the Family Educational Rights and Privacy Act of 1973 (FERPA)⁷⁴ and its regulations,⁷⁵ the MGDPA excludes certain types of records from its ambit. Among the exceptions are records in the sole possession of the record-

67. *Id.* § 13.01(3), (12).

68. *Id.* § 13.02(3).

69. 2 MINN. CODE AGENCY R. § 1.202(I) (1982).

70. MINN. STAT. § 13.42 (1982).

71. *Id.* § 13.42(3)(d).

72. This ambivalence is best exemplified by legislative actions in the 1980 session. Within a two-day period, the legislature first amended the definition of “data on individuals” to include the words “living or dead,” and then deleted that amendment. Compare Act of Apr. 23, 1980, ch. 603, § 2, 1980 Minn. Laws 1144, 1145 with Act of Apr. 25, 1980, ch. 618, § 25, 1980 Minn. Laws 1609, 1621.

73. MINN. STAT. § 13.32(1)(a) (1982).

74. See 20 U.S.C. § 1232g (1976 & Supp. V 1981). This Act, also referred to as the Buckley Amendment, was enacted as § 438 of the General Education Provisions Act.

75. See 45 C.F.R. § 99 (1982).

maker.⁷⁶ Therefore, a teacher's personal notes would be exempt from the Act if and only if they were not shown to any other person (except a substitute teacher) and were destroyed at the end of each school year.⁷⁷

Generally, educational data are private and may not be disclosed to third parties without the data subject's or, in the case of minors, the parents' consent. The statute incorporates certain provisions of the FERPA regulations by reference, authorizing non-consensual third-party disclosures to state educational authorities;⁷⁸ to federal auditors;⁷⁹ to other schools who request the data if the students or parents of minor students have been notified in advance of a policy to share information with other school systems;⁸⁰ to immunization program administrators;⁸¹ to the public if the data are directory information;⁸² to appropriate persons in health and safety emergencies;⁸³ and to various others under other fairly esoteric conditions.⁸⁴

Although the state statutory provision on educational data⁸⁵ and its implementing rules⁸⁶ attempt to achieve consonance with the FERPA regulations, there are some differences. A crucial difference is that the state statute is broader, so that some data are not covered by the FERPA but are subject to the MGDPA. Medical records of students who have reached their majority⁸⁷ and in-

76. See MINN. STAT. § 13.32(1)(a) (1982) (adopting 45 C.F.R. § 99.3(b)(1)(i)).

All parents must be given the opportunity to withhold permission for data on their minor children to be disseminated as directory information. Directory information is a term of art meaning information expressly made such by action of the educational entity pursuant to 20 U.S.C. § 1232g (1976 & Supp. V 1981) (incorporated by reference in MINN. STAT. § 13.32(5) (1982)), and the FERPA regulations.

77. See MINN. STAT. § 13.32(1)(a) (1982).

78. See *id.* § 13.32(3)(e) (adopting 45 C.F.R. § 99.31(a)(3)(iv)).

79. See *id.* (adopting 45 C.F.R. § 99.35(a)).

80. See *id.* (adopting 45 C.F.R. § 99.34(a)(1)(ii)).

81. See *id.* § 13.32(d), (f).

82. See *id.* § 13.32(5). Such data may be disclosed if the disclosure is specifically approved by the Commissioner of Administration, see *id.* § 13.05(4)(c), expressly authorized by state statute or federal law subsequent to the collection of the data, see *id.* § 13.05(4)(b), or pursuant to a valid court order, *id.* § 13.32(3)(b).

83. See *id.* § 13.32(3)(d) (provisions of FERPA and its regulations incorporated by reference).

84. See 45 C.F.R. § 99.31(a) (1982). Examples include the Comptroller General of the United States, research contractors, and accrediting organizations.

85. See MINN. STAT. § 13.32 (1982).

86. See 2 MINN. CODE AGENCY R. § 1.205(c)(3) (1982).

87. The FERPA regulations expressly exclude such records from their applicability. See 45 C.F.R. § 99.3(b)(4) (1982). The Minnesota statute does not. The Minnesota rules

formation collected on alumni⁸⁸ are examples.

Federal Law

The MGDPA proscribes the disclosure of governmental data when restrictively classified by state statute or “federal law.”⁸⁹ “Federal law” is defined to include federal statutes, federal regulations, and federal case law.⁹⁰ Accordingly, while state agencies may not promulgate rules which prohibit the disclosure of government data in Minnesota, federal agencies may. It is possible for government data on individuals, which were private or confidential when collected, to be divulged to people or agencies not identified at the time of collection if a federal statute or regulation enacted or promulgated subsequent to the collection of the data specifically authorizes such disclosure.⁹¹

Federal law may also be important in determining when data on individuals may be collected, in what ways private or confidential data may be used, and to whom private or confidential data may be disseminated.⁹²

Freedom-of-Information Component

The section of the MGDPA formally labeled “Access to Government Data”⁹³ is often referred to as the freedom-of-information component of the statute. In federal law, the access to information and privacy provisions are separate statutes.⁹⁴ The federal access to information statute is officially entitled the Freedom of Information Act (FOIA) and was originally enacted in 1966. Because of the federal appellation, state laws which prescribe standards for public access to government data are also frequently called freedom-of-information acts (foia).

In part, the predecessor to the foia component of the MGDPA was the Official Records Act, a terse, four-paragraph law, first en-

mention such records only in connection with the proscription denying parents access to minor student educational records. *See* 2 MINN. CODE AGENCY R. § 1.205(C)(3) (1982).

88. The FERPA regulations exempt from their coverage information collected on former students, *see* 45 C.F.R. § 99.3(b)(5) (1982), but no such exemption exists in the Minnesota statutes.

89. *See* MINN. STAT. § 13.03(1) (1982).

90. *See* 2 MINN. CODE AGENCY R. § 1.202(H) (1982).

91. *See* MINN. STAT. § 13.05(4)(b) (1982).

92. *See id.* § 13.05(3), (4).

93. *Id.* § 13.03.

94. *Compare* 5 U.S.C. § 552 (1976 & Supp. V 1981) *with id.* § 552a.

acted in 1941, which required officials to keep public records.⁹⁵ Before 1979 that statute's fourth subdivision required public officials to "permit all public records in [their] custody to be inspected, examined, abstracted, or copied at reasonable times." In *Kottschade v. Lundberg*,⁹⁶ however, the Minnesota Supreme Court construed that subdivision narrowly, holding that the legislature intended the term "public record" to encompass only "information pertaining to an official decision [but] not information relating to the process by which a decision was reached."⁹⁷ The legislature reversed *Kottschade* in 1979 by replacing the provision of the Official Records Act with the present foia component of the MGDPA.

The most important aspect of the Minnesota foia component is that it asserts the presumption that government data are public.⁹⁸ Absent a state statute or federal law expressly classifying data restrictively, the foia component makes all government data open to public inspection.

Government Data

Any information which is collected, created, received, maintained, or disseminated by a public agency subject to the MGDPA constitutes "government data."⁹⁹ It does not matter whether the information is stored as handwritten notes, typed forms, reports, computerized data, photographs, microfilm, charts, graphs, videotape, or audio recordings; whatever its physical form, the information is government data.¹⁰⁰ It is also immaterial *where* the government data are stored. Consequently, if a data subject asks if s/he is the subject of stored data,¹⁰¹ the agency must disclose to the requester the classification of all government data stored on her/him. Thus, the governmental agency is obligated to locate and determine the classification of all government data the agency keeps on that individual.¹⁰² Accordingly, government data include "desk drawer records" kept by staff members, as well as the

95. Act of Apr. 28, 1941, ch. 553, §§ 1-4, 1941 Minn. Laws 1174, 1174-75 (codified as amended at MINN. STAT. § 15.17 (1982)).

96. 280 Minn. 501, 160 N.W.2d 135 (1968).

97. *Id.* at 505, 160 N.W.2d at 138.

98. MINN. STAT. § 13.03(1) (1982).

99. *Id.* § 13.02(7).

100. *Id.*

101. *See id.* § 13.04(3) (granting individual right to inquire if s/he is subject of stored data).

102. *See* 2 MINN. CODE AGENCY R. § 1.213(A), (B) (1982).

official files. A “special” file maintained by a supervisor under lock and key, for example, constitutes government data. Failure to disclose the existence of such a file, upon a general request from a data subject to know what data are being maintained about her/him, would be maintaining a “secret file” in contravention of clear legislative intent.¹⁰³

Health Data

Health data¹⁰⁴ are data on individuals created, collected, or maintained by the Minnesota Department of Health in connection with investigations or studies of communicable diseases.¹⁰⁵ Health data are classified as either confidential¹⁰⁶ or private.¹⁰⁷

Data on individuals maintained by the Health Department pursuant to an investigation or treatment of sexually transmitted diseases are classified as confidential and may not be disclosed even to the data subjects.¹⁰⁸ Only Health Department employees whose work assignments reasonably require access,¹⁰⁹ the data subjects’ personal physicians,¹¹⁰ and local health officers¹¹¹ have access to such files.

Other communicable disease file data on individuals, data on individuals collected or created in connection with an investigation of a communicable disease other than a sexually transmitted one, are classified as private and are available to the data subjects.¹¹² The MGDPA expressly permits these private data to be made public in order “to diminish a threat to public health,” but the Act is silent with respect to who or what may trigger such a determination.¹¹³

103. *See* MINN. STAT. § 13.04(3) (1982).

104. “Health data” and “medical data” are discrete terms under the MGDPA. *See* **Medical Data** *this index*.

105. MINN. STAT. § 13.38 (1982).

106. *Id.* § 13.38(2).

107. *Id.* § 13.38(1).

108. *Id.* § 13.38(2).

109. 2 MINN. CODE AGENCY R. § 1.206(A)(1) (1982).

110. MINN. STAT. § 13.38(2) (1982).

111. “Local health officer” is a term of art referring to the physician member of the county or town health board (or the physician-appointee of the city council in a home rule charter city which by ordinance has declared the city council to function as the city health board) pursuant to MINN. STAT. § 145.01. Authority to divulge this information to the health officer is expressly granted in MINN. STAT. § 13.38(2).

112. MINN. STAT. § 13.38(1) (1982).

113. As a practical matter, the determination will be made by the Department of Health.

Housing Agency Data

Housing agency data include all data maintained by a public housing authority.¹¹⁴ This category of data is included in this annotated index because it well illustrates how one relatively isolated category of information may comprise sub-elements in each of the six classifications into which all government data fall. Examples of housing agency data varyingly classified are:

Protected non-public data:	Correspondence between agency officials and agency attorneys with respect to active investigation data. ¹¹⁵
Confidential data on individuals:	Active investigation data collected in preparation for litigation of unlawful detainer, tenant grievance hearings, or other such matters. ¹¹⁶
Nonpublic data:	Information pertaining to negotiations with property owners about purchase of their property. ¹¹⁷
Private data on individuals:	Data about applicants for tenancy in public housing ¹¹⁸ and home addresses and telephone numbers of housing authority employees. ¹¹⁹
Public data on individuals:	Names and addresses of urban homesteading recipients. ¹²⁰
Public data not on individuals:	Housing agency budgets; amounts of money spent on conferences attended by agency staff; policy option papers. ¹²¹

Individual

The term "individual" has three distinct functions in the MGDPA. They are: (1) to distinguish human beings from nonhuman "persons" such as corporations, trade unions, governmental

114. MINN. STAT. § 13.54 (1982).

115. *See id.* § 13.54(3).

