

PUBLIC DATA AND THE INTERNET

WHITE PAPER FOR

ONLINE SERVICES: RESPONSIBILITY – RISK – REWARD ISSUES

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Local governments in Minnesota are exploring new ways to provide public access to information through the Internet. Some are considering establishing, or are already providing, fee-based subscription services that provide enhanced databases or enhanced access capabilities that are not available to the general public. Whenever a Minnesota local government is contemplating allowing the general public to view government data through the Internet, whether at no cost or through a fee for service subscription, it should include a review with legal counsel of the public/private classification of the data and the applicable laws regarding viewing, copying and charging for copies or use of the data among its preliminary planning tasks. This White Paper provides a brief overview of legal issues a local government may encounter when establishing a system to display government data through the Internet.

I. Minnesota Regulation of Public Information - Data Practices and Public Records Laws Overview

Within one law, titled the Minnesota Government Data Practices Act, Minnesota Statutes Ch. 13 (“MGDPA”), the Minnesota Legislature has addressed both the rights of the public to view and obtain copies of public data and the rights of citizens to prevent personally sensitive information from being unnecessarily disclosed to the public.

Complying with the MGDPA can be very challenging for local governments and the challenges are exacerbated for local governments that maintain both paper and electronic data since some of the rules on disclosure and viewing, copying and copying/access fees differ depending upon which media the data is maintained in or how it is accessed by the public.

A. Keeping and Maintaining Public Data and Records

1. The Minnesota Government Data Practices Act

Minnesota Statutes, Chapter 13, the Minnesota Government Data Practices Act (MGDPA), governs the “collection, creation, storage, maintenance, dissemination, and access to government data.”¹ This law has a broad reach and impacts almost all government entities in Minnesota.

Government Data is defined very broadly in the MGDPA as “. . . all data collected, created, received, maintained or disseminated by any government entity *regardless of its physical form*, storage media or conditions of use.”²

Although very progressive when initially created, the MGDPA did not contemplate the variety of storage media and methods for organizing and transmitting data that are available today such as the proliferation of personal computers and access to high speed Internet in businesses and homes. Even so, many of the original MGDPA provisions remain intact and applicable to local governments that provide access to electronic data and records.

a. Who Decides Which Data is Public?

In Minnesota, the Legislature has reserved to itself the authority to determine whether government data is public or non-public. Although the Commissioner of the Minnesota Department of Administration can temporarily classify data, the Legislature makes the final determination of whether any particular type of government data is public information.

The Legislature can be comparatively slow to act upon or react to new data classification and dissemination issues. Recognizing this fact, the Legislature empowered the Commissioner of the Minnesota Department of Administration to issue formal opinions interpreting legislative intent and the application of data practices statutes. However, when interpreting the MGDPA, even the Commissioner is not always certain of what the Legislature intended.

b. What has the Legislature Decided? Which Data is Public?

Through the MGDPA, the Legislature created a statutory presumption that government data is public data unless specifically classified by federal law or the Minnesota Legislature as not public.³ However, the Legislature also created

¹ Minn.Stat. §13.01, subd. 3 (2004)

² Minn.Stat. §13.02, subd. 7 (2004) [emphasis added]

³ See Minn.Stat. §§ 13.01, subd. 3 & 13.03, subd. 1

many exceptions to this general rule that are contained either in the MGDPA itself, or in various other chapters of Minnesota Statutes.

Applying the MGDPA to any situation can be challenging since the data classification statutes are not always clear, and State and local governments are continually creating new government programs that generate new types of data. The Legislature has attempted to address new data practices issues by constantly amending the MGDPA and modifying the treatment of specific types of government data. To accommodate the variety of government data types and the corresponding exceptions to the public data presumption, the MGDPA has grown to over 112 pages in length and 128 distinct statutory sections.

Due to the size and complexity of this law, the best practice is to consult your legal counsel when determining if specific data can or should be disclosed to the public.

2. Minnesota Public Records Act

The Public Records Act requires government officials and agencies to create and maintain the public records necessary to document official actions.

a. What are Public Records?

The Public Records Act, Minn. Stat. § 15.17, defines “official records” as those records of government officials and agencies that must be kept to provide “full and accurate knowledge of their official activities.”

See *Kottschade v. Lundberg*, 280 Minn. 501, 160 N.W.2d 135 (1968).

Public records also include any papers, files, or records of the office or in the official custody of judges having probate jurisdiction, county auditors, county recorders, and court administrators of the district court. Minn. Stat. § 382.16

b. Access to Public Records

The Public Records Act and Minn. Stat. § 382.16 provide that the public is entitled to access all official records, which the Supreme Court has interpreted to mean all “public records.” *Kottschade v. Lundberg*, 280 Minn. 501, 160 N.W.2d 135 (1968).

