The Office of the
Minnesota Attorney General
helping people afford their lives and live with dignity, safety, and respect

January 10, 2024

Senator Bonnie Westlin, Chair
Senator Warren Limmer
Senator Eric Lucero
Senator Erin Maye Quade

Representative Jamie Becker-Finn, Vice Chair
Representative Sandra Feist
Representative Harry Niska
Representative Peggy Scott

Re: HF 2480; Classification of data maintained by attorney general clarified

Dear Chair Westlin, Vice-Chair Becker-Finn, and members of the Legislative Commission on Data Practices,

This Commission is currently considering HF 2480, a proposed amendment to Minnesota Statutes, section 13.65. Section 13.65 is a provision of the Data Practices Act that addresses specific types of data held by the Attorney General's Office ("AGO"). The AGO opposes the change because, among other things, it would impede the statutorily mandated work of the Attorney General's Office to represent the legal interests of the State of Minnesota and to help Minnesotans afford their lives and live with dignity, safety, and respect.

Section 13.65 reflects a careful balancing of competing goals. As the chief legal officer for the State, the AGO holds a variety of sensitive data, the confidentiality of which is essential to the functioning of a legal office and a law-enforcement agency, both of which the AGO is. This includes data provided to the AGO by State agencies, non-profits, companies, and individuals that is essential to the State's efforts to pursue bad actors who violate state and federal laws. While HF 2480 may appear innocuous, it would significantly alter how large amounts of data held by the Office would be classified and would substantially impact the Office's work.

You are aware that in 2022, the Minnesota Supreme Court issued a decision in *Energy Policy Advocates v. Ellison* that confirmed the Office's long-standing application of Minnesota Statutes section 13.65.

To be clear, the *Energy Policy Advocates* decision did not fundamentally alter Minnesota law, nor does it have broad-reaching impacts for the Data Practices Act. Rather, the Court confirmed an interpretation of Section 13.65 that the AGO has applied for more than 40 years. And as the Supreme Court noted in its decision, the holding of the case is limited to the interpretation of Section 13.65, which applies only to data held by the AGO. Simply put, it is entirely appropriate that the Data Practices Act provides more protection over data held by the AGO than data held

by other government offices given the particularly sensitive nature of our work on behalf of the State and the people of Minnesota.

It is also useful to take stock of the actual data at issue in *Energy Policy Advocates*. The data in the case is not, as some have suggested, solely about the State's efforts to hold energy companies liable for their misrepresentations on climate change, or the Office's later retention of special counsel to assist in those efforts. The data requests at issue in this case were particularly broad and swept in data on a host of issues. For example, the request sought attorney-client and work-product privileged communications between the Office and other attorney general offices concerning multi-state antitrust litigation. The Office later did produce substantial data concerning its retention of outside counsel to assist in its climate-deception lawsuit.[1] The Office has never made any effort to conceal its retention of outside counsel to pursue its climate-deception litigation, nor has the Office's long-held interpretation of Section 13.65, accepted by the Supreme Court, prevented outside parties from obtaining these documents. [2]

The impact of this proposed statutory change is not just limited to the issues at hand in the *Energy Policy Advocates* case. If enacted, this bill would produce significant and adverse unintended consequences for the entirety of the statutorily mandated work this Office does on behalf of Minnesota consumers and State agencies, boards, and commissions.

The primary statutory text at issue is in subdivision 1 of Section 13.65. This subdivision classifies five types of data as "private data on individuals" when in the possession of the AGO. This classification means that the data can be accessed by a person who is the subject of the data, but not the public generally. The proposed amendment would make any data that is not about a person accessible to anyone. It poses a number of problems with each of the statute's five classifications, which would create a host of negative effects.

Subdivision 1(a) – Records of disciplinary proceedings. In its capacity as the State's chief legal officer, the AGO represents State agencies, boards, and commissions in many different types of disciplinary matters. The data classification of these proceedings varies widely depending on the nature of the action, the party being disciplined, and the result of the disciplinary proceeding. Importantly, all of this data also exists in the files of the actual agency that is proposing to impose the discipline. Subdivision 1(a) gives significant protection to this data in the hands of the AGO for at least three good reasons.

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[1] These documents did not exist at the time of the Data Practices Act requests at issue in *Energy Policy Advocates*, which explains why they were not produced earlier.

[2] The Minnesota Coalition on Government Information submitted written testimony to the October 24, 2023 meeting of the Commission in support of the proposed change to Section 13.65 that, among other things, contains an argument for the proposed change that uses a recent Supreme Court decision reviewing actions of the Minnesota Pollution Control Agency in asking the Environmental Protection Agency to delay its comments to a proposed Polymet water discharge permit to show why this change is needed. *See In re Matter of Denial of the Contested Case Hearing Requests*, 993 N.W.2d 627 (Minn. 2023). The case has no relevance to the issue at hand. That was not a Data Practices Act case and did not turn on any Data Practices Act issue, and even if the Data Practices Act were relevant to this case, Section 13.65 has no application to data held by the MPCA. The proposed amendment to Section 13.65 in HF 2480 would have had no impact on the outcome of that case.