116. *See id.* § 13.54(2).

117. *See id.* § 13.54(4). Negotiation data becomes public at the time of closing the property sale.

118. *But see id.* § 13.31(2).

119. *See id.* § 13.43(2). This illustrates how the text of the MGDPA must be read as a whole. Both of these examples of private data on individuals arise from provisions in the statute other than the section labeled "Housing Agency Data."

120. *See id.* § 13.31(2).

121. *See id.* §§ 13.03(1), .43(2).

agencies, and nonprofit organizations; (2) to differentiate between people who are alive and those who are dead; and (3) to make parents the surrogate data subjects for their minor children for a variety of purposes of the MGDPA.

The first function is critical because the entire data classification system rests on the distinction made between data maintained on individuals and data maintained on other persons. The MGDPA defines the former type of data as "data on individuals"¹²² and the latter as "data not on individuals."¹²³ Although in most instances, all subjects of government data have a right of access to data about them maintained by government agencies,¹²⁴ only data subjects who are individuals are entitled to "Tennessee Warnings"¹²⁵ and have the right to contest the accuracy or completeness of data.¹²⁶

Whether data cease to be "data on individuals" when the individual to whom the data pertain dies has been vigorously debated for the last several years. For certain data to be private or confidential within the definition of the MGDPA, the data must be data on individuals. If a human being, on whom private or confidential data is maintained, dies and if on account of death the human being ceases to be an individual for purposes of the MGDPA, then the private or confidential data classifications will no longer apply because the data will pertain to a non-individual.

The legislature has equivocated on the impact of death on the MGDPA's definition of individual. In 1980, as part of the annual amendment process, the legislature expanded the definition of "data on individuals" to include data on an individual "living or dead."¹²⁷ However, in that same legislative session, the legislature removed the words "living or dead" by subsequent enactment.¹²⁸ To further confuse the issue, the legislature, in 1981, provided for "private" and "confidential" treatment for data on dead human beings when that data is maintained by a medical examiner or coroner.¹²⁹

122. *Id.* § 13.02(5).

123. *See id.* § 13.02(4).

124. Individual data subjects have access to public and private data about them, *see id.* § 13.02(12), (15); non-individual data subjects have access to public and to nonpublic data about them. *See id.* § 13.02(9), (14).

125. *See id.* § 13.04(2).

126. *See id.* § 13.04(4).

127. *See Act of Apr. 23, 1980, ch. 603, § 2, 1980 Minn. Laws 1144, 1145.*

128. *See Act of Apr. 25, 1980, ch. 618, § 25, 1980 Minn. Laws 1609, 1621.*

129. *See Act of May 29, 1981, ch. 311, § 24, 1981 Minn. Laws 1427, 1436.*

The rules of the Department of Administration appear to resolve the problem by explicitly defining the term "individual" to mean a living human being.¹³⁰ However, the law continues to be unclear whether a statute which expressly classifies particular data as "private" or "confidential" impliedly converts those classifications to "nonpublic" or "protected nonpublic" upon the human being's death or operates to completely remove the not public classification from the data and render it public.

The term "individual" is also defined in the MGDPA to include parents or guardians of minors¹³¹ in order to give parents and guardians access to their minor children's records and to exercise other rights conferred by the MGDPA on behalf of their children or wards.¹³²

Investigative Data

Investigative data comprise civil and criminal varieties, both of which contain subcategories. The general pattern is that investigative data are inaccessible to everyone except the investigatory officials during the pendency of the investigation. Once the investigation is complete, however, the data become accessible to the data subjects and, in some instances, to the general public.

Civil investigative data appear in four separate places in the MGDPA: In a section entitled "Investigative Data"¹³³ which deals with pending judicial, administrative, or arbitral civil proceedings; in the "Licensing Data" section,¹³⁴ in the "Housing Agency Data" section,¹³⁵ and in the "Welfare Data" section.¹³⁶ Two of these provisions ("Investigative Data" and "Housing Agency Data") classify active data as inaccessible to the data subjects (i.e., as confidential data on individuals or as protected nonpublic data not on individuals). The "Licensing Data" and "Welfare Data" sections classify only investigative data on individuals as confidential. Their post-pendency classifications vary. Most licensing data become private data once the investigations cease,¹³⁷

130. See 2 MINN. CODE AGENCY R. § 1.202(I) (1982).

131. See MINN. STAT. § 13.02(8) (1982).

132. See **Children** this index. This also applies to individuals adjudged to be mentally incompetent no matter what their age is.

133. MINN. STAT. § 13.39 (1982).

134. *Id.* § 13.41.

135. *Id.* § 13.54.

136. *Id.* § 13.46.

137. See, e.g., *id.* § 13.41(2).

but the names and addresses of licensees and of applicants for licenses as well as records made pursuant to disciplinary hearings become public data.¹³⁸ Investigative data gathered to undertake or to defend against a civil action apparently become public data once the investigation is no longer pending.¹³⁹ Welfare investigative data become public once they are submitted to a court or to a hearing examiner.¹⁴⁰ It is not clear what happens to inactive welfare investigative data which are never presented either to a court or to a hearing examiner. Inactive housing agency investigative data evidently become benefit data and, accordingly, become classified as private.¹⁴¹

Criminal investigative data, similar to civil investigative data, are generally classified as confidential during the pendency of the investigations; they become public once the statute of limitations runs, the agency decides not to prosecute, or the offender exhausts or lets expire his or her appeal rights.¹⁴² There are a number of important exceptions, though, which are detailed in the section of this index entitled **Law Enforcement Data**.

Jargon

The clear legislative intent favoring disclosure of public data to anyone and disclosure of private data to data subjects would be subverted if the data divulged took the form of computer symbols or technical jargon incomprehensible to all but a few with the appropriate technical expertise. The MGDPA addresses this potential problem by requiring that governmental agencies explain the content and meaning of data.¹⁴³ The requirement that jargon be reduced to intelligible form is articulated as follows: "Upon request . . . a person . . . shall be informed of the public data's meaning;"¹⁴⁴ also, data subjects, upon their request, "shall be in-

138. *Id.* § 13.41(4).

139. The negative pregnant of the presence of the word "active" in the term "active investigation data," *id.* §§ 13.39(2), .54(2), is that inactive data are not so classified, and lacking statutory authority for restricting their disclosure, they are classified as public data. *Id.* § 13.03(1). Another interesting wrinkle in the case of licensing data is that the chief legal officer of the public agency makes the determination whether a legal action is pending, thereby triggering its classification. *Id.* § 13.39(1).

140. *Id.* § 13.46(3).

141. *See generally id.* § 13.31(3).

142. *Id.* § 13.82(5).

143. *Id.* § 13.04(3).

144. *Id.* § 13.03(3).

formed of the content and meaning of that data.”¹⁴⁵

The vocabulary of data practices contains its own jargon too. However, not all of the jargon derives from the language of the statute. The most widely used jargon term in the dialect of data privacy, for example, is the “Tennessen Warning.”¹⁴⁶ It is the handy and concise term for the statutory notice provision requiring governmental agencies to advise data subjects of certain rights before they collect private or confidential data.¹⁴⁷ It appears nowhere in either the MGDPA or its implementing rules.

“Necessary” is a term of art in the MGDPA, referring to the standard of accountability for the maintenance of data on individuals by government agencies.¹⁴⁸ Agencies may not collect or store data on individuals beyond those “*necessary* for the administration and management of programs specifically authorized by the legislature, local governing body or mandated by the federal government.”¹⁴⁹

Other terms, all explicated in this index, which might be considered data practices jargon and of importance to practitioners are the following: “access,” “confidential data,” “federal law,” “government data,” “individual,” “new uses of data,” “rights of data subjects,” “responsible authority,” “summary data,” “temporary classification,” and “willfulness.” Still others, mentioned in the finding index (Part III), include: “applicants,” “contests to accuracy,” “designees,” “education record,” “entity,” “informed consent,” “necessary data,” “political subdivision,” “public data,” “retention of data classification,” and “statewide system.”

Labor Relations

Labor relations information is a good example of how and why the MGDPA has expanded in the manner that it has. Because the data practices statute is fundamentally a check on the potential for arbitrariness and capriciousness on the part of government agencies, the classification scheme presumes that government data are public, absent a specific state statute or federal law restricting the disclosure of certain data.¹⁵⁰ The legislature built in a method for government agencies to seek a more restrictive classification of

145. *Id.* § 13.04(3).

146. See **Tennessen Warning** this index.

147. MINN. STAT. § 13.04(2) (1982).

148. *Id.* § 13.05(3).

149. *Id.* (emphasis added); see also **Necessary** this index.

150. MINN. STAT. § 13.03(1) (1982).

data where no statute or federal regulation existed to prevent access to anyone for the asking—the temporary classification by the Commissioner of Administration.¹⁵¹

Among a number of temporary classifications granted by the Commissioner of Administration was an application by the Minnesota Department of Personnel¹⁵² asking that management positions on various issues not yet presented to labor representatives in the collective bargaining process be protected from disclosure. The commissioner granted the temporary classification in 1979, and that temporary classification was enacted into law in 1980.¹⁵³

Many management officials collectively sighed relief when the MGDPA was so amended, but the 1980 amendment left open the possibility that a labor organization could argue that because non-public data are available to the non-individual subjects of that data,¹⁵⁴ nonpublic data collected on unions should be accessible to the union as the data subject. To address that glitch, the legislature amended the provision in 1981, classifying labor relations data concerning a specific labor organization as protected non-public data.¹⁵⁵

So, with two refinements, public agency management officials need not divulge their collective bargaining positions to the union before they have formally decided to make particular offers or compromises during negotiations. However, labor relations information presented by management during the collective bargaining process or interest arbitration loses its nonpublic or protected non-public status and therefore must be subject to the general rule that all data are public unless classified by state statute, temporary classification, or federal law as nonpublic or protected nonpublic.¹⁵⁶

Law Enforcement Data

No area of government record keeping has been more controversial than law enforcement data. Law enforcement investigative data was exempt from the Data Privacy Act as initially enacted in 1974.¹⁵⁷ However, by the following year investigative data was

151. *Id.* § 13.06.

152. Currently called the Department of Employee Relations.

153. Act of Apr. 23, 1980, ch. 603, § 15, 1980 Minn. Laws 1144, 1148 (current version at MINN. STAT. § 13.37(1)(c) (1982)).

154. *See* MINN. STAT. § 13.02(9) (1982).

155. *Id.* § 13.37(2).

156. *Id.* § 13.03(1).

