MINNESOTA COALITION ON GOVERNMENT INFORMATION
HMO PUBLIC PROGRAM DATA ISSUE SUMMARY
Prepared by Matt Ehling

HOUSE CIVIL LAW COMMITTEE
December 15, 2014

The Minnesota Coalition on Government Information (MNCOGI) has previously testified about the status of Health Maintenance Organization (HMO) data pertinent to HMO-administered public health care programs.

Attached is MNCOGI's previous testimony about the data issues involved in this matter. It was originally presented to the Legislative Commission on Data Practices on October 28, 2014.

Other key points that are pertinent to this debate are as follow:

1. HMOs manage large public programs funded by taxpayer dollars.
Minnesota has chosen non-profit HMOs to administer large public health care programs. These programs utilize a combination of state and federal dollars. The HMOs receive blocks of money from the state, and then pay subcontract providers for services rendered to public program enrollees. Prior to the decades of the 1980s/1990s, the administration of these programs was largely conduced by the state, rather than by private entities.

2. Public oversight is necessary to ensure the best outcomes.
Public health care programs use large amounts of taxpayer dollars. Minnesota has a significant interest in ensuring that its public programs are well run, and maximize the use of taxpayer dollars to the benefit of program enrollees and the state, generally. This is true whether public or private entities administer these programs.

The state currently conducts program oversight in a variety of ways. For instance, there are ongoing state reviews of HMO solvency, and the Legislative Auditor has recently used a third party firm to conduct public program audits. However - as in other areas of government function - public access to program data is the final benchmark for true oversight, as the public itself is paying for the programs.

Key oversight-realted information includes amounts paid to providers, and specific HMO administrative expenses related to public programs. Together, these can be

used to understand how much money is being spent on patient care, and how much is being utilized by the HMO system in terms of financial reserves, administrative costs, etc.

3. The legislature should ensure that taxpayers have access to data about public health care program operations.

Earlier this year, attempts were made to classify specific data related to public health care program administration as "nonpublic" (see the attached amendment to HF 2167). Such calls have recently been renewed. MNCOGI would urge the legislature to ensure that HMO data that is pertinent to the oversight of public health care plans is available as "public" data.

Please see the attached testimony of October 28, 2014 for a discussion of technical specifics regarding health plan data classification.

Minnesota Coalition on Government Information (MNCOGI)
Overview of health plan data classification
Prepared by Matt Ehling, MNCOGI Legislative Issues Committee

Legislative Commission on Data Practices
October 28, 2014

Background.

The current discussion about the classification of certain health plan (HMO) data was spurred by an earlier debate over the passage of the so-called "Helmberger" Data Practices bill - a bill that arose from a legal dispute over the reach of Minn. Stat. 13.05 Subd. 11, a provision of the Minnesota Government Data Practices Act (Chapter 13).

Minn. Stat. 13.05 Subd. 11 was originally enacted by the Minnesota Legislature in 1999, in recognition of the large number of private contractors that had become involved with government operations. Such contractors were (and still are) routinely retained to perform a variety of government functions underwritten by taxpayer dollars.

Minn. Stat. 13.05 Subd. 11 was historically viewed as covering private entities that contracted with the government in order to execute certain government functions. The coverage was limited to the contracted functions that particular private entities were performing. Such entities were assumed to be covered by virtue of the fact that their contracts were executed under Minnesota law, even though those contracts did not contain any express reference to Minn. Stat. 13.05 Subd. 11.

In 2013, the Minnesota Supreme Court, in its *Helmberger v. Johnson Controls* decision, opined that in order for the MGDPA to apply to private entities, their contracts with the government needed to contain an express reference to 13.05 Subd. 11. Without such express "notice" language, Chapter 13 would not cover private contractors.

During the 2014 legislative session, the Minnesota Legislature responded to the court's decision with the so-called "Helmberger" bill, which modified 13.05 Subd. 11 to ensure that all private contractors were covered by Chapter 13, even without the existence of specific notice language in their contracts.

During the debate over the bill's passage, the Minnesota Council of Health Plans (representing HMOs) first sought protection for specific HMO data pertinent to contracted work with the Department of Human Services (DHS). The Council then sought an amendment that would have exempted HMOs entirely from 13.05 Subd. 11 for one year. MNCOGI opposed that amendment, but supported an alternative amendment that subjected HMOs to the law, but delayed implementation for one year.

Now, the legislature has an opportunity to revisit the issue of health plan data, and the larger question of what data - if any - should be reclassified before the one-year HMO "buffer" period expires.