However, not all official records are public data. As an example, the Minnesota Supreme Court has determined that the public should not have access to certain information in court files and vital statistics records.⁴

⁴ See the Minnesota Supreme Court Rules of Public Access to Records of the Judicial Branch for more information.

Verify with your legal counsel which records are public before providing full access to the information, particularly if the records include any personal information on individuals.

Keep in mind that Federal laws also impact the determination of what data is public. Since Congress has determined that social security numbers are private data on individuals, must a Minnesota county redact social security numbers contained in any official or public record before disclosing the record to the public? In 2006 this was a hotly contested issue in Texas that resulted in a lengthy opinion from the Texas Attorney General and enactments by the Texas Legislature to clarify the responsibilities of county officers to exclude or redact social security numbers from records provided to the public.

With the exception of rules issued by the Supreme Court on judicial records, the issue of how to address social security numbers in Minnesota public records has not been directly addressed by the Legislature as it was in Texas. Therefore, whether a county recorder, treasurer or auditor can redact a person's social security number is not clear in Minnesota since the current laws on public disclosure of official or public records require inspection and copying of the full "record" or file.

When public records contain sensitive information such as social security numbers, a local government can provide the public with Internet access to a cleansed, redacted version of the record. Protecting sensitive information in this manner has a cost impact since redacting records can be an expensive and time consuming process.

B. Providing Access to Inspect Public Data and Records

Generally, a local government in Minnesota must allow inspection of any government data free of charge if the data is classified by the MGDPA as public.

"Inspection" of data and records is defined by statute as the visual inspection of paper or other types of data. Inspection usually does not include printing data or records.

Minn. Stat. § 13.03, subd. 3(b)

The Internet Access Exception to Data Inspection

There is an exception to the "no cost" for inspection rule: A local government can charge a reasonable fee to access electronic data when either the data or the remote access to the data has been enhanced when the enhancement has been requested by the person seeking the data.

Minn. Stat. § 13.03, subd. 3(b)

See Minn. Dept. of Admin. Advisory Opinions 06-011, 02-036 and 00-006

The question of what constitutes a “request” for enhanced data or enhanced access to data has not been fully answered by the Legislature, the courts or the Commissioner of Administration. Requiring a person or business to enter into a subscription agreement or user agreement to access the data can indicate that enhanced access or enhanced data has been requested.

For local governments that provide Internet access to view public data in electronic format that is not “enhanced” upon request, the Legislature has expanded the definition of “inspection” to include viewing the data, printing copies of the data from a person’s own computer and/or downloading the data to a person’s own computer. Consequently, viewing public data on a “non-enhanced” local government website and printing or downloading that data constitutes inspection of data for which no direct charge may be imposed upon the visitor.

Minn. Stat. § 13.03, subd. 3(b)

See Minn. Dept. of Admin. Advisory Opinion 03-025

C. Providing Copies of Public Data and Records

Generally, a copy of public data must be provided to an individual or business requesting a copy. The requestor can obtain a copy in any format or media that the local government maintains the data in. The local government can charge the requestor for the cost of copying the data.

However, as discussed above in Section I.B., a local government that provides Internet access to public data that is not “enhanced” data or provided through “enhanced” access must allow the public to print the data using their own computer or download the data to their computer at no cost.

1. Creating New Data

When a local government does not maintain the type of data or the format of data that a requestor is seeking, the local government is not required to create new data for a requestor, although it can agree to do so. The local government and the requestor should agree upon the terms and cost for creating new data and for providing a copy of the data before any programming or copying work is started.

2. Charging for Copies.

The ability to charge a person for making paper copies of government data depends upon two factors: (1) whether a person seeks to merely inspect public data or wishes to obtain copies of such data; and (2) whether or not the requestor is the subject of the data requested.

If the data is maintained in a manner where the only way that a person can view or inspect the data is to provide them with a hard copy, the local government should not charge the person for making an “inspection” copy.

When the requestor is the subject of the data, then a local government may only charge for “the actual cost of making, certifying and compiling the copies”, but not the actual costs of searching for and retrieving the data.⁵

When the requestor is not the subject of the data requested, a local government may “require the requesting person to pay the actual costs of *searching for and retrieving* government data, *including the cost of employee time*, and for making, certifying, and electronically transmitting the copies of the data or the data, but may not charge for separating public from not public data.”⁶ If a person is requesting paper copies of public data, the charge for the first 100 pages of black and white, letter or legal sized copies is capped at 25 cents for each page copied.