157. Act of Apr. 11, 1974, ch. 479, § 7, 1974 Minn. Laws 1199, 1204.

within the ambit of the Act and classified as "confidential" during the pendency of active investigations.¹⁵⁸ In 1976, the legislature began an annual process of retaining the confidentiality of active investigations but saddled that provision with an annual expiration date. Following seven years of controversy and conflicting annual testimony by media representatives and various law enforcement agency representatives, the legislature enacted a separate provision now entitled "Comprehensive Law Enforcement Data" that prescribes in detail the classification of such data.¹⁵⁹

Essentially, law enforcement data are confidential if collected during an active investigation but become public once the investigation has become inactive.¹⁶⁰ An investigation becomes inactive upon the occurrence of one of three events:

1. The agency's or prosecutor's decision not to pursue the case;
2. The running of the statute of limitations; or
3. The exhaustion or expiration of a convicted person's right to appeal.¹⁶¹

There are some exceptions to the basic rule, however. Even before a convicted individual exhausts his or her appeal rights, for example, any investigative datum presented as evidence in court becomes public.¹⁶² Also, photographs which "are clearly offensive to common sensibilities" are classified as "private" even though the investigations are no longer active.¹⁶³ Thirdly, the legislature expressly classified some four dozen items of law enforcement data as "public" regardless of the status of any investigation. The four dozen items fall into three functional categories of law enforcement data collection activity: request-for-service data, incident data, and arrest data.¹⁶⁴

In all three categories, the time, date, and place of the request, incident, or arrest; the names and addresses of the requesters, and adult arrestees;¹⁶⁵ the nature of the request or the response, the charge, or legal basis for an action; whether the agency used pursuit, weapons, wiretaps, or warrants; the age and sex of arrestees;

158. Act of June 5, 1975, ch. 401, § 1, 1975 Minn. Laws 1353, 1353.

159. Act of May 29, 1981, ch. 311, § 36, 1981 Minn. Laws 1427, 1441 (codified as amended at MINN. STAT. § 13.82 (1982)).

160. MINN. STAT. § 13.82(5) (1982).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* § 13.82(2), (3), (4).

165. The names and addresses of juveniles taken into custody are not public. *Id.*

agencies and officers involved; healthcare facilities to which victims or casualties were taken; offenders' resistance or use of weapons; and factual summaries of incidents are all public data.¹⁶⁶

Under the statutory amendment, law enforcement agencies have discretion to alter the accessibility in three different types of circumstances: (a) They may release confidential data to aid law enforcement, to promote public safety, or to dispel widespread rumor or unrest;¹⁶⁷ (b) they may absolutely refuse to divulge data which reveal the identities of undercover agents or sex crime victims, and may refuse to divulge data that identifies informants, and witnesses to or victims of crimes;¹⁶⁸ and (c) they may temporarily withhold incident data if disclosure would hamper an investigation or would endanger someone.¹⁶⁹

To complicate matters, there is another section in the statute labeled "Law Enforcement Data," a product of the 1979 legislative session.¹⁷⁰ That section duplicates some of the provisions in the 1981 amendment but is not as extensive. Unduplicated provisions include: classifying data identifying stolen, lost, confiscated, or recovered property as nonpublic;¹⁷¹ classifying informant reward data as confidential (if its disclosure would reveal an informant's identity);¹⁷² and a bar to using the data practices statute to expand or to limit the scope of criminal or civil discovery.¹⁷³

Medical Data

Generally government data collected about an individual because s/he is or was a patient at a public medical facility¹⁷⁴ are

166. *Id.*

167. *Id.* § 13.82(8).

168. *Id.* § 13.82(10). Law enforcement agencies may not exercise their discretion with respect to informants, witnesses, and victims of non-sex crimes unless there is a threat to such an individual's physical safety and, in the case of victims and witnesses, the individual specifically requests non-disclosure. *Id.*

169. *Id.* § 13.82(7). A reasonableness standard is imposed on law enforcement agencies in exercising such discretion, and reasonableness can be tested by bringing an action in district court to release the data. *Id.*; see also **Victims of Crimes, Protection of Identities** this index.

170. Act of June 5, 1979, ch. 328, § 20, 1979 Minn. Laws 910, 921 (current version at MINN. STAT. § 13.81 (1982)).

171. MINN. STAT. § 13.81(1)(c) (1982). The data are private if they identify individuals.

172. *Id.* § 13.81(1)(d). The data are protected nonpublic if no individuals are identified but the integrity of the fund would be compromised.

173. *Id.* § 13.81(4).

174. A public medical facility can be a hospital, clinic, medical center, health service or nursing home. The term "medical data" also applies to data furnished to the public

“private data” and are therefore accessible to the data subject but are not available to third parties.¹⁷⁵

There are four exceptions to this general rule:

(A) A patient’s condition may be communicated to family members or other appropriate persons;¹⁷⁶

(B) If the patient has died, the medical data may be divulged to the surviving spouse or next of kin;¹⁷⁷

(C) The patient’s name, general condition, and dates of admission and release are public data;¹⁷⁸

(D) A medical provider may cause the information to be classified as “confidential” by determining that disclosure to the data subject is, or is likely to be, detrimental to the data subject’s physical or mental health or may cause the patient to harm himself or another.¹⁷⁹

The exceptions have an exception too: A patient may request that the information described in exceptions (A) or (C) above not be disclosed, in which event these data remain private.¹⁸⁰

Misdemeanor

To date, no one, to the best of the authors’ knowledge, has ever been subject to criminal prosecution for violating any of the provisions of the MGDPA. Yet, as a disincentive to disregard the requirements of the statute, the legislature made willful violation of any provision of the law by any person a misdemeanor.¹⁸¹

medical facility by private health providers and by patients’ relatives and to business and financial data about patients. *See id.* § 13.42(1)(b).

175. *See id.* § 13.02(12).

176. *See id.* § 13.42(3)(e).

177. *See id.* § 13.42(3)(d).

178. *See id.* § 13.42(1)(a), (2).

179. *See id.* § 13.42(3), *citing id.* § 144.335. A “medical provider” may be a physician, surgeon, osteopath, chiropractor, nurse, midwife, optometrist, physical therapist, psychologist, dentist, pharmacist, or podiatrist. *See id.* § 144.335(1)(b).

180. *Id.* § 13.42(2). The failure of the Hennepin County Medical Center to honor such a request prompted a \$12,000 lawsuit in which the plaintiff prevailed at trial. *See Koudsi v. Hennepin County Medical Center*, No. 756428 (Minn. 4th Dist. Ct. Feb. 25, 1981). The supreme court reversed. *See Koudsi v. Hennepin County Medical Center*, 317 N.W.2d 705 (Minn. 1982). Statutory language allowing patients to request non-disclosure was enacted after commencement of the *Koudsi* case. *See Act of Apr. 23, 1980*, ch. 603, § 28, 1980 Minn. Laws 1144, 1152 (codified at MINN. STAT. § 13.42(3), (4) (1982)). Under the current statute, even if a patient requests non-disclosure to third parties, the patient’s name, general condition, and dates of admission and release will be available to law enforcement authorities if the patient is the subject of a lawful investigation. *See MINN. STAT. § 13.42(2)* (1982).

181. MINN. STAT. § 13.09 (1982).

For a public official or a civil servant, the criminal penalty is in addition to civil damages and disciplinary action up to and including dismissal.¹⁸² The criminal provision is not restricted to governmental employees. The use of the term “any person” manifests legislative intent that any reporter or private sleuth who purloins a restrictively classified document would also be subject to prosecution.

Necessary

One provision of the MGDPA is intended to hold agencies to a specified standard of accountability when they make a wide variety of detailed decisions which taken together will constitute the agency’s administration of data on individuals. This provision establishes what can be called a “rule of necessariness” to which agencies must look, and for which they can be held accountable, as they make decisions affecting data on individuals.

To be able to collect or store any data on individuals, the agency must first make a determination that the collection or storage is necessary to administer or manage some legally authorized program.¹⁸³ Likewise, when agencies make decisions as to how private or confidential data may be used or disseminated, they are required to determine whether the specific use or dissemination is necessary.¹⁸⁴ It should be emphasized that the “necessariness rule” applies when agencies make collection or storage decisions about all of the three types of data on individuals.¹⁸⁵ However, in agency decisions concerning the use or dissemination of data on individuals, the “necessariness rule” is only applied to private or confidential data.¹⁸⁶ Any use or dissemination may be made of public data on individuals.¹⁸⁷

The MGDPA rules provide further guidance on the application of the “necessariness rule.” Collection or storage of any data on individuals and the use or dissemination of private or confidential

182. *Id.* The state tort claims statute’s indemnification clause, holding state employees harmless against tort claims, does not apply where the conduct is deemed to be willful neglect of duty. *Id.* § 3.736(9). Similarly, the political subdivision tort liability statute authorizes indemnification of county, municipal, school district, and commission employees, *id.* § 466.07, but expressly proscribes such indemnification in the case of willful neglect of duty. *See id.* § 466.07(2).

183. *Id.* § 13.05(3).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

data on individuals may be necessary in one or more of four specified circumstances. Those circumstances are:

1. Data are necessary if the agency's collection, storage, use, or dissemination of the data is required to carry out functions or programs authorized by law *and* if the data so collected and stored are "periodically examined, updated, modified or referred to by" the agency maintaining the data;¹⁸⁸
2. Data are necessary if the agency would be unable to fulfill its duties in an efficient or cost effective manner if the agency could not collect, store, use or disseminate the data;¹⁸⁹
3. Data are necessary if the agency must retain the data to commence or defend a legal action;¹⁹⁰ or,
4. Data are necessary if their continued retention is required to comply with laws relating to auditing, records management, historical interest or similiar purposes.¹⁹¹

The rules further require agencies to apply the "rule of necessity" in their development of a data review compliance plan. This plan was to be completed by each agency within eighteen months of the effective date of the rules.¹⁹² As part of this plan, each agency is required to develop procedures to assure that the agency will make determinations as to whether or not the continued collection or storage of any of its data on individuals and the continued use or dissemination of its private or confidential data is necessary.¹⁹³ For purposes of this plan, data are necessary if they fall into any of the circumstances specified above.

If any agency determines, through implementation of its procedures, that collection or storage of any data on individuals or use or dissemination of any private or confidential data is not necessary, the agency must cease the collection, storage, use or dissemination.¹⁹⁴ Lastly, the rules require the agency to dispose of all stored data on individuals when continued retention is no longer necessary. This disposition must be conducted in compliance with the "Records Management Statute."¹⁹⁵

188. 2 MINN. CODE AGENCY R. § 1.214(B)(1)(a) (1982).

189. *Id.* § 1.214(B)(1)(b).

190. *Id.* § 1.214(B)(1)(c).

191. *Id.* § 1.214(B)(1)(d).

192. *Id.* § 1.214. The rules were effective September 5, 1981.

193. *Id.* § 1.214(C).

194. *Id.*

195. *Id.* § 1.214(C)(2). For a discussion of a statutory requirement which more se-

New Uses of Data

Compliance with the MGDPA requires agencies to notify individuals, from whom they are about to collect private or confidential data, of the uses and disseminations that will be made of the data.¹⁹⁶ The notice, colloquially referred to in MGDPA jargon as the “Tennessen Warning,” limits the agency’s use and dissemination of the data to that which was communicated to the individual in the required notice.¹⁹⁷ Any proposed use or dissemination of the data beyond that which was communicated to the individual prior to collection will constitute a new use or dissemination of data.