As today's hearing largely involves an overview of this matter, MNCOGI presents the following framework as an aide to evaluating any data classification requests that are brought forward.

1. The "Helmberger" bill re-set the data landscape to where it was from 1999-2013.

Before evaluating whether any changes to HMO data classification are warranted, it is important to understand what the "Helmberger" bill (SF 1770) did to the Data Practices Act and the general data landscape.

As noted in the introduction, SF 1770 did not create a *new* public right to access private contractor data, but merely *reinstated* the understanding of 13.05 Subd. 11 that existed from 1999-2013. The understanding that private contractor data pertinent to a government function was subject to Chapter 13 was explored in several Data Practices advisory opinions during those years - opinions that upheld the concept where it applied.

In the aftermath of the passage of SF 1770, the data landscape that exists in relation to 13.05 Subd. 11 is the same as it was during the years 1999-2013, save for the current one-year delay governing HMOs that will expire in June of 2015.

2. Understanding the "welfare data" section of Chapter 13 will clarify the current debate.

More pertinent to today's discussion, it is important to understand that SF

1770 did not change a key provision of state law that governs HMO data. That is Minn. Stat. 13.46 - the "welfare data" section of Chapter 13.

13.46 Subd 1(c) defines the "welfare system" as comprising the Department of Human Services (DHS) and other government organizations, and any entities under contract to those organizations "to the extent specified in the contract." Minnesota's HMOs fit squarely within this definition, as they are entities under contract to DHS to administer public health care programs.

13.46 provides a great deal of protection for data on individuals, which is understandable given the sensitive nature of the health care information collected and maintained by the covered organizations. In addition, 13.46 Subd. 6 deals with "other data" that is not pertinent to individuals. This other data is classified as "public" with the exception of security data, and civil and welfare investigative data. Subdivision 6 thus can be read to leave certain operational and organizational information held by contracted entities available for public review, unless it is classified by a separate provision of law.

Data pertinent to subcontract entities that contract with HMOs may also be covered by Chapter 13 in certain instances. For instance, in 2001 the Commissioner of Administration issued a Data Practices Advisory Opinion (01-052) maintaining that Delta Dental (a subcontractor to Blue Cross/Blue Shield) must release certain data related to work conducted under the auspices of the state's "PMAP" public health care program.

In short, the legislature must take into consideration the full scope and reach of Minn. Stat. 13.46 when considering any changes to HMO data sets.

3. Requests to create "not public" data deserve close scrutiny.

Chapter 13 affords a public presumption to all government data, unless the data are otherwise classified by state or federal law. This presumption was instituted to ensure that citizens had access to information about government operations undertaken in their names, and paid for with their tax dollars.

Direct public access to government data permits citizens, the press, and policy makers to undertake their own investigations, and to make their own

evaluations about a wide manner of government processes. Such access is a foundational principle of good governance. Accordingly, MNCOGI believes that any claim that certain government data should be withdrawn from public view should be closely scrutinized. MNCOGI likewise believes that the creation of "not public" data must be linked to a clear public benefit that eclipses any civic good otherwise derived from the availability of that data.

MNCOGI further notes that there is an important relationship between public access to government data, and the impact of government entities and programs on the public itself. Put simply, the greater the impact, the greater the public's interest in having access to data for the purposes of oversight. This is certainly the case with public and private entities that utilize large amounts of taxpayer resources.

For instance, Minnesota's public health care programs are administered by non-profit HMOs that disseminate billions of state and federal dollars on a biannual basis. Because of this fact, the public has a vested interest in understanding how those entities manage government funds. This fact that should be considered when and if requests are made to re-classify HMO data.

4. Changes to HMO data classifications should not convert important public data to "nonpublic" data.

During the course of the debate over the passage of SF 1770, many data-related amendments were discussed and proposed. Some were very broad, including amendments that would have classified all "financial and business" data held by HMOs as "nonpublic" data. Such a change would have effectively removed from public view much existing, public information about the operation of HMOs, including statutory financial statements and annual reports that are provided to the Minnesota Department of Health (MDH) for oversight purposes. Such reports - which contain aggregate-level financial information about HMO operations - are currently maintained as public data and available for public inspection.

As the legislature evaluates how and whether to classify HMO data going forward, it should take care to ensure that it does not remove important, currently public data from view.

5. Limits on the exposure of private business data must be understood.

Much of the debate surrounding the passage of SF 1770 involved HMO concerns about the exposure of certain business information through data practices requests.

