Legislative Commission on Data Practices

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Written Testimony of Matt Ehling
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Dear Commission members,

The Minnesota Coalition on Government Information (MNCOGI) would like to thank all members of the legislature who worked to re-authorize the Legislative Commission on Data Practices during this past session. Given the detail and complexity that attends data issues generally - and Data Practices issues specifically - MNCOGI is pleased to see the return of a dedicated venue for the evaluation and discussion of such issues.

As the Commission will be considering various topics to take up during its coming meetings, MNCOGI would like to submit an overview of various data-related matters for the Commission's consideration:

High-level Data Practices matters

Improving data requester experience

Given that ensuring public access to governmental information is a key function of the state's Data Practices Act (DPA), the Commission may wish to explore ways to improve the experience of the data-requesting public. MNCOGI continues to hear from public requesters who have been stymied in their efforts to access public data. Possible policy updates could involve changing the open-ended "reasonable time" standard in Chapter 13 to a more time-specific data production standard. Other changes could involve providing new remedies for governmental non-compliance, or enhancing existing remedies. Past suggestions have included instituting binding Data Practices opinions (at present, such opinions are advisory only), or modifying the existing civil remedy in § 13.08 to provide for more robust penalties.

Improve records retention

For government data to be accessible to the public, government entities must not only *produce* data they are legally required to disclose, but they must also *retain* data that will be requested in the future. However, the retention of government records is sometimes uneven, and controversies over records retention have arisen over the last few years. Recent news coverage about the State Patrol's destruction of e-mails sought in a civil suit provides one such example.

Solutions to record retention problem have been proposed in the past. For instance, Representative Scott proposed a bill in 2017 to set a standardized retention period for certain governmental correspondence, including e-mails. This proposal was supported by Legislative Auditor Jim Nobels, due to the fact that the Office of the Legislative Auditor needs to review such documentary material when it undertakes its program evaluation mission. Overseeing records retention is part of the Legislative Auditor's statutory duties, and with the coming turn-over in that position, there is an opportunity to highlight records retention issues as the auditor position is filled. As part of its evaluation, the legislature might also want to examine the current role of the Records Disposition Panel, on which the Legislative Auditor serves, along with the Attorney General and the State Auditor.

Evaluate data practices infrastructure

It may also be useful for the Commission to examine the state's overall data practices infrastructure, and to specifically review whether the Data Practices functions carried out by the Department of Administration (including data training, opinion writing, and data appeals) should be moved to an independent office outside of the executive branch. This idea has been raised several times in the past by legislative study groups, and would be similar to some other state models.

Electronic data management and data requests

Given that the bulk of data requests filed under the DPA are made - and fulfilled - electronically, it may be worth examining current practices around data request "portals" used by government entities; electronic

data inspection; and data copy costs.

Issue-specific Data Practices matters

Body camera data

It has been five years since the legislature passed regulations for portable recording devices (police body cameras), including regulations pertaining to how body camera data is classified and retained. At this juncture, MNCOGI believes it is worth evaluating how the statute (§ 13.825) is functioning in practice, and looking at where statutory adjustments could be made.

Complaint data about government employees

Since 2012, there has been a disparity in law between small cities and counties, and larger cities and counties in regard to the public's ability to access complaint data about certain government employees. (In short, residents of small cities and counties are prevented from accessing the same kinds of complaint data that are available to citizens of larger cities and counties.) This outcome resulted from a 2012 update to the "personnel data" section of the Data Practices Act (§ 13.43), but it has posed functional problems for citizen data access since then. For several sessions running, Senator Howe has introduced a bill that would address this disparity, and the Commission might wish to review either the bill or the issue.

Other data matters

While the bulk of MNCOGI's focus is on public access to government data, our board keeps track of other data issues that may be of interest to the Commission. Some of these are listed below:

Use of artificial intelligence by government

The adoption of artificial intelligence technologies by government entities will pose many challenges for government accountability and public understanding of governmental functions, as the technology itself is highly opaque, and raises many novel policy questions. A

comprehensive legal framework is needed to address the bundle of issues arising from the use of artificial intelligence technology by government entities. MNCOGI is willing to help the legislature probe these issues, and to offer suggestions for language to help regulate this area.

Use of Tennessen Warnings; other data privacy matters
How are Minnesota government entities currently using "Tennessen Warnings," which are generally required to be provided by government entities when they collect "private data on individuals?" This statutory requirement has been on the books for several decades, and a review of current practices may be helpful in understanding how government entities are using it (or not using it) at present.

Consumer data privacy landscape
Consumer data privacy continues to be much discussed throughout the nation, as California's consumer data privacy law bears witness to. There have been several attempts to enact similar legislation in Minnesota (Representative Elkins introduced one such bill last session), and the Commission would be a useful venue in which to continue that discussion.

Follow-up from prior hearings

MNCOGI has participated in numerous prior hearings before the Data Practices Commission (and its related bodies, such as the LCC Data Practices Subcommittee). In 2019, MNCOGI testified on two issues that have had further developments, which committee members should be aware of:

Access to cloud-based data under the DPA (discussed in 2019)
The LCC subcommittee held several hearings on whether data used by government entities and stored in third-party "cloud storage" was "government data" subject to the DPA's requirements. Importantly, there is now a court order from the Office of Administrative Hearings (OAH) holding that Anoka County's use of a cloud-based system to

store certain video data utilized by the county means that such data is "government data" subject to the DPA. In that case (*In the Matter of Walmart, Inc. v. Anoka County*), OAH Judge Lipman ordered Anoka County to play video data - which had previously been withheld by the government - at a court hearing.

Comprehensive surveillance and warrants (discussed in 2019)
The LCC subcommittee held a number of hearings on the use of facial recognition technology by government entities, and Senator Limmer proposed draft legislation for the purposes of discussion. One of the issues discussed in the course of those hearings was whether facial recognition technology embedded within municipal CCTV camera networks might trigger the Fourth Amendment's warrant requirement, due to the comprehensive scale of the surveillance. Recently, the Fourth Circuit Court of Appeals held that another type of comprehensive surveillance system - a twenty-four-hour aerial surveillance program operating over Baltimore, Maryland - implicated the Fourth Amendment due to the way it was structured and operated. (See *"Leaders of a Beautiful Struggle v. Baltimore Police Department"* No. 20-1495).

Thank you for your attention to these matters. MNCOGI board members would be happy to provide further details on any of the above issues.

Sincerely,

Matt Ehling
Board Member, MNCOGI