When the Tennessen Warning requirement and related provisions were amended by the legislature in 1975,¹⁹⁸ the legislature anticipated four situations in which strict compliance by agencies would be difficult. The first situation is one where an agency, unaware of a certain legally required use or dissemination of the data, would fail to communicate that use or dissemination and therefore could not, without violating the MGDPA, comply with the use or dissemination requirement. In a second situation, an agency might give the Warning but inadvertently forget to include a clearly authorized use or dissemination of the data. In the third situation, an agency might give a complete and proper Warning only to learn after the Warning was given that the legislature or federal government has authorized new or different uses or disseminations of the data. In the fourth situation, an agency might be unsure of how to limit the use and dissemination of private and confidential data which were collected prior to the enactment of the Warning requirement. A fifth situation, not specifically addressed by the legislature, is one where an agency never provides individuals with any warning whatsoever.

To deal with the situation where an agency gives an incomplete or improper Tennessen Warning, the MGDPA provides agencies with two methods to recover from their failures. First, an agency may always return to the individuals from whom it collected private data and solicit and receive from those individuals consent to the agency’s initiation of a new or different use or dissemination of

verely limits the use or dissemination of private or confidential data collected *from* individuals, see **Tennessen Warning** this index.

196. MINN. STAT. § 13.04(2) (1982).

197. *Id.* § 13.05(4).

198. Act of June 5, 1975, ch. 401, §§ 3, 4, 1975 Minn. Laws 1353, 1356-58.

the data.¹⁹⁹ This informed consent provision does not, however, extend to initiating a new or different use or dissemination of confidential data.²⁰⁰

Second, if receipt of the informed consent of the data subject is not easily accomplished, the agency may seek the Commissioner of Administration's approval for initiation of the new or different use or dissemination of the private or confidential data.²⁰¹

In the case of subsequent enactments by the legislature, federal government or local governing body authorizing new or different uses or disseminations, the MGDPA authorizes the agency to immediately implement whatever the new enactment requires.²⁰² A subsequent enactment should also generate a change in the agency's Tennesen Warning to reflect the new or different uses or disseminations which are authorized.

The legislature used the effective date of the 1975 amendments to the MGDPA as a cutoff date for data collected prior to the enactment of the Tennesen Warning requirement. Agency conduct prior to August 1, 1975, is subject to different requirements. Data collected prior to August 1, 1975, and which have not been treated as public data, "may be used, stored, and disseminated for any purposes for which the data were originally collected or for purposes which are specifically approved by the commissioner as necessary to public health, safety or welfare."²⁰³

For the fifth situation, in which an agency has failed to give a Tennesen Warning, it appears that the only way the agency may initiate a new or different use or dissemination of data collected without a warning is by soliciting and receiving the informed consent of the individuals from whom the data were collected. The Commissioner of Administration has taken the position that he is without authority to approve uses or disseminations of data when the agency has entirely failed to give a Tennesen Warning.²⁰⁴

199. MINN. STAT. § 13.05(4)(d) (1982).

200. The legislature intentionally limited informed consent to only private data because it would be impossible for an individual to give "informed" consent to the release of data which s/he cannot even see.

201. MINN. STAT. § 13.05(4)(a), (c) (1982).

202. *Id.* § 13.05(4)(b).

203. *Id.* § 13.05(4)(a).

204. Letter from James J. Hinker, Jr., Commissioner of Administration, to Marshall D. Anderson, Executive Director, Public Housing Agency of the City of St. Paul, (Dec. 29, 1981) (on file at Data Privacy Division, Department of Administration).

Official Records Act

Considered by some to be the outdated predecessor of the MGDPA, the Official Records Act²⁰⁵ still plays an important role in regulating records in Minnesota governmental agencies. The Official Records Act provides that state agencies and certain political subdivisions “shall make and preserve all records necessary to a full and accurate knowledge of their official activities.”²⁰⁶ This is an affirmative duty imposed on agencies to, at a minimum, create and maintain records of some kind so that the public may gain knowledge of agency activities and the basis for agency decisions. These records must be prepared in such a way “as to insure permanent records.”²⁰⁷ Records may be made permanent through the preparation of photostatic, microphotographic, or microfilmed copies. Copies prepared from photographs, photostats, microphotographs, or microfilm are admissible as evidence and “shall have the same effect and weight as evidence as would a certified or exemplified copy of the original.”²⁰⁸

The chief administrative officer of each agency is responsible for caring for and preserving the agency’s public records. This includes a duty to “carefully protect and preserve government records from deterioration, mutilation, loss, or destruction.”²⁰⁹ Custodians of public records, or their legal representatives, must deliver records to their successors in office at the end of their term, expiration of their authority, or upon death.²¹⁰

Prior to the 1979 amendments to the MGDPA²¹¹ and in particular the foia provision,²¹² the Official Records Act contained the sole general guide to which records of governmental agencies were accessible for public inspection. However, the now-repealed language of the foia provision was extremely vague as to exactly which government records were available for inspection by the public. The repealed language merely provided that any custodian of official records “shall permit all public records in his custody to be inspected, examined, abstracted, or copied at

205. Act of Apr. 28, 1941, ch. 553, §§ 1-4, 1941 Minn. Laws 1174, 1174-75 (codified as amended at MINN. STAT. § 15.17 (1982)).

206. MINN. STAT. § 15.17(1) (1982).

207. *Id.*

208. *Id.*

209. *Id.* § 15.17(2).

210. *Id.* § 15.17(3).

211. Act of June 5, 1979, ch. 328, 1979 Minn. Laws 910.

212. *Id.* § 23, 1979 Minn. Laws at 922.

reasonable times . . . by any person.”²¹³ The Official Records Act contained no express definition of the term “public record.” In 1968, in a dispute involving access to the field notes of county assessors, the Minnesota Supreme Court defined public record by amplifying the “official record” terminology used in the Official Records Act.²¹⁴ The Minnesota court stated that public records, which must be made available for public inspection, were those records “pertaining to an official decision, and not information relating to the process by which such a decision was reached.”²¹⁵

The MGDPA has replaced the repealed foia provision of the Official Records Act by adopting the comprehensive data classification system which provides detailed definitions of the six possible types of government data in terms of who can gain access to each type.²¹⁶

Personnel Data

Personnel data are expansively defined as

data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a state agency, statewide system or political subdivision or is a member of an advisory board or commission.²¹⁷

An important implication of this definition is that the MGDPA does not limit its regulation of personnel data to that which may be stored in the traditional employee file housed in the agency personnel office. The definition merely provides, *inter alia*, that if any data were or are being collected on an individual because that individual is or was an employee or is or was an applicant for employment, the data so collected are treated as personnel data for purposes of the MGDPA.

The expansiveness of the MGDPA definition may be important, for example, when a governmental supervisor has a practice of maintaining a “little black book” on employees. Often such books or records are not maintained as part of the official personnel file but may nevertheless provide the real basis on which personnel decisions are made. “Little black books” or similar records are created and maintained, in part, because the individuals identified in

213. MINN. STAT. § 15.17(4) (1978) (repealed 1979).

214. *Kottschade v. Lundberg*, 280 Minn. 501, 160 N.W.2d 135 (1968).

215. *Id.* at 505, 160 N.W.2d at 138.

216. MINN. STAT. § 15.17(4) (1982).

217. *Id.* § 13.43(1).

them are or were employees of the agency. Given the MGDPA's definition of personnel data, "little black books" and, for that matter, all other data collected because a person is or was an employee, applicant, volunteer and so forth, are personnel data.

After defining personnel data, the "Personnel Data" section primarily focuses on regulating access to the various data. The statute employs a simple technique to guide decisions as to what personnel data are private and what are public. The MGDPA presents two lists of specific data elements or types of data which are public. The first list is concerned with data on individuals who are current or former employees.²¹⁸ The second list is concerned with data on individuals who are current or former applicants for employment.²¹⁹ If agencies maintain data that appear on either of those two lists, the MGDPA declares the data to be accessible to the public.²²⁰ For example, for current and former employees, innocuous data such as their names, gross salaries, job descriptions, and work telephone numbers are public information.²²¹ In addition, more significant and controversial data about current and former employees, including whether or not complaints or charges have been made against them and whether or not the complaints or charges resulted in disciplinary action, are accessible to the public.²²²

For persons applying for public employment, the MGDPA lists eight elements or types of data about current and former applicants that are public data.²²³ Among the eight are job history, veteran's status, relevant test scores, and rank on eligible list.²²⁴ To protect applicants during the pendency of their applications, the MGDPA allows agencies to withhold the names of applicants, effectively making those names private data until, in agencies which use a civil service selection process, the applicant's name appears on a list as being certified as eligible to fill a vacancy,²²⁵ or, in agencies not using a civil service process to fill a vacancy, until the applicant is considered to be a "finalist" for the vacant

218. *Id.* § 13.43(2).

219. *Id.* § 13.43(3).

220. *Id.* § 13.43(2), (3).

221. *Id.* § 13.43(2).

222. *Id.*

223. *Id.* § 13.43(3).

224. *Id.*

225. *Id.*

position.²²⁶ The MGDPA defines "finalist" as "an individual who is selected to be interviewed by the appointing authority prior to selection."²²⁷

Having defined in detail what personnel data are public, the MGDPA then sets forth a rule that "[a]ll other personnel data is private data on individuals, except pursuant to a valid court order."²²⁸ Thus read in its entirety, the "Personnel Data" section of the MGDPA provides that some personnel data are public and accessible by anyone, while the balance of personnel data are private and accessible by the data subject. Therefore it seems impossible for any agency to deny access to personnel data because they are confidential.²²⁹

For those personnel data that are private, agencies are not only required to provide their employees with access to that data but are also required to administer the private data consistent with other requirements imposed by the MGDPA. This would include providing employees with "Tennessen Warnings" when private data are collected from them.²³⁰

Private Data

Private data is defined as data "which is made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of that data."²³¹ The notion of having a classification for data which are not public but are accessible to any subject of the data was first proposed to the Minnesota legislature by the State Department of Administration in 1975.²³²

In its 1974 study of the data administration practices of government agencies, mandated by the 1974 version of the Act,²³³ the Department established that the term "confidential," traditionally used to describe limited access data, actually conveyed two discrete meanings: (1) allowing access to information to the subject

226. *Id.*

227. *Id.*

228. *Id.* § 13.43(4). Private personnel data also include all data collected and maintained by employee assistance programs which may be administered in some agencies as a function entirely separate from the personnel function. *See id.* § 13.43(7).

229. *Id.* § 13.43.

230. *Id.* §§ 13.43(4), .04(2); *see also* **Tennessen Warning** this index.

231. *Id.* § 13.02(12).

232. 1975 COMM'R OF ADMIN. ANN. REP. 9-10.

233. *See* Act of Apr. 11, 1974, ch. 479, § 2, 1974 Minn. Laws 1199, 1200.

of that information but not to third parties; and (2) denying access even to the subject of the data. To deal with and differentiate between these two meanings, the Department proposed that the terms "private" and "confidential" have the meanings which those terms currently enjoy in the definitional section of the MGDPA.²³⁴

As defined, private data can only be data on individuals. For data to attain the private classification, the definition requires that the data be made private "by statute or federal law applicable to the data."²³⁵ The definition operates both prospectively and retrospectively. It states that if there is a statute or federal law, either currently in force or later enacted, which regulates information and which in some way states that the information is not available for public inspection but is accessible to the subject of the data, then the information must be treated as private data. In practice, both within the MGDPA and in other statutory provisions, the legislature has adopted a technique of incorporating by reference either the term "private data on individuals" or its statutory numerical equivalent,²³⁶ as a method of stating that certain data are to be treated as "private data."

