MINNESOTA COALITION ON GOVERNMENT INFORMATION (MNCOGI)

Senate Judiciary and Public Safety Committee
Written testimony of Matt Ehling and Don Gemberling, MNCOGI board members
Senate File 4949
March 20, 2024

Dear Chair Latz, Senator Westlin, and Senators,

Thank you for the opportunity to provide written comments regarding SF 4949.

For background, MNCOGI met with Hennepin County representatives prior to the introduction of SF 4949, and noted at that time that MNCOGI would oppose much of the bill's proposed content; but we do not have any objection to the new data classification for juvenile library patron "name" data now located in section 4. However, in that section, MNCOGI still recommends one small change, as further detailed in our letter.

Overall, if this bill moves forward, MNCOGI recommends striking all of the bill content except for lines 3.14-3.26, and then re-numbering. Our reasons are as follow:

Eliminating damages for public data requesters: In section 3, the bill eliminates the ability of data requesters to seek damages related to a government entity's failure to fulfill a data request that does not involve either themselves, a related minor, or a decedent. This would eliminate a long-standing — and powerful — remedy available to citizens who are seeking information about government operations. Since the inception of the Data Practices Act (DPA), any "person" who "suffers any damage" as a result of a violation of Chapter 13 has been able to seek damages under the Act's civil remedy (codified today at § 13.08 subd. 1). Such violations include both a government entity's improper disclosure of "private" or other "not public" data, as well as a government entity's failure to disclose data that is "public" pursuant to the Act.

In SF 4949, the word "person" (present in the civil remedy section since 1974) is eliminated, and is replaced with "the subject of the data" and "a parent or guardian of a minor subject of the data." Existing language relating to a "representative" of a "decedent" (a deceased, natural person) remains. This proposed change then limits the persons who can sue for damages under the Act primarily to individuals

who are the subjects of data, or who are responsible for a data subject (i.e., parents, guardians, and representatives of decedents.). While it is important for such persons to have access to the Act's civil remedy for damages (and they already do), Hennepin County's proposed change would eliminate access to damages for all *other* persons — including citizens, members of the press, or public interest groups who have sued for access to "public" data about government operations.

For decades, the Act's civil remedy has always permitted claims for damages for a government entity's failure to produce responsive, public data. While monetary (compensatory) damages in most public data request disputes may be small, they can be the gateway to exemplary damages for a government entity's willful violation of the DPA (currently $1000 to $15,000 for each willful violation, which can be applied per violation).

Hennepin County's proposed change to § 13.08 effectively eliminates the availability of exemplary damages for data requesters who are seeking public data about the government's activities. This removes a powerful compliance tool to address misbehavior by government actors. For example, MNCOGI is currently involved in a lawsuit over access to Minneapolis Police Department (MPD) disciplinary records — including records related to former officer Derek Chauvin, convicted of the murder of George Floyd. Access to such records is critical to understanding how MPD handled disciplinary activity in the past, in order for the public and policy makers to suggest policy changes going forward. In our complaint, MNCOGI has sought exemplary damages, stemming from the City's improper response to our data request. Removing such a remedy in law will disadvantage public interest plaintiffs; as well as the press; and citizen data requesters of all kinds.

MNCOGI board member Don Gemberling (the former director of the Minnesota Department of Administration's Data Practices Office*) adds the following:

> **"As someone who has long worked with the legislature in trying to get better compliance with the DPA, the County's attempt to limit damages awards only to data subjects would severely damage legal recourse available to citizens. The legislature should improve existing remedies and not wipe out one of the important ones."**

---

*Formerly the Information Policy Analysis Division (IPAD) of the Minnesota Department of Administration.

Changes to the Official Records Act and Records Management Statute: In section 5, Hennepin County is proposing changes to the Official Records Act (ORA, at § 15.17), which deals with maintaining "all records" that document "a full and accurate knowledge" of the government's official activities (aka, "official records"). In our discussion with Hennepin County, county representatives expressed an interest in "updating" the ORA to clarify when digital copies of certain records could be made. Our response was that we were willing to engage in a review of the ORA with them and others to look at such records maintenance issues, but we indicated that the current short session would not be an appropriate time to do this, since a more extensive discussion was warranted (including with representatives of the State Archives) before any substantive changes were made.

The bill, however, not only modifies how official records are to be handled (which requires a much deeper discussion than the time available at the end of the legislative session), but also alters the definition of "official records," which has been in statute since 1941. The current definition has been relied on in important government accountability efforts, including the litigation that ended up sending the NorthMet mining permit back for further review (*see In RE Denial of Contested Case Hearing*, Minn. 2023).

In the facts of that case, an administrative law judge found extensive violations of the Data Practices Act, Records Management Statute, and the ORA, by the staff of the Minnesota Pollution Control Agency (PCA). One ORA violation involved the destruction of an e-mail showing that PCA asked the federal Environment Protection Agency to not submit written comments related to its concerns about the NorthMet mining project during the open comment period of the project's administrative review (so that those concerns would not be publicly available at that time). This e-mail was an example of an "official record" that documented a key government decision, and accordingly was required to be maintained under the ORA.

"Official records" under § 15.17 are records that are so integral to government operation that they must be preserved for delivery to governmental successors, since they document key government decisions. Changes to this long-held definition are too important to be handled in haste, without a full review of what that definitional change will mean for future retention requirements, and for government accountability efforts that rely on the availability of records. MNCOGI would instead advocate for a review of these important statutory sections at a later time, outside of the rushed end-of-session timeframe.

MNCOGI board member Don Gemberling adds:

> **"For about thirty years, under a repealed portion of the Records Management Act, the Commissioner of Administration was responsible for establishing and managing a records management program for the State and all of its political subdivisions. For ten of my years in state government, I had responsibility for that activity. In that time, I became convinced of how important records management was for government accountability and history."**
>
> **"Use by the public of laws like the DPA, depends entirely on the data being in existence to be reviewed. In a world in which government already puts up significant barriers to public access, there should be no enhanced ability for the government to reply to data requests with the following: There is no data responsive to your request."**

Data breach notification: There are other problems in the bill, including with the manner in which Hennepin County proposes to modify the "data breach" section of Chapter 13 (see section 2). This change will effectively reduce the information on data breaches that the government is obligated to provide to the public. After a review of the construction of this section, MNCOGI's board has determined that the narrowing of the public disclosure requirement in § 13.055 subd. 2 does not serve the public interest well — particularly during a time of increased data security threats.

Minor library patron data: In regard to the minor library data provision (section 4), MNCOGI has no opposition to adding a "private" classification for the juvenile library patron "name" data described in the bill. However, that section has one issue that needs to be remedied. Lines 3.27-3.28 eliminate the long-standing "Tennessen warning" requirement under which a government entity must notify a data subject about the uses it will put "private data" towards. This requirement should be maintained by removing lines 3.27 and 3.28.

Thank you for your willingness to review MNCOGI's comments about SF 4949.

Sincerely,

Matt Ehling, Don Gemberling
MNCOGI board members