Minnesota Rule §1205.0300 provides additional guidance on the allowable costs that can be assessed for providing paper copies beyond the first 100 black and white copies or for providing an electronic copy of public data. The rule states that:

The responsible authority may charge a reasonable fee for providing copies of public data. In determining the amount of the reasonable fee, the responsible authority shall be guided by the following:

- A. the cost of materials, including paper, used to provide the copies;
- B. the cost of labor required to prepare the copies;
- C. any schedule of standard copying charges as established by the agency in its normal course of operations;
- D. any special costs necessary to produce such copies from machine based recordkeeping systems, including but not limited to computers and microfilm systems; and
- E. mailing costs.

3. Internet Access and Copies

Absent a request to obtain enhanced data or enhanced access to data, if a local government provides Internet access to public data to the general public, any person viewing the data over the Internet can also print the data on their own computer/printer and download the data to their computer free of charge.

Consequently, viewing public data on a local government’s public web site constitutes “inspection” of that data for which no direct charge may be imposed on the visitor. The MGDPA places no affirmative obligation on local governments to provide any remote or

⁵ Minn.Stat. §13.04, subd. 3 (2006)

⁶ *Supra*, Footnote 1 [emphasis added]

Internet access to public data and local governments are not required to create web sites that display extensive or sensitive public data. The public data that can be accessed through a local government's web site or subscription site is a decision to be made by the officers or elected officials of each local government.

One side effect of providing the public with Internet access to extensive "free" public data is that a local government may impair its ability to recoup some of its costs to develop the data or technology systems to display the data. Local governments can construct subscription or license based systems and charge fees to individuals or companies that want this data and are willing to pay to access and download the data. However, if the data is available to the general public through the Internet, the local government cannot selectively charge commercial businesses for the same data that can be downloaded by the general public for free. A local government can overcome this potential impediment by displaying limited public data on its general web site while providing more extensive and enhanced data on the fee-based subscription service site.

4. Secondary Use of Data

The MGDPA does not explicitly address subsequent or secondary use restrictions on public records or data once the public obtains a copy of the data. Unless specific restrictions are authorized by the Legislature or imposed by the courts, the public can commercially sell, display or reproduce the public data it has lawfully acquired. Such secondary use of public information can result in public data being made available to many people or businesses far beyond the geographic boundaries of the local government and can negatively impact a local government's options for recovering data system development costs through fee-based services.

The rights of State agencies to enforce the copyright protections provided by the Federal Copyright Act was addressed by the Minnesota Attorney General's Office in Opinion No. 852-315a, Dec. 4, 1995. This opinion relies upon various Minnesota statutes to conclude that state agencies can use federal copyright protections in original works of authorship to impose restrictions on the commercial re-use and re-sale of public data.

Although counties and other local governments must comply with the MGDPA and permit inspection and copying of public data, local governments are also granted federal copyright protection by action of law for original works of authorship. The statutory basis for this right is less clear than for State agencies, but an argument can be fashioned that counties can require a person or company requesting copies of public data that has commercial value to restrict its secondary use to prevent commercial re-sale, or reproduction of the data.

II. No Legal Obligation to Keep or Provide Public Data in Any Particular Media

Although both the MGDPA and the Public Records Act authorize government entities to create and maintain records and data in electronic form, neither law requires computerization of public records and data. In most instances, the format used to maintain public information is left to the discretion of the individual government entity.

Minn. Stat. § 13.03, subd. 3 and § 15.17, subd. 1

A. What the MGDPA Says About Data Formats

A government entity must keep records containing government data in a way that makes the data easily accessible for convenient use. Photographic, photostatic, microphotographic, and microfilmed records are specifically deemed to be accessible for convenient use and other common formats for preserving electronic data should meet this requirement. Minn. Stat. § 13.03, subd. 1

The Commissioner of Administration has acknowledged that keeping government data in a computer database complies with this requirement.

B. What the Public Records Act Says About Data Formats

The Public Records Act specifically authorizes local governments to maintain records in electronic format, but does not require it. Minn. Stat. § 15.17, subd. 1

C. A Policy and Financial Decision

Since the data practices and public records statutes do not mandate that public data and records must be kept in electronic format or that access to the electronic data or records must be available through the Internet, each local government is free to determine how it will maintain its data and records and whether remote access will be available to the public.

When considering making data available through the Internet, a local government may want to consider the competing interests of public access to government data and the personal privacy attitudes in the local community before providing Internet access to public data containing personal information. An assessment of local attitudes regarding accessibility to potentially sensitive information in public data or records may help define the acceptable level of access and data detail within the local community.