The proper treatment and classification of various type of data on individuals, which are not public, may not be clear when a statutory section uses the term confidential or other comparable language. This is most often true when the statutory section was enacted prior to 1975. As an additional complication, federal law uses only the term "confidential" in regulating data or information. In both instances, it is clear that the information is not public, but there may be a question as to whether the information is accessible by the information subject.

To assist in resolving the interpretational problems these older statutory sections and federal law present, the rules of the Department of Administration provide detailed guidance by defining the terms "private data" and "confidential data."²³⁷ The most obvious requirement concomitant to an agency's maintenance of "private data" is that the agency cannot make the data available to the public. However, there are a number of other requirements

234. 1975 COMM'R OF ADMIN. ANN. REP. 9-10; H.F. 1014, 67th Minn. Legis., 1975 Sess. The language of the 1975 bill, which was drafted in part by the Department of Administration as its recommendation on appropriate legislation, was enacted as Act of June 5, 1975, ch. 401, 1975 Minn. Laws 1353.

235. MINN. STAT. § 13.02(12) (1982).

236. *Id.*

237. *See* 2 MINN. CODE AGENCY R. § 1.202(C), (D) (1982).

imposed on agencies whenever they collect, store, maintain or disseminate "private data."²³⁸ In addition to the right not to have private data disclosed to the public, subjects of private data enjoy other rights whenever an agency seeks to collect or maintain private data.²³⁹

Quasi-Judicial Power of the Commissioner of Administration

The preponderance of remedies afforded to individuals who believe their rights under the MGDPA have been violated are actualized through recourse to a civil legal action.²⁴⁰ However, there is one situation in which a state agency is assigned the task of dispute resolution. The MGDPA gives individuals the right to contest the "accuracy or completeness of data" concerning themselves.²⁴¹ If a responsible authority's response to such a contest is adverse to the individual, then the individual's initial recourse is not to a court action but to the Commissioner of the State Department of Administration.

The contested data section of the MGDPA provides that "[t]he determination of the responsible authority [that certain data are accurate or are complete contrary to the assertion of the individual] may be appealed pursuant to the provisions of the administrative procedures act relating to contested cases."²⁴² Prior to 1978, this provision was the source of considerable confusion to agencies. The contested case procedure of Minnesota's Administrative Procedures Act²⁴³ pertains only to the operations of state government agencies.²⁴⁴ The language of the MGDPA left unanswered the question of which agency was to hear an appeal of a decision made by a responsible authority in a political subdivision.

The Department of Administration provided an answer to that question when it published proposed rules in September 1978.²⁴⁵ Among other things, the proposed rules provided that appeals concerning the accuracy or completeness of data, which arise out of any agency subject to the MGDPA, be it a state agency, political

238. For examples of requirements associated with private data, see **Necessary and Yearly Report** this index.

239. For examples of provisions which provide rights for subjects of private data, see **Rights of Subjects of Data** and **Tennessee Warning** this index.

240. See **Remedies** this index.

241. MINN. STAT. § 13.04(4) (1982).

242. *Id.*

243. *Id.* ch. 14.

244. *Id.* § 14.03(2).

245. 3 Minn. Admin. Reg. 346 (1978).

subdivision or statewide system, should be directed to the Commissioner of Administration. As commissioner of a state agency, the Commissioner of Administration is empowered to initiate a contested case proceeding "when one is required by law."²⁴⁶

The adopted rules of the Department of Administration prescribe the procedure by which individuals may bring an appeal concerning the accuracy or completeness of data.²⁴⁷ Once the Department's rules have been complied with for purposes of initiating an appeal, the appeal is handled consistent with the statutory contested case procedure and the rules of the Office of Administrative Hearings pertaining to contested cases.²⁴⁸

For purposes of enforcing the various rights afforded to individuals by the MGDPA, this is the only provision of the Act which implicates individual rights and which requires that administrative remedies must be exhausted prior to initiating a court action. In all other provisions of the MGDPA, a rebuff to the exercise of rights, be they the rights of individuals or the rights of the public, can only result in recourse to a judicial proceeding. When the responsible authority has made his or her decision relative to some provision of the MGDPA, no other administrative remedies are provided and it will be time to prepare a summons and complaint.

This right of appeal to the Commissioner of Administration is very limited. It occurs only when an individual has contested the *accuracy or completeness* of certain data concerning her/himself and the responsible authority has determined the data are accurate or complete.²⁴⁹ The commissioner's handling of the appeal is limited to reviewing the data for its accuracy and completeness and, if a finding of inaccuracy or incompleteness is made, to order a method for correcting the data.

Questions

A common type of governmental data not on individuals is that generated by the wide variety of government-administered examinations. Examinations are most commonly administered in three areas: academia, licensing agencies, and personnel functions. Examination data are defined as "testing or examination materials or

246. MINN. STAT. § 14.57 (1982).

247. 2 MINN. CODE AGENCY R. § 1.215 (1982).

248. *Id.* § 1.215(A).

249. MINN. STAT. § 13.04(4) (1982).

scoring keys”²⁵⁰ used to select or promote employees or administer licensing or academic exams. Examination data are classified as nonpublic when disclosure of the examination data “would compromise the objectivity, fairness, or integrity of the examination process.”²⁵¹

This language provides responsible authorities with considerable discretion in determining whether to allow public access to examinations and scoring keys. However, in their use of that discretion, responsible authorities cannot make arbitrary determinations as to whether examination data are public, but must base their determinations on whether access in a given situation would “compromise the objectivity, fairness, or integrity of the examination process.”²⁵²

The relationship between examiner and examinee becomes more complex once the examination has been seen and completed by the examinee. If an examinee has failed an examination, fairness dictates that the examinee be able to establish, beyond the raw statement of a score, why s/he failed. There ought to be, and the MGDPA says there will be, a due process procedure to guide the relationship.

To establish due process, the Act provides that “[c]ompleted versions of personnel, licensing, or academic examinations shall be accessible to the individual who completed the examination.”²⁵³ The MGDPA, however, continues to balance fairness for the individual against institutional imperatives by giving responsible authorities discretion to deny access to completed versions of examinations if “the responsible authority determines that access would compromise the objectivity, fairness, or integrity of the examination process.”²⁵⁴

Even in situations when the responsible authority decides to provide access to completed versions of examinations, responsible authorities are given the authority to minimize the effect of that access on the testing process. The MGDPA accomplishes this by providing that responsible authorities “shall not be required to provide *copies* of completed examinations or answer keys” to those who have completed the examination.²⁵⁵

250. *Id.* § 13.34.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* (emphasis added).

Remedies

Although specific remedy provisions are provided in various sections of the MGDPA, the primary and general remedy provision is found at Minnesota Statutes section 13.08. This section provides a variety of remedies for violations and proposed violations of the MGDPA and even for an agency's failure to comply. Venue for any of these remedies will be in the plaintiff's county of residence, the county where the defendant political subdivision exists, or if the state is the defendant, in any county.²⁵⁶

Any state agency, political subdivision, or responsible authority which violates any provision of the MGDPA is liable to any person who suffers damages on account of that violation.²⁵⁷ The person damaged may bring an action in district court to recover compensatory damages, costs, and reasonable attorney's fees. If the court finds that the agency's violation has been willful, "exemplary damages" of \$100 to \$10,000 may be awarded for each violation.²⁵⁸

Agencies and responsible authorities may be enjoined to prevent a violation or proposed violation of the MGDPA. "The court may make any order or judgment as may be necessary to prevent the use or employment by any person of any practices which violate this chapter."²⁵⁹

As an additional and broader remedy, "any aggrieved person" may bring an action to compel an agency to comply with any provisions of the MGDPA.²⁶⁰ In such an action, the court may award costs and disbursements, including attorney's fees to the plaintiff. However, if the court determines the plaintiff has brought an action which "is frivolous and without merit and a basis in fact," the court may award costs and attorney's fees to the responsible authority.²⁶¹

Responsible Authority

In most instances, the MGDPA does not directly impose duties and requirements on agencies but instead places the responsibility

256. *Id.* § 13.08(3).

257. *Id.* § 13.08(1).

258. *Id.*

259. *Id.* § 13.08(2). For a case in which a party attempted to use this language to urge a court to bar the use of evidence allegedly collected in violation of MINN. STAT. § 13.04, see *AAMCO Indus., Inc. v. DeWolf*, 312 Minn. 95, 250 N.W.2d 835 (1977) (rights of data subjects then codified at MINN. STAT. § 15.165 (1976)).

260. MINN. STAT. § 13.08(2) (1982).

261. *Id.*

for implementation and administration on the "responsible authority" for the agency. For example, a literal reading of the Act dictates that requests for access to various types of government data should be directed to the responsible authority only.²⁶²

As defined, in part, the responsible authority in either a state agency or political subdivision is "the individual responsible for the collection, use and dissemination of any set of data on individuals, government data, or summary data."²⁶³ As a concept within the operation of the Act, the responsible authority derives from the Swedish Data Act of 1973. For purposes of the Act, the responsible authority functions essentially as an "ombudsman." The responsible authority is one individual in each agency whose overall duty is to assure the proper administration of the Act. The responsible authority also functions as a single individual within each agency to whom the public or data subject can turn to effectuate various rights under the Act.

Responsible authorities assume their duties either because they are assigned the care and custody of an agency's data by law or because they are appointed to that position by the agency's governing body.²⁶⁴ The rules of the Department of Administration contain a listing which identifies the proper responsible authority in a variety of agencies which are subject to the Act.²⁶⁵

The duties assigned to the responsible authority by the MGDPA are numerous. The majority of those duties are set out in Minnesota Statutes section 13.05. Among the responsible authority's duties, drawn from various provisions, are:

1. Preparing procedures to assure access by the public to public government data;²⁶⁶
2. Preparing an annual report which describes the private or confidential data being maintained by the agency;²⁶⁷
3. Limiting the collection of data on individuals to that data which is necessary to the administration and management of programs authorized by the legislature or local governing body, or which is mandated by the federal government;²⁶⁸
4. Preparing a public document which sets forth the rights of

262. *See id.* § 13.03(3).

263. *See id.* § 13.02(16).

264. *See id.*

265. *See* 2 MINN. CODE AGENCY R. § 1.202(K)(1) (1982).

266. *See* MINN. STAT. § 13.03(2) (1982).

267. *See id.* § 13.05(1).

268. *See id.* § 13.05(3).

data subjects and specific procedures for providing data subjects with access to private or public data;²⁶⁹

5. Preparing summary data from private or confidential data on individuals;²⁷⁰ and

6. Establishing procedures to assure the accuracy, completeness, currency, and security of all data on individuals.²⁷¹

Rights of Subjects of Data

Although there are a number of express and implied rights of subjects of government data in the MGDPA, the following discussion is confined to the statutory section which is captioned "Rights of Subjects of Data."²⁷² The three principal rights of individuals²⁷³ who are the subjects of government data are notice, access, and data contest.