- First, by protecting the data in the possession of the AGO, subdivision 1(a) prevents the data from having a different classification depending on whether it is in the hands of the agency or the AGO. A requestor seeking the data can always make a request for the data to the relevant agency, where the request will be processed using the appropriate Data Practices Act classification for that data.
- Second, subdivision 1(a) places the decision-making in the correct place: the agency, board, or commission that is considering the disciplinary matter. The relevant agency is better positioned than the AGO to determine the appropriate data classification for the agency's disciplinary files and to produce any public data.
- Third, subdivision 1(a) prevents the AGO from becoming a clearinghouse for the disciplinary data of State agencies. On these matters, the role of the AGO is to represent State agencies in litigation, not manage their data-practices responsibilities. It is both unwise and cost-ineffective to have attorneys managing the Data Practices Act obligations of their clients.

Subdivision 1(b) – Records of non-final policy and administrative decisions. This provision concerns communications and non-investigative files in the AGO, often on sensitive matters, and strikes a careful balance between the goals of allowing candid communications in forming decisions and affording public access once a final public action is taken. It is similar to the deliberative process privilege that is common in open records statutes, including the federal Freedom of Information Act. *See United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 267–68 (2021).[3] Subdivision 1(b)'s protections are appropriately focused, yet they allow individuals to obtain the information if the data is about them (even if not final) while allowing the general public access to final public actions. The proposed amendment to Section 13.65 – which its advocates present as a narrow amendment – would in fact fundamentally remove the protections Subdivision 1(b) is designed to afford the AGO.

Subdivisions 1(c) & 1(d) – Records of Consumer Complaint Data. The AGO is charged with enforcement of the State's various consumer-protection laws. As part of its mission, the AGO receives and reviews a very large volume of complaints from the public that are critical to

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[3] As the Supreme Court held in *United State Fish and Wildlife*: "This case concerns the deliberative process privilege, which is a form of executive privilege. To protect agencies from being "forced to operate in a fishbowl," the deliberative process privilege shields from disclosure "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated[.]" The privilege is rooted in "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news." To encourage candor, which improves agency decision-making, the privilege blunts the chilling effect that accompanies the prospect of disclosure.

"This rationale does not apply, of course, to documents that embody a final decision, because once a decision has been made, the deliberations are done. The privilege therefore distinguishes between predecisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not." *United States Fish & Wildlife Serv.*, 592 U.S. 261 at 268.

identifying whether any entities may be violating State and federal laws. Making consumer complaint data public would substantially chill the willingness of parties to come forward with complaints for a variety of reasons, including a fear of retaliation. Even if the proposed amendment left in place some protections for complaining individuals, it would still chill the submission of very important complaints.

Small businesses are often just as concerned as individuals about their complaints to the AGO becoming public and the resulting possibility of retaliation. This is particularly true where a small business is complaining about the business practices of a large company whose services are vital to it – for example, a small business that relies on internet access that is available only from the company they are complaining about. Similarly, the AGO receives numerous complaints from non-profit corporations who will be less willing to come forward with knowledge of fraud if they knew their report would be publicly available. The proposed amendment to Section 13.65 will significantly chill the willingness of the public – both individuals and small businesses – to make consumer-protection complaints to the AGO and would impede the Office's work and make it more difficult to help the public.

Subdivision 1(d) – Inactive Civil Investigative Data. The AGO is the State's primary law-enforcement agency for civil matters, especially with respect to enforcement of consumer-protection laws. Subdivision 1(d) permits the AGO to protect inactive civil investigative data, a protection that is essential to the Office's investigatory work. On this issue, there can be no dispute that the legislature *intended* to afford broad protections to inactive civil investigative data. The proposed amendment substantially alters what investigative data would be subject to protection from public disclosure: the amendment would remove the protection for all investigations into non-individuals, which is a drastic change. For the first time, this proposed amendment would differentiate between investigative data on an individual who is suspected of violating a consumer protection statute and a company that is violating the same statute, where the latter would no longer be classified as private data. This change would significantly hamper the AGO's investigations. In the course of its investigations, the AGO often obtains data from entities like nonprofits and corporations: sometimes that data comes from third-party entities and sometimes it comes from the entity being investigated. Either way, making these entities' data publicly available would significantly chill the Office's investigations into suspected consumer fraud and violations of state and federal consumer-protection laws.

The antitrust enforcement context provides one example of the chilling effect of this proposed amendment. In its antitrust work, which is mandated by both state and federal law, the AGO often obtains important information from the customers or vendors of companies engaged in anticompetitive conduct. Many of these customers and vendors are not individuals but businesses. A farm organized as an LLC, for example, might rightly fear retaliation for reporting on the conduct of the large agricultural conglomerates to which it must sell its products. Subdivision 1(d) allows the AGO to assure these entities that they can safely cooperate with the AGO without fear that their cooperation will become public through a public records request if the investigation becomes inactive.

Subdivision 1(e) – Home protection hotline data. As part of the AGO's consumer-protection efforts, it provides important services to consumers facing the loss of their home. The AGO receives sensitive data from consumers about their income and mortgage status, and this data clearly merits protections. At present, the only people who can access the data are the consumers themselves, and the protections are easily administered: the AGO simply determines whether the requestor is the consumer, and if not, denies access to the data. The amendment would create uncertainty about what data are in fact protected and require a document-by-document analysis of whether the data pertains to an individual or to a corporate entity. There is no reason for general-public access to these files, nor is there any sense in forcing the AGO into the administrative burdens of parsing the data. Those resources are better spent on the Office's consumer-protection mission and its efforts to help Minnesotans stay in their homes.

Thank you for the work that you do on this Commission and thank you for allowing me to provide the perspective of the Attorney General's Office on this bill.

Sincerely,

Keith Ellison
Attorney General