To properly frame this discussion, it must be understood that Minn. Stat. 13.05 Subd 11 (even as amended by SF 1770) does not generally expose all business data held by private entities. It only makes available data that is relevant to a contracted government function.

More pertinent to today's discussion, private entities (such as HMOs) under contract to the "welfare system" only expose certain business data that is relevant to a function under contract. Chapter 13 coverage would not reach their other, private lines of business.

6. "Trade secret" data is already covered by Chapter 13, but its application has limitations.

It is also worth noting that there are other, existing protections for certain types of business information already found in the Data Practices Act. Minn. Stat. 13.37 Subd 1(b) contains a classification for "trade secrets information" that can be applied to private vendor data when private entities interact with the government.

It is equally important to understand that the "trade secrets" classification is not absolute or all-encompassing. The extent of trade secret information is limited by Minnesota law, and must meet the following criteria. The data must be:

"A formula, pattern, compilation, program, device, method, technique or process;

(1) that was supplied by the affected individual or organization;

(2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy and;

(3) that derives independent economic value, actual or potential, from not

being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."

All of the above criteria must be met in order for data to be withheld as "trade secret" information. Government agencies that utilize private vendor data exercise discretion in their review of trade secret claims, and independently evaluate assertions made by private vendors, who are required to properly label such data. Many agencies (such as MDH) have policies in place to notify private entities if their data is not eligible for coverage as "trade secret" information.

Recently, MDH has specifically described certain limitations on using the "trade secret" definition to cover cost or pricing information. An example of this approach can be found in the recently produced MDH document "Request for Application for the Registration of Medical Cannabis Manufacturers" available on the internet at this link:

http://www.health.state.mn.us/topics/cannabis/mfrrfa.pdf

In the document, the agency notes that it "will not consider prices or costs submitted by the Applicant to be trade secret information under any circumstance."

7. Any review of HMO data needs to include an overview of all relevant statutes.

Any review of HMO data classification needs to include multiple statutes, beyond the provisions found in Chapter 13. HMOs hold vast stores of government data - including both data on individuals, and data not on individuals. MNCOGI notes that the data at the center of the current discussion is all data "not on individuals" - essentially business or organizational data. There are many existing statutes outside of Chapter 13 that govern and classify this kind of data held by HMOs. These include, but are not limited to:

- Requirements to provide certain public reports on HMO "demonstration projects" (Minn. Stat. 62D.23);

- Requirements to provide annual reports to the Commissioner of Health

(Minn. Stat. 62D.08) that include unaudited financial statements that are maintained as nonpublic data;

- Information on "aggregate spending" on major categories of health care services that are maintained as public data (Minn. Stat. Subd. 9(b));

- Information on "aggregate non personally identifiable health plan encounter data" that are maintained as public data (Minn. Stat. Subd. 9(b));

- Administrative expenses to be reported to the Commissioner of Human Services, and maintained as nonpublic data (Minn. Stat. 256B.69 Subd 9a);

- HMO "provider payment rates" to be provided to the Commissioner of DHS and maintained as nonpublic data (Minn. Stat. 256B.69 Subd 9b).

Given the complexity of the statutory landscape governing health plan data - and possible ambiguities arising from the inter-relation of statutes - MNCOGI notes that it is important to clearly understand what is currently "public" and "nonpublic" before re-classifying any additional data.

8. Should any currently "nonpublic" data be converted to "public" data?

Given the important oversight purpose described previously, the legislature may wish to evaluate whether any currently "nonpublic" health plan data should be reclassified as "public" data, including any nonpublic details on HMO administrative expenses. Likewise, if there are any statutory provisions that create ambiguities about the classification of HMO data, the legislature may wish to remove such ambiguities in favor of a clear, public classification.

..... moves to amend H.F. No. 2167, the first engrossment, as follows:
Page 1, after line 19, insert:

"Sec. 2. Minnesota Statutes 2013 Supplement, section 43A.23, subdivision 1, is amended to read:

Subdivision 1. **General.** (a) The commissioner is authorized to request proposals or to negotiate and to enter into contracts with parties which in the judgment of the commissioner are best qualified to provide service to the benefit plans. Contracts entered into are not subject to the requirements of sections 16C.16 to 16C.19. The commissioner may negotiate premium rates and coverage. The commissioner shall consider the cost of the plans, conversion options relating to the contracts, service capabilities, character, financial position, and reputation of the carriers, and any other factors which the commissioner deems appropriate. Each benefit contract must be for a uniform term of at least one year, but may be made automatically renewable from term to term in the absence of notice of termination by either party. A carrier licensed under chapter 62A is exempt from the taxes imposed by chapter 297I on premiums paid to it by the state.