Individuals who are about to have certain data collected from them by an agency have the right to be notified of why data is being collected from them, how that data will be used, whether they have to provide the data, the consequences of providing or refusing to provide the data, and the identity of persons and agencies to whom the data will be disseminated.²⁷⁴ When this notice must be given and the implications of this notice are discussed under the title **Tennessee Warning** in this index.

Individuals have various specific rights relative to their general ability to gain access to data recorded about them.²⁷⁵ Upon request, an individual must be informed by the government agency whether s/he is the subject of public, private, or confidential²⁷⁶ data maintained by the agency. Even though an individual may not gain access to confidential data, the MGDPA requires that an individual be informed that confidential data is being maintained about him or her.

Having learned that s/he is the subject of data, the individual has the further right to be "shown the data without any charge to

269. *See id.* § 13.05(8).

270. *See id.* § 13.05(9).

271. *See id.* § 13.05(5).

272. *Id.* § 13.04.

273. These rights are only provided to individuals who are the subjects of governmental data. Data subjects who are not individuals, such as corporations, have access rights to public and nonpublic data. They have no right to notice or contest under the MGDPA.

274. MINN. STAT. § 13.04(2) (1982).

275. *Id.* § 13.04(3).

276. *Id.*

him and, if he desires, shall be informed of the content and meaning of that data."²⁷⁷ The explanation requirement is intended to prevent agencies from effectively denying the individual's rights by only allowing the individual to see data written or presented in "bureaucratese" or "computerese," indecipherable to ordinary persons. After the data subject has seen the public or private data concerning him or her, the data need not be disclosed again for a period of six months "unless a dispute or action pursuant to this section is pending or additional data on the individual has been collected or created."²⁷⁸

If the individual requests it, the responsible authority must provide the individual with copies of the public or private data and may require the individual "to pay the actual costs of making, certifying, and compiling the copies."²⁷⁹ Any of the above requests that an individual makes must receive a response from the responsible authority or her/his designee within five days of the date of the request. If the responsible authority cannot comply within five days, and so informs the individual, an additional five days within which to comply is allowed.²⁸⁰

Individuals have the right to contest the accuracy or completeness of public or private data maintained about them.²⁸¹ "To exercise this right, an individual shall notify in writing the responsible authority describing the nature of the disagreement."²⁸² Within thirty days, the responsible authority must either: "(a) correct the data found to be inaccurate or incomplete and attempt to notify past recipients of inaccurate or incomplete data, including recipients named by the individual; or (b) notify the individual that he believes the data to be correct."²⁸³ Disputed data can be disseminated only if the individual's statement of disagreement is also disseminated with the data.²⁸⁴ If the responsible authority determines that the disputed data are correct or complete, that determination may be appealed to the Commissioner of Administration.²⁸⁵

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* § 13.04(4).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

Rules

Pursuant to statutory direction,²⁸⁶ the Commissioner of Administration promulgated rules in 1981.²⁸⁷ The statute limits the commissioner's rule-making authority in that the rules may not "affect [the] rights of subjects of data."²⁸⁸ The Department of Administration further chose to narrow the scope of the rules to data on individuals.²⁸⁹

Substantively, the rules require agencies to (1) notify minors of their right to request that certain data be withheld from their parents;²⁹⁰ (2) limit the number of government officials who have access to restrictively classified data to those "whose work assignments require access";²⁹¹ (3) incorporate provisions of FERPA regulations in the administration of educational data;²⁹² and (4) explain that the word "confidential" in hoary statutes is not sufficient to classify data as confidential unless the legislative intent was to prevent access by the data subject.²⁹³

Procedurally, the rules prescribe time limits for appointing responsible authorities;²⁹⁴ require staff training in data practices matters;²⁹⁵ and impose a variety of duties with respect to the compilation of lists, the formulation of procedures, and the publication of several documents.²⁹⁶

Additionally, the rules clarify certain ambiguities in the statute. For example, dead people are not individuals;²⁹⁷ county sheriffs and other elected officials are separate responsible authorities;²⁹⁸

286. *Id.* § 13.07.

287. 2 MINN. CODE AGENCY R. §§ 1.201-.220 (1982). The proposed rules were published in September 1978. 3 Minn. Admin. Reg. 346 (1978). The hearing examiner conducted a public hearing on October 31, 1978. Owing to delays in the hearing examiner's report and in the Attorney General's review (occasioned in part by the uncertainty of the impact of intervening statutory amendments on the status of proposed rules), the rules were not published in final form until August 31, 1981, and took effect five days later.

288. MINN. STAT. § 13.07 (1982).

289. 2 MINN. CODE AGENCY R. § 1.201(A), (C) (1982).

290. *Id.* § 1.205(C)(1)(a).

291. *Id.* §§ 1.204(A)(2), .206(A)(1).

292. *See id.* § 1.205(C)(3). FERPA is an acronym for the Family Educational Rights and Privacy Act of 1974, also referred to as the Buckley Amendment or Pell-Buckley.

293. 2 MINN. CODE AGENCY R. § 1.202(C)(2) (1982).

294. Appointments are to be made within 30 days of effective date of the rules. *Id.* § 1.210.

295. *Id.* §§ 1.213(D)(1), .211(B).

296. *Id.* §§ 1.203(A)(1), .204(B), .206(B), .207(B), .212(A), .213(C)(1), .213(D)(2)-(3), .214(A).

297. *Id.* § 1.202(I).

298. *Id.* § 1.202(K)(2)(a).

and non-custodial parents have access rights to data on their minor children.²⁹⁹ The rules amplify the meaning of "necessary,"³⁰⁰ define and explain the meaning of "informed consent,"³⁰¹ and provide a solution to the problem of how to respond to subpoenas duces tecum for private or confidential data.³⁰²

Lastly, the rules enumerate timelines and procedures with respect to decisions on applications for temporary classifications of data;³⁰³ discuss administrative appeals;³⁰⁴ and provide advisory forms for the Annual Inventory of Records and for the appointment of a responsible authority.

Summary Data

Denying public access to private or confidential data on individuals may frustrate legitimate public research. The concept of summary data was introduced as part of the original Data Privacy Act³⁰⁵ to deal with the problem of allowing public access to statistical data while maintaining the privacy or confidentiality of the individual subjects of that data. "Summary data" is defined in the current MGDPA as follows: "Summary data" means statistical records and reports derived from data on individuals but in which individuals are not identified and from which neither their identities nor any other characteristic that could uniquely identify an individual is ascertainable.³⁰⁶

The MGDPA permits the "use of summary data derived from private or confidential data on individuals under the jurisdiction of one or more responsible authorities."³⁰⁷ A responsible authority is required to prepare summary data "upon the request of any person, provided that the request is in writing and the cost of preparing the summary data is borne by the requesting person."³⁰⁸

In those instances where a responsible authority does not desire to prepare the summary data, s/he may delegate the power to an officer of the agency who is "responsible for any central repository

299. *Id.* § 1.205(B)(2)(a).

300. *Id.* § 1.214(B)(1).

301. *Id.* § 1.213(E)(2)(b), (c).

302. *Id.* § 1.201(E).

303. *Id.* § 1.217.

304. *Id.* § 1.215.

305. *See* Act of Apr. 11, 1974, ch. 479, § 1, 1974 Minn. Laws 1199, 1200.

306. MINN. STAT. § 13.02(19) (1982).

307. *Id.* § 13.05(7).

308. *Id.*

of the summary data.”³⁰⁹ The responsible authority may even delegate this power to a person outside the agency, including the person who is requesting the preparation of the summary data.³¹⁰

To delegate this power to a person outside the agency, the MGDPA requires that two conditions be met. First, the person must set forth in writing the purpose for summarizing the private or confidential data and must agree not to disclose the private or confidential data to which s/he gains access. Second, the agency must reasonably determine that the person’s “access will not compromise private or confidential data on individuals.”³¹¹

The rules of the Department of Administration provide more detailed guidance to regulate the interaction of agencies and persons who request summary data from agencies. The rules require that agencies prepare and implement procedures to assure that access to summary data is provided in compliance with the MGDPA.³¹² The rules also require that an agency’s procedures include the ability to respond to requests for summary data within ten days of the receipt of a request. The rules contemplate four possible responses to a request for access to summary data. The agency may:

1. Provide an estimate of the costs of supplying the summary data and provide the data;³¹³
2. Provide an estimate of the costs and a written statement describing a time schedule for preparing the summary data;³¹⁴
3. “Provide access to the requestor to private or confidential data for the purpose of the requestor’s preparation of summary data,”³¹⁵ or
4. Provide the requestor with a written statement of why access would compromise the private or confidential data.

The rules provide further guidance concerning summary data, including: 1) the assessment of costs for providing summary data; 2) the definition of terms, such as “person outside” and “administrative officer”; 3) a description of the minimum contents for any non-disclosure agreement; and 4) examples of methods which

309. *Id.*

310. *Id.*

311. *Id.*

312. *See* 2 MINN. CODE AGENCY R. § 1.207(B) (1982).

313. *See id.* § 1.207(B)(1)(a).

314. *See id.* § 1.207(B)(1)(b).

315. *Id.* § 1.207(B)(1)(c).

agencies may use to prepare summary data.³¹⁶

Temporary Classifications of Data

In 1976 the Department of Administration recommended to the legislature that classifications of data as private or confidential be authorized only by express state statute, state agency rule, or federal law. To compensate for the effects of such a decision on an environment where records were often withheld from the public on the basis of long-practiced tradition or because of the vagueness of the then-existing "public records law,"³¹⁷ the Department further recommended that its commissioner be given the authority to temporarily classify data until the data could receive statutory or rule-making treatment.³¹⁸

In 1976 the legislature enacted these recommendations but deleted the authority for state agencies to classify data by rule.³¹⁹ The Commissioner of Administration's authority to grant classifications of data was to expire after June 30, 1977.³²⁰ The legislature extended this authority a year at a time until the 1979 session when the legislature gave the Commissioner of Administration permanent authority to issue temporary classifications.³²¹

Pursuant to the temporary classifications provision,³²² any agency subject to the MGDPA can apply to the commissioner to classify government data as private, confidential, nonpublic, or protected nonpublic. The rules of the Department of Administration require the agency to use application forms provided by the Department.³²³

Once an agency files an application with the Department, the data described in the application are classified in the manner sought by the applicant for a period of forty-five days or until the commissioner rules on the application, whichever comes first.³²⁴ The application documents themselves are classified as public data and are routinely reviewed and commented on by representatives of the Minnesota media community. The MGDPA mandates the

316. *Id.* § 1.207(B)(1)(d).

317. *See Official Records Act* this index.

318. *See* 1975 COMM'R OF ADMIN. ANN. REP. 26-30.

319. Act of Apr. 13, 1976, ch. 283, § 8, 1976 Minn. Laws 1063, 1065.

320. *Id.*, 1976 Minn. Laws at 1066.

321. Act of June 5, 1979, ch. 32, § 13, 1979 Minn. Laws 910, 916.

322. MINN. STAT. § 13.06 (1982).

323. 2 MINN. CODE AGENCY R. § 1.217(A) (1982).

324. MINN. STAT. § 13.06(1) (1982).

general contents of applications but imposes different requirements depending on whether the application seeks a classification for data on individuals or data not on individuals.

