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HEARING ON H.F. 1933, H.F. 1940
FEBRUARY 26, 2014

Chairman Lesch and members of the House Civil Law Committee,

Thank you for the opportunity to submit written comments regarding H.F. 1933 and H.F. 1940.

I am a member of the Minnesota Coalition on Government Information (MNCOGI), an all-volunteer association of attorneys, librarians, journalists, and others interested in issues relating to government information and transparency. I serve as the chair of that organization's legislative issues committee, and help to review and evaluate proposals that come before the Minnesota Legislature related to Data Practices issues.

MNCOGI submits the following comments in relation to two bills on "booking photographs" that are presently before the committee. Both bills attempt to set parameters around access to - and use of - booking photos maintained by Minnesota law enforcement agencies.

Background

Behind both of these bills lies a controversy over the bulk publication of booking photographs by publications such as "mugshots.com" and other so-called "scandal sheet" enterprises. Such websites and publications make bulk requests for arrest data (including booking photographs) and then publish the data in an aggregated form, often on-line. Some web site operators charge a fee for the removal of booking photographs, on the supposition that many people will pay to have an arrest photograph erased from the permanent repository of the World Wide Wed.

Some individuals have raised concerns that such publications are - in some cases - inaccurately implying that arrested persons have actually been tried and convicted. Others have raised general objections to the practice of posting booking photographs on-line, where they can easily be connected to an individual's "search" history on Google or other computer search

engines. Still others object to the "fee-for-removal" practice followed by some unscrupulous web site operations.

While there are legitimate concerns underlying this controversy (including concerns about defamation), MNCOGI believes that any policies created to deal with the issue should avoid creating negative impacts on public data availability, and on the First Amendment.

MNCOGI's comments on the bills before the committee are as follow:

Issues with H.F. 1940
H.F. 1940 presumes to institute several requirements to govern the dissemination and use of booking photographs, many of which MNCOGI opposes.

Requesters should not have to specify their uses of public, government data
H.F. 1940 would require that - prior to the receipt of public booking photo data from a law enforcement agency - requesters must submit a statement to the agency that includes:

• The requester's name and addresses, including (if the requester is a company) the names and addresses of the company's majority shareholders or directors), as well as;

• "A brief statement of the purpose of the request and the manner in which the photograph is intended to be used."

The imposition of such a requirement would be a departure from long-standing practice under the Minnesota Government Data Practices Act (MGDPA). The MGDPA does not currently require that data requesters file statements regarding their use of public data with government entities. Such a requirement would reverse a central presumption behind the MGDPA, which is to provide the public with broad-based, non-discriminatory access to government data. MNCOGI believes that once government data has been classified as "public," the government should generally refrain from applying further controls over the data, such as applying the use-based disclosure parameters contemplated by H.F. 1940. (To the limited extent that the government has instituted controls over the use of public data, those

controls are already found in existing law, as will be described later in these comments.)

Requiring specific requesters to file use-related disclosures would also allow the government to place burdens upon a particular sub-set of data requesters that others do not face, in direct contravention of the egalitarian ideals behind the MGDPA.

If adopted more broadly, the practice of requiring requesters to file use-related disclosures would place a great deal of leverage in the hands of government entities, especially when those disclosures are connected to penalties such as those contemplated by H.F. 1940. The use of those penalties is more fully discussed later in these comments.

Requesters should not have to specify where they will post or otherwise publish public, government data

H.F. 1940 also contains requirements that data requesters submit disclosures regarding publication, including "all locations and formats of publication, including Web site addresses if applicable."

Again, provisions of H.F. 1940 would contravene long-standing practice under the MGDPA, which does not currently require that requesters provide notice to the government about where they will publish public, government data. Once government data has been classified as "public," the government should set no further parameters (including the filing of disclosures) regarding where such data is to be published. Connecting publication-related disclosures to penalties - such as those contemplated by H.F. 1940 - also raises First Amendment issues.

Certain provisions of H.F. 1940 conflict with the First Amendment

The most problematic part of the design of H.F. 1940 is its connection of publication-related disclosures to monetary penalties. For instance, in the event that a requester transfers or sells a booking photo to another person, that person must file a use-related disclosure to a Minnesota law enforcement agency. If they do not file such a disclosure, they then become subject to penalties that include "$1,500.00 for each violation" of the applicable portion of the proposed statute.

Although H.F. 1940's penalties are damages payable to the person who appears in a booking photograph, the mere fact that a requester must submit

a disclosure to a government entity prior to publication (or else face monetary penalties) creates First Amendment issues.

Penalties already exist that address concerns related to the mis-use of booking photographs

In examining the context and controversy surrounding H.F. 1940, it should be noted the need for such a bill is diminished by the fact that penalties for defamation already exist in Minnesota law. For instance, in the event that a publication inaccurately asserts that a person has been convicted of a crime when they have not, the aggrieved party may currently bring a defamation lawsuit.

Issues with H.F. 1933

While H.F. 1933 avoids many of the issues created by H.F. 1940, there are other matters to consider in the Legislature's review of this bill.

The Legislature should consider policy uniformity in electronic data dissemination

H.F. 1933 would bar the provision of booking photographs to requesters in an "electronic format." This language has presumably been included to slow the bulk collection and publication of booking photo data. In considering this proposal, the committee may wish to consider the longer-range prospects for the electronic dissemination of government data. Many agencies are now routinely publishing public government data on their web sites, and the Legislature may wish to consider policy continuity in how public data is to be disseminated in an electronic format.