III. Recouping the Costs of an Electronic Data System

A. Enhanced Data or Enhanced Access to Data

The Legislature has adopted amendments to the MGDPA that address access to and billing for copies of electronic data. Amendments to the law now clarify that a government entity can charge a reasonable fee to access electronic data when the data or the remote access to the data has been “enhanced” if the enhancement was requested by the person seeking the data.

Minn. Stat. § 13.03, subd. 3(b)

See Minn. Dept. of Admin. Advisory Opinions 06-011, 02-036 and 00-006

Enhanced remote access requires that either the data itself has been enhanced, such as manipulating or translating the data so it can be accessed remotely, or that the access to the data has been enhanced, such as allowing access to government data outside of regular business hours and on holidays and weekends. One challenge to imposing an “enhancement” fee is that the enhancements are to be provided “at the request of the person seeking access.” Absent this element, the access may be deemed to be un-enhanced remote access which, as discussed above, constitutes merely inspection of data for which no fee may be charged. What constitutes a “request” for enhanced data or access has not been fully defined by the Legislature, the courts or the Commissioner of the Department of Administration. A requestor’s written or electronic agreement to pay a fee for enhanced data or access should satisfy the “at the request” requirement.

B. Commercial Value of Data

In some circumstances, local governments may impose a fee for information that has “commercial value”. Minnesota Statutes, Section 13.03, subd. 3(d) provides:

When a request [for data] . . . involves any person’s receipt of copies of public data that has commercial value and is a substantial and discrete portion of or an entire formula, pattern, compilation, program, device, method, technique, process, database, or system developed with a significant expenditure of public funds by the government entity, [it] may charge a reasonable fee for the information *in addition* to the cost of making, certifying and compiling the copies.

This “commercial value” provision applies to copies in paper and electronic formats. However, the Legislature has not provided specific guidance on how to determine when data has commercial value. Also, it is not clear what part of a formula, pattern, compilation, program, device, method, technique, process, database or system must be requested before it can be deemed to be “substantial and discrete.” These questions must be answered on a case-by-case basis. Finally, demonstrating a reasonable commercial value can present accounting and proof challenges.

C. Government Developed Software

The Legislature has authorized Counties, either individually or in cooperation with other government entities, to develop and market computer software products or systems. Minn. Stat. § 375.85. Under this statute a County may enforce a copyright in self-developed or vendor custom-developed computer software products or systems, and may sell or license such products to the public or private businesses at a price based on its market value.

To protect the public investment, a county can enforce a copyright or acquire a patent for the computer software or components of any program that the county creates.

If a patent is obtained, the data related to the program is classified as nonpublic trade secret information.⁷ Opinions issued by the Department of Administration suggest that while a local government can gain intellectual property rights in computer and other information management systems, a local government cannot seek or enforce a copyright as to any “raw” public data itself. As discussed in Section I.C.4, until a court determines otherwise or the Legislature specifically prohibits such actions, it is arguable that a local government can enforce copyright protections in compilations of original works of authorship, including unique arrangements of information and data.

D. GIS Systems – A Special Case?

Counties, Cities and the Metropolitan Council have expended significant public funds to develop sophisticated Geographic Information Systems. These systems rely upon many interconnected databases of raw data about geographic and physical features of a particular area. Some government entities sell licenses to private businesses to use the databases and use the license fee revenues to supplement the public funds needed to develop the GIS system or to update the data and features of the system.

Is there an enforceable copyright in GIS databases? The Commissioner of Administration has suggested that, while a local government can gain intellectual property rights in computer and other information management systems a local government has created, the government cannot seek or enforce a copyright in any raw public data itself. Courts have previously recognized that a person or company that has developed a unique and commercially valuable arrangement of data in a database or interconnected databases can enforce a copyright in the database.

Although not resolved by court decision, an argument can be made that a county or other local government can enforce a copyright in a complete GIS database or set of databases that constitute a unique arrangement of data that allows useful manipulation of the data to create valuable visual representations of selected data sets. An additional argument is that a GIS database falls within the Legislature’s intended scope of a “computer software product or system” that may be licensed and protected under Minn. Stat. § 375.85 by restricting the reuse or resale of GIS databases. If a county cannot protect GIS data that has commercial value from

⁷ Minn. Stat. § 13.37 (2006).

further resale or disclosure by third parties, ongoing license fees used for acquisition of new and updated geographic and physical data may evaporate. This would impose a financial limitation on the number of jurisdictions that can afford to create useful GIS systems and maintain and update them over time.

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