In an application to classify data on individuals, the applicant is required to establish that there is no statute or federal law which either allows or forbids the classification of the data as private or confidential and that the data covered by the application is treated as private or confidential by other agencies subject to the MGDPA, or “[t]hat a compelling need exists for immediate temporary classification, which if not granted could adversely affect the public interest or the health, safety, well being or reputation of the data subject.”³²⁵

In an application to classify data not on individuals, the applicant is required to establish that no statute or federal law exists which either allows or forbids the classification of the data. The applicant is also required to establish by argument and assertion that the data covered by the application is treated as nonpublic or protected nonpublic by other agencies subject to the MGDPA; that “[p]ublic access to the data would render unworkable a program authorized by law; or [t]hat a compelling need exists for the temporary classification which if not granted could adversely affect the health, safety, or welfare of the public.”³²⁶

Prior to the 1980 amendments to the MGDPA, it was possible for an agency to apply for and receive a classification of data solely for its own use where the subject data were actually maintained in a number of agencies.³²⁷ For example, from 1977 to 1979, there were approximately twenty political subdivisions of the state which had received temporary classifications of “private” for their personnel data. The state Department of Personnel had received a private classification for the use of all state agencies. The other 2,000-odd agencies subject to the MGDPA all had personnel files which arguably were classified as public, because at that time there was no state statute or federal law which classified personnel data.³²⁸ To better handle these situations, the legislature amended the MGDPA and gave the Commissioner of Administration authority to give statewide effect to temporary classification deci-

325. *Id.* § 13.06(2).

326. *Id.* § 13.06(3).

327. MINN. STAT. § 15.1642(1) (1978).

328. Temporary classification decisions of the Commissioner of Administration are filed at the Data Privacy Division of the Department of Administration.

sions.³²⁹ It is still possible for an agency to apply for and receive a unique classification if it is the only agency which maintains data of that type.

The procedural requirements and timelines for the processing of applications which will have statewide effect are different from those for single-agency applications.³³⁰ For example, the commissioner is required to give public notice of his intent to give statewide effect to an application decision in the State Register.³³¹ Although the commissioner is required to give notice of this intent, s/he is not required to publish notice of the actual decision on the application. This can lead to situations where agencies may be maintaining data in an incorrect fashion because they are not aware of the commissioner's actual decision.

If the commissioner disapproves of any application for temporary classification, s/he is required to notify the applicant of that disapproval, provide reasons for the disapproval, and state the classification which s/he deems appropriate. Twenty days after the commissioner disapproves an application, the data covered by the application become public. During the twenty-day period, the applicant agency has the right to submit an amended application to the commissioner. The commissioner must rule on the amended application within twenty days. If the commissioner disapproves the amended application, the data covered by the application become public five days after the commissioner's disapproval.³³²

If the commissioner approves an application for temporary classification, the classification is effective immediately. The commissioner must submit the record of his consideration to the Attorney General's Office for review as to form and legality.³³³ The Attorney General has twenty-five days in which to conduct the review and is authorized to either approve the classification, disapprove the classification as confidential but approve it as private, or disapprove the classification.³³⁴ By January 15 of each year, the commissioner is required to summarize all temporary classifications in effect and submit that summary in bill form to the legislature.³³⁵

329. Act of Apr. 23, 1980, ch. 603, § 9, 1980 Minn. Laws 1144, 1146.

330. MINN. STAT. § 13.06(4) (1982).

331. *Id.*

332. *Id.* § 13.06(5).

333. *Id.*

334. *Id.*

335. *Id.* § 13.06(7).

Tenessen Warning

Based on the recommendations contained in the 1973 federal report, *Records, Computers and the Rights of Citizens*,³³⁶ it is a part of fair information practices philosophy that individuals from whom agencies collect data ought to be able to discover how that data are to be used and be able to prevent data collected from them for one purpose from being used for other purposes. The methodology used by the MGDPA to effectuate these principles is complex and must be extracted from the language of two separate provisions of the Act.

The MGDPA uses a complicated technique by which a notice provision in Minnesota Statutes section 13.04, subdivision 2, is linked to a provision in Minnesota Statutes section 13.05, subdivision 4, which limits an agency's ability to use and disseminate private and confidential data. The notice provision in section 13.04, subdivision 2, is commonly referred to by those who deal extensively with the MGDPA as the "Tenessen Warning." This label, which uses the name of the chief senate author of data practices legislation, Minnesota Senator Robert J. Tennessen, was adopted in part as a way of alerting agencies that the failure to provide this notice has legal consequences which are somewhat analogous to the failure to give, or improper giving of, a *Miranda* warning.

The MGDPA requires that the Tennessen Warning be given only when four specified conditions are present in a data collection transaction between an agency and an individual. The MGDPA sets out those conditions in the following language: "An individual asked to supply private or confidential data concerning himself shall be informed"³³⁷ Distilled from that phrase, the four conditions are as follows. First, the Warning need only be given when an agency is collecting data from an individual rather than an organization, business, or other legal "person" who is not an individual. Second, the Warning must be given when the agency is asking an individual to supply data but need not be given in those situations when an individual voluntarily supplies data without any request from the agency to do so. Third, the Warning must be given only when the data being collected is classified as private or confidential rather than public data on individuals or

336. REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, U.S. DEPT OF HEALTH, EDUCATION & WELFARE, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS (1973).

337. MINN. STAT. § 13.04(2) (1982).

any of the three types of data not on individuals. Fourth, the Warning only has to be given in those situations where the data sought pertains to the individual from whom they are collected. If all four of these conditions are present in an agency data collection transaction, the MGDPA requires the agency, prior to the collection of the data, to provide to the individual a notice which must include specific elements dictated by the Act.³³⁸

The Tennessean Warning notice consists of five separate statements. The agency must inform the individual:

1. Why the data are being collected;
2. How the data will be used by the collecting agency;
3. Whether the individual may refuse or is legally required to provide the data requested;
4. The consequences to the individual of either providing or refusing to provide the requested data; and
5. The identity of other persons or entities authorized by state or federal law to receive the data.³³⁹

As discussed under the title **Necessary** in this index, agencies are held accountable to a "rule of necessariness" in making various data administration decisions. The "necessariness rule"³⁴⁰ is further limited in cases of private or confidential data. "Private or confidential data on an individual shall not be collected, stored, used or disseminated by political subdivisions, statewide systems or state agencies for any purposes other than those stated to the individual at the time of collection."³⁴¹

The necessariness rule, the limitations on private or confidential data, and the Tennessean Warning, taken together, produce the following: Agencies can collect private or confidential data from individuals only if the data are necessary. Before collecting private or confidential data, the agency must provide the individual with a Tennessean Warning which specifies why the data are being collected, how they will be used and to whom they will be disseminated. Once this Warning is given, the agency is limited in its collection, storage, use, and dissemination of the data to those purposes which it communicated to the individual at the time the data were collected.

338. *See id.*

339. *See id.*

340. *Id.* § 13.05(3).

341. *Id.* § 13.05(4).

Union Access to Personnel Data

Some types of personnel data were first classified as private in 1979.³⁴² On several occasions thereafter, questions were raised about the effect of the private classification on Minnesota's Public Employees Labor Relations Act (PELRA).³⁴³ Typical of those questions were: Could the exclusive representatives of employees gain access to the represented employees' and other employees' personnel files? Could a labor organization gain access to private personnel data, particularly an employee's home address, for the purpose of sending electioneering information to employees to assist in efforts to either organize employees or to decertify another labor organization?

These issues often produced sharp disagreements between labor organizations and employers, with public employers citing the private classification of some personnel data to deny access and the labor organizations citing their rights under the labor relations act. In response to these issues and others, the legislature, in 1981, amended the personnel data section of the MGDPA by providing that personnel data "may be disseminated to labor organizations to the extent that the responsible authority determines that the dissemination is necessary to conduct elections, notify employees of fair share fee assessments, and implement the provisions of [PELRA]."³⁴⁴ The statute also provides that personnel data "shall be disseminated" to a labor organization and to the Bureau of Mediation Services if the director of the Bureau either orders or authorizes the dissemination.³⁴⁵ This latter provision apparently is designed to resolve doubts government agencies may have about disseminating private personnel data to labor organizations. The language suggests, for example, that if the public employer is in doubt as to whether a certain dissemination is necessary to implement PELRA, the employer may contact the director of the Bureau of Mediation Services and ask his or her assistance in resolving that doubt.

342. Act of June 5, 1979, ch. 328, § 17, 1979 Minn. Laws 910, 919 (current version at MINN. STAT. § 13.43 (1982)).

343. MINN. STAT. §§ 179.61-.76 (1982).

344. Act of May 24, 1981, ch. 311, § 10, 1981 Minn. Laws 1427, 1432 (codified at MINN. STAT. § 13.43(6) (1982)).

345. MINN. STAT. § 13.43(6) (1982).

Victim of Crimes, Access to Investigative Data

One of the implications of the MGDPA's data classification system, and, in the opinion of some, a serious defect of that system, is that there may be situations in which an individual having a legitimate and significant interest in gaining access to certain data may not be able to do so because of the classification of the data. In the instance of active law enforcement investigative data,³⁴⁶ the data's confidential classification may preclude access even to the victim of the crime.

The problem of victim access to active investigative data is particularly acute when the victim, or his or her attorney or other representative, may want and even need access to the investigative data to begin assessing or preparing a civil case against the alleged perpetrator. While there may be insufficient investigative data to criminally charge and convict the alleged perpetrator, the difference in the degree of proof in a civil case may make the investigative data or evidence developed from it legally sufficient, or at least very helpful, in preparing the civil case.

To deal with victim access to investigative data, the legislature, in 1979, amended the MGDPA to provide that upon written request to the appropriate prosecutorial authority in the jurisdiction which is maintaining the active investigative data, the prosecuting authority "shall release investigative data collected by a law enforcement agency to the victim of a criminal act or his legal representative."³⁴⁷ The prosecuting authority is not required to provide victims or their legal representatives access to active investigative data if "the prosecuting authority reasonably believes: (a) That the release of that data will interfere with the investigation; or (b) That the request is prompted by a desire on the part of the requestor to engage in unlawful activities."³⁴⁸

Victims of Crimes, Protection of Identities

Certain provisions of the MGDPA are intended to protect the identities of crime victims. These provisions are scattered throughout the MGDPA and provide varied treatment for victim identities. One provision of the MGDPA generally provides that all data contained on law enforcement incident complaint reports are

346. *Id.* § 13.82(6).

347. Act of June 5, 1979, ch. 328, § 21, 1979 Minn. Laws 910, 922 (current version at MINN. STAT. § 13.82(6) (1982)).

348. MINN. STAT. § 13.82(6) (1982).

public data.³⁴⁹ This general rule is subject to certain exceptions. Among those exceptions is: “[D]ata on individuals which could reasonably be used to determine the identity of . . . [a] victim of criminal sexual conduct or intrafamilial sexual abuse shall be private data on individuals.”³⁵⁰ As private data, names and other data which would identify victims of the specified crimes cannot be made available to the public from an incident complaint report.

