WRITTEN TESTIMONY OF MATT EHLING
BOARD MEMBER
MINNESOTA COALITION ON GOVERNMENT INFORMATION

HEARING ON S.F. 1770
FEBRUARY 27, 2014

Chairman Latz and members of the Senate Judiciary Committee,

Thank you for the opportunity to submit written comments regarding S.F. 1770.

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 S.F. 1770, a bill that would clarify a provision of the Minnesota Government Data Practices Act (MGDPA) in light of the Supreme Court's majority opinion in the *Helmberger v. Johnson Controls* case.

Background

The *Helmberger* case involved a question of access to the records of a private company that had been contracted to perform a government function. The Timberjay newspaper had been investigating matters related to the construction of school buildings that were being built by a private company under contract with Independent School District 2142. The project's general contractor was Johnson Controls of Milwaukee, Wisconsin, and it was using a variety of sub-contractors to help complete its jobs. The Timberjay sought out Johnson's subcontracts for these projects - initially from the school district itself – under the MGDPA. The district maintained that it did not hold the records, and so the Timberjay requested them directly from Johnson Controls. For background, the MGDPA allows a requester to seek data directly from a private entity under public contract in such a circumstance, and the Timberjay made such a request. Johnson Controls then denied access to the data.

The Timberjay pursued the records through administrative processes until the issue arrived at the Minnesota Court of Appeals. That court found for the Timberjay, and ordered the data to be disclosed. Afterwards, the Minnesota Supreme Court took up the case, and sided with Johnson Controls on a fairly narrow basis. The Supreme Court opined that private contractors performing government functions were only obligated to disclose data to public requesters if their contracts contained an express "notice" provision stating as much. Since Johnson's contract did not contain such a provision, the Court held that the company was not obligated to provide data to the Timberjay under the MGDPA.

Now, in light of the *Helmberger* opinion, the Minnesota Legislature has an opportunity to clarify Minnesota law to ensure that records held by private entities performing government functions are available for public review.

Clarification would further accountability

At issue here is a fundamental matter of public accountability. Minnesota government agencies contract with private entities to perform a wide variety of government functions – everything from the provision of public health care services to road repair. Vast amounts of state money are spent on privatized government services, and the public has a right to know how its resources are being utilized, regardless of whether the party expending those resources is a government entity itself, or a private, contracted party.

Because of this, the MGDPA was amended in 1999 in order to shed light upon privatized government functions. The provision that was added at the time – Minn. Stat. 13.05, Subd. 11 – is the provision now at issue before the committee. Clarifying that provision would further the purpose behind the original 1999 language, and thus further the cause of public oversight of governmental activities.

S.F. 1770 aligns with the *Hemlberger* opinion

S.F. 1770 makes modest but important adjustments to the language of Minn. Stat. 13.05, Subd. 11. First and foremost, the bill aligns with the Supreme Court's *Helmberger* opinion, which relies upon contract-based notice provisions as a trigger to apply the MGPDA to private entities. S.F. 1770 modifies Minn. Stat. 13.05, Subd. 11 to expressly state the following:

"All contracts entered into by a government entity must include a notice making it clear that the requirements of this subdivision apply to the contract."

This language slightly modifies the prior language to more expressly require that all government contracts must contain a notice provision.

S.F. 1770 ensures the availability of data held by private contractors
Importantly, S.F. 1770 also clarifies the reach and expands the applicability of Minn. Stat. 13.05, Subd. 11.

The bill expressly states that "all data created, collected, received, stored, used, maintained, or disseminated by any party" involved in performing a contracted government function is subject to the MGDPA. This language implicitly draws in all sub-contract entities involved in privatized government functions, as well as the primary, contracted entities.

In addition, S.F. 1770 expands the applicability of Minn. Stat. 13.05, Subd. 11 in light of an issue raised by the Supreme Court. The bill expressly states that even in the event that a government contract with a private entity does not contain a notice provision, the failure to include such a provision does not "invalidate the application" of the MGDPA to that private entity. This addresses one of the Supreme Court's concerns in *Helmberger* about applying the MGDPA to a private party when the Legislature had not made it expressly clear that the Act would apply in the absence of specific contract language.

Conclusion
In conclusion, MNCOGI would urge the committee to support the clarity that S.F. 1770 seeks to bring to Minnesota law, and the protection of the public interest that would result from such a statutory change.