(b) All self-insured hospital and medical service products must comply with coverage mandates, data reporting, and consumer protection requirements applicable to the licensed carrier administering the product, had the product been insured, including chapters 62J, 62M, and 62Q. Any self-insured products that limit coverage to a network of providers or provide different levels of coverage between network and nonnetwork providers shall comply with section 62D.123 and geographic access standards for health maintenance organizations adopted by the commissioner of health in rule under chapter 62D. Data related to contracted amounts paid to providers and vendors for administrative services by insurance carriers authorized to provide coverage under the state employees group insurance plan are nonpublic data as defined in section 13.02.

(c) Notwithstanding paragraph (b), a self-insured hospital and medical product offered under sections 43A.22 to 43A.30 is required to extend dependent coverage to an eligible employee's child to the full extent required under chapters 62A and 62L. Dependent child coverage must, at a minimum, extend to an eligible employee's dependent child to the limiting age as defined in section 62Q.01, subdivision 9, disabled children to the extent required in sections 62A.14 and 62A.141, and dependent grandchildren to the extent required in sections 62A.042 and 62A.302.

(d) Beginning January 1, 2010, the health insurance benefit plans offered in the commissioner's plan under section 43A.18, subdivision 2, and the managerial plan under section 43A.18, subdivision 3, must include an option for a health plan that is compatible with the definition of a high-deductible health plan in section 223 of the United States Internal Revenue Code.

Sec. 3. Minnesota Statutes 2012, section 43A.316, is amended by adding a subdivision to read:

Subd. 11. **PEIP.** Data related to contracted amounts paid to providers and vendors for administrative services by insurance carriers in the state public employee insurance program are nonpublic data as defined in section 13.02.

Sec. 4. Minnesota Statutes 2012, section 256B.69, subdivision 9a, is amended to read:

Subd. 9a. **Administrative expense reporting.** Within the limit of available appropriations, the commissioner shall work with the commissioner of health to identify

and collect data on administrative spending for state health care programs reported to the commissioner of health by managed care plans under section 62D.08 and county-based purchasing plans under section 256B.692, provided that such data are consistent with guidelines and standards for administrative spending that are developed by the commissioner of health, and reported to the legislature under Laws 2008, chapter 364, section 12. Data provided to the commissioner under this subdivision are nonpublic data as defined under section 13.02. Data related to contracted amounts paid to providers and vendors for administrative services by managed care organizations in state public health care programs are nonpublic data as defined in section 13.02.

Sec. 5. Minnesota Statutes 2012, section 471.6161, subdivision 6, is amended to read:

Subd. 6. **Filing of contract.** Every political subdivision contracting for and providing group insurance coverage as provided in this section shall file with the clerk or other comparable officer of the subdivision a copy of the group insurance contract and make the copy available for public inspection. Data related to contracted amounts paid to providers and vendors for services by insurance carriers for group insurance of political subdivisions are nonpublic data as defined in section 13.02.

Sec. 6. Minnesota Statutes 2012, section 471.617, subdivision 1, is amended to read:

Subdivision 1. **If more than 100 employees; conditions.** A statutory or home rule charter city, county, school district, or instrumentality thereof which has more than 100 employees, may by ordinance or resolution self-insure for any employee health benefits including long-term disability, but not for employee life benefits. Any self-insurance plan shall provide all benefits which are required by law to be provided by group health insurance policies. Self-insurance plans must be certified as provided by section 62E.05 and must be filed and certified by the Department of Commerce before they are issued or delivered to any person in this state. Data related to contracted amounts paid to providers and vendors for services by third party administrators and insurance carriers for self-insurance plans of political subdivisions are nonpublic data as defined in section 13.02.

Sec. 7. **EFFECTIVE DATE.**

This act is effective January 1, 2016."

Renumber the sections in sequence and correct the internal references

Amend the title accordingly

..... moves to amend H.F. No. 2167, the first engrossment, as follows:

Page 1, after line 19 insert:

"(c) Nothing in this subdivision requires the release of not public data. Notwithstanding any provision of law to the contrary, data governed by this subdivision that is of a financial, business, or proprietary nature, the release of which could cause competitive harm to the private person or provide economic value to other persons from its disclosure or use, is nonpublic data or private data on individuals."