A separate provision of the MGDPA authorizes law enforcement agencies to protect the identities of victims of any crime, witnesses to crimes, and paid and unpaid informants subject to certain conditions specified in the provision. This authority derives from a comprehensive amendment regulating law enforcement data enacted in 1981.³⁵¹ Law enforcement agencies also have unconditional authority to protect the identities of undercover law enforcement officers and victims of crimes involving sexual conduct.³⁵²

For both victims of nonsexual conduct crimes and witnesses to any crime, the procedural requirements which must be met before identities can be protected are the same. The authority given to law enforcement agencies provides in pertinent part that among those circumstances in which a law enforcement agency may withhold public access to data on individuals to protect identities are:

When access to the data would reveal the identity of a victim or witness to a crime if the victim or witness specifically requests that his identity not be revealed, and the agency reasonably determines that revealing the identity of the victim or witness would threaten the personal safety or property of the individual.³⁵³

If the law enforcement agency determines there is a reasonable threat, then the agency may withhold public access to any data which would reveal the identity of the victim or witness. Although the MGDPA does not state a classification for this identity data, it

349. *Id.* § 13.81(1)(a). For a detailed discussion of what constitutes an incident complaint report and how the data contained in these reports should be treated, see letter opinion from Minnesota Attorney General to Marshall City Attorney (Dec. 29, 1980), on file with Opinions Division, Office of the Attorney General.

350. MINN. STAT. § 13.81(1)(a) (1982).

351. Act of May 29, 1981, ch. 311, § 36, 1981 Minn. Laws 1427, 1441.

352. MINN. STAT. § 13.82(10) (1982).

353. *Id.* § 13.82(10)(d).

appears from a practical perspective that the data would be "private."

The MGDPA is silent on whether or not law enforcement agencies should provide notice to victims and witnesses of the right to have their identities protected. However, various professional law enforcement associations have recommended to law enforcement agencies that some type of notice be provided and have developed standard forms and procedures to provide notice and to review requests for protection.³⁵⁴

Welfare Data

Unlike personnel data, which is defined by the MGDPA in terms of the status of the individuals on whom data is maintained, welfare data is defined by the MGDPA in terms of the agencies which maintain the data. Except for certain data collected and maintained because of investigations relating to enforcement of rules or law,³⁵⁵ and some data maintained about licensees,³⁵⁶ all other data on individuals maintained by the "welfare system" is classified as private data on individuals.³⁵⁷

The concept of the "welfare system" is a unique feature of the MGDPA's treatment of welfare data. The welfare system includes "the department of public welfare, county welfare boards, human services boards, community mental health boards, state hospitals, state nursing homes, and persons, agencies, institutions, organizations and other entities under contract to any of the above agencies to the extent specified in the contract."³⁵⁸

The MGDPA also applies to "statewide systems." For purposes of the Act, a statewide system "includes any record-keeping system in which government data is collected, stored, disseminated and used by means of a system common to one or more state agencies or more than one of its political subdivisions or any combination of state agencies or political subdivisions."³⁵⁹

Based on that definition and on the definition of welfare system,

354. See Resolution adopted by Minnesota State Chiefs of Police Association (Sept. 11, 1981) (copy of resolution on file with Daryl Plath, Association Secretary and Chief of Hastings, Minnesota, Police Department).

355. MINN. STAT. § 13.46(3) (1982) (welfare investigative data classified as confidential).

356. *Id.* § 13.46(4).

357. *Id.* § 13.46(2).

358. *Id.* § 13.46(1)(c).

359. *Id.* § 13.02(18).

the rules of the Department of Administration categorize the welfare system as a statewide system within the meaning of the Act.³⁶⁰ One consequence of designating the welfare system as a statewide system is that the entire system has only one responsible authority.³⁶¹ The responsible authority for the welfare system is the Commissioner of the Department of Public Welfare.³⁶²

Besides specifying the treatment of data on individuals by the welfare system, the welfare data section also prescribes the handling of various types of licensing data maintained by the Department of Public Welfare³⁶³ and the handling of and access to medical data generated by health providers under contract to agencies of the welfare system.³⁶⁴ Lastly, the section provides that, in most instances, data "collected, used, maintained or disseminated by the welfare system that is not data on individuals is public."³⁶⁵ However, data not on individuals the disclosure of which might jeopardize "the security of information, possessions, individuals or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass or physical injury" are classified as nonpublic.³⁶⁶

Willful Violations of the MGDPA

There are a variety of situations in which the finding of a willful violation of the MGDPA will be significant. In an action for damages, a finding that an agency or responsible authority willfully violated the MGDPA may entitle a plaintiff to an award of "exemplary damages."³⁶⁷ A finding of a willful violation of the MGDPA will be necessary to convict a person of the misdemeanor penalty provided by the MGDPA.³⁶⁸ The criminal penalty provision appears to apply to anyone who violates the MGDPA and not just to public agencies and public servants.³⁶⁹ A finding of a willful violation of the MGDPA is also required if an agency decides

360. See 2 MINN. CODE AGENCY R. § 1.202(G)(3)(a) (1982).

361. See *id.* § 1.202(K)(3).

362. See *id.*

363. See MINN. STAT. § 13.46(4) (1982).

364. See *id.* § 13.46(5).

365. *Id.* § 13.46(6).

366. See *id.* §§ 13.37(1), .46(6).

367. *Id.* § 13.08(1) (exemplary damages of "not less than \$100, nor more than \$10,000 for each violation" may be imposed).

368. See *id.* § 13.09.

369. "Any person who willfully violates [the MGDPA or rules promulgated thereunder] is guilty of a misdemeanor." *Id.*

to discipline any of its employees for violations of the MGDPA.³⁷⁰

X-rays

A unique feature of the MGDPA is that it regulates more than just those traditional types of government data which are commonly understood to be records, files, information, datum or other types of recorded information. In general, traditional government information is, at its most basic level, collections of words and numbers. The MGDPA also extends its various regulatory features to non-traditional forms of "information" such as X-rays, audio, video or magnetic tape and photographs. This extension is accomplished primarily through the statement of the definition of government data. The definition states, in pertinent part, "'government data' means all data . . . *regardless of its physical form, storage media or conditions of use.*"³⁷¹ Support for this expansive view of what constitutes government data is found in other provisions of the MGDPA. For example, photographic negatives which are maintained by the state Department of Public Safety as part of the driver's license record system are classified as private data on individuals.³⁷² In inactive law enforcement investigative files, photographs "which are clearly offensive to common sensibilities are classified as private data."³⁷³

Yearly Report

For the first two years of the MGDPA's development, the legislature attempted to refine a mechanism by which the public would receive notice of the types of data on individuals maintained by Minnesota governmental agencies.³⁷⁴ This notice provision is comparable to that contained in the federal Privacy Act of 1974.³⁷⁵ In 1974 and 1975, the Department of Administration was required to gather detailed information from state agencies and political subdivisions to prepare reports based on that information and to submit these reports to the legislature. In 1976 the legislature again amended the Act to produce the current reporting

370. Willful violation by a public employee "constitutes just cause for suspension without pay or dismissal." *Id.*

371. *Id.* § 13.02(7) (emphasis added).

372. *Id.* § 13.69(2).

373. *Id.* § 13.82(5).

374. *See* Act of Apr. 11, 1974, ch. 479, § 2, 1974 Minn. Laws 1199, 1200; Act of June 5, 1975, ch. 401, § 2, 1975 Minn. Laws 1353, 1354.

375. *See* 5 U.S.C. § 552a (1976 & Supp. V 1981).

requirement.³⁷⁶

The statute now requires agencies to prepare a public document containing the title, name and address of the agency's responsible authority; a description of the types of private or confidential data maintained by the agency; and copies of blank forms used to collect private or confidential data on individuals.³⁷⁷ Each year the agency must update the public document to maintain its accuracy.³⁷⁸ The responsible authority is required to make this document available to the public. The document need not be submitted to the Commissioner of Administration unless he requests submission.³⁷⁹

The rules of the Department of Administration provide further guidance to responsible authorities as to the content of the yearly report.³⁸⁰ If the full scale report had not been prepared as of the effective date of the rules, then an interim report must be prepared and made available to the public until the full report is completed. The rules require that the following additional information be included in the public document: names, titles and addresses of any designees appointed by the responsible authority; identification of the files or systems for which the designee is responsible; citations to state statute or federal law which classifies each type of data maintained by the agency as private or confidential. The appendix to the rules includes an advisory form which agencies may use to prepare the public report.³⁸¹

Zoo

The Minnesota Zoological Garden is a public agency.³⁸² Accordingly, it is subject to the MGDPA³⁸³ and is obliged to discharge a number of affirmative duties including:

1. appointing a responsible authority;³⁸⁴
2. compiling an inventory of records;³⁸⁵
3. developing procedures for access to public data;³⁸⁶

376. See Act of Apr. 13, 1976, ch. 283, § 6, 1976 Minn. Laws 1063, 1064.

377. See MINN. STAT. § 13.05(1) (1982).

378. See *id.*

379. See *id.* § 13.05(1), (2).

380. See 2 MINN. CODE AGENCY R. § 1.212(B) (1982).

381. See Advisory Form E, 6 Minn. Admin. Reg. 279-80 (1981).

382. See generally MINN. STAT. ch. 85A (1982).

383. *Id.* § 13.02(11).

384. See 2 MINN. CODE AGENCY R. § 1.202(K)(2)(e) (1982).

385. See MINN. STAT. § 13.05(1) (1982).

386. See *id.* § 13.03(2).

4. publishing a public document setting forth the rights of data subjects and procedures for exercising those rights;³⁸⁷
5. preparing procedures for updating files;³⁸⁸
6. giving Tennessean Warnings³⁸⁹ to individuals from whom private or confidential data are collected;³⁹⁰
7. establishing procedures to provide access to parents or minors;³⁹¹
8. developing procedures to ensure non-access to confidential data;³⁹²
9. implementing procedures to ensure access to summary data;³⁹³
10. reviewing and identifying all data maintained by the agency and ensuring that restrictive classifications are supported by state statute or federal law;³⁹⁴
11. training designees;³⁹⁵
12. publishing a list identifying the responsible authority and all designees;³⁹⁶
13. preparing administrative procedures and educating staff;³⁹⁷
14. developing informed consent forms;³⁹⁸
15. formulating a plan for the review and analysis of data practices.³⁹⁹

387. *See id.* § 13.05(8).

388. *See id.* § 13.05(5).

389. *See Tennessean Warning* this index.

390. *See* MINN. STAT. § 13.04(2) (1982).

391. *See* 2 MINN. CODE AGENCY R. § 1.205(C) (1982).

392. *See id.* § 1.206(B).

393. *See id.* § 1.207(B).

394. *See id.* § 1.208.

395. *See id.* § 1.211(B).

396. *See id.* § 1.214.

397. *See id.* § 1.213(D).

398. *See id.* § 1.213(E)(2)(c).

399. *See id.* § 1.214.

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Welfare system, defined, Minn. Stat. § 13.46(5)

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Workers' compensation, self-insurance data, Minn. Stat. § 13.73

X

X-rays, as type of government data, Minn. Stat. § 13.02(7)

Y

Yearly report to public, Minn. Stat. § 13.05(1)

(see also **Annual report**)

Z

Zoo, as type of state agency, Minn. Stat. § 13.02(17)

