

A PRICE OF IGNORANCE IN MINNESOTA - STATE OPEN-GOVERNMENT LAW LOSES STRENGTH IF CITIZENS DON'T KNOW IT

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Author: DON GEMBERLING

"Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power which knowledge brings."

-- James Madison

Although retired from my government role as "data practices guru," I continue my strong interest in issues of government information. As I monitor the current realities of government information in Minnesota, I have reached a sad conclusion. Citizens of our state are blessed with one of the strongest data practices laws in the country. This law guarantees a high degree of public access to government data and requires government to collect and use personal data in adherence to fair principles.

However, in the real lives of citizens, the Data Practices Act (DPA) may seem meaningless. This lack of meaning stems in large part from the high levels of ignorance, i.e., the lack of knowledge and education about the DPA, among the media, government officials and, saddest of all, the citizens who are given significant rights by the act.

These recent stories, from Twin Cities newspapers, demonstrate the power of this ignorance:

1. Parents of students in Eden Prairie threaten to sue because their school district is making disciplinary use of student pictures downloaded from Facebook.
2. The chief of the Minneapolis Police Department is sued because of alleged violations of the DPA.
3. In reporting on the St. Paul Police Department's use of a search warrant to capture a reporter's telephone records, an article states that only government employees can criminally violate the DPA.
4. The Minnesota Department of Public Safety refuses to release the names of employees being disciplined for perusing drivers' license files.

But knowledge about the DPA applied to these stories reveals the following:

1. Is the Eden Prairie school district either improperly or incorrectly using data about students? Before incurring legal fees, parents should consider that the DPA tries to protect student privacy by limiting a school district's use of data collected from students and parents to those uses communicated at the time of collection. Also, if the pictures wrongly portray students, both the DPA and the federal law governing education records provide "cheap" administrative mechanisms to challenge the accuracy and completeness of education records.

2. The lawsuit brought under the DPA that will most often cost the taxpayers money involves the premature release of detailed disciplinary data about a public employee. Minneapolis Police Chief Tim Dolan is accused of doing exactly that. The taxpayers of Minneapolis may want to ask: Who forgot to inform/educate Dolan?

3. In Minnesota Statutes Section 13.09, the DPA makes it clear that "any person," and not just a government employee, can violate the act and be charged with a misdemeanor. The legislative history of this language includes an incident in which a reporter was caught rummaging through a government official's desk. John Finnegan, former Pioneer Press editor, eloquently stated that such conduct ought to be criminally punished. Anybody can violate the DPA.

4. "WHO done it?" The history of the DPA includes careful negotiation between the public, including the media, and government officials about what ought to be public. The DPA's treatment of public employee disciplinary data resulted from such a negotiation. Names of public employees, with limited exceptions, are always public. Names are public even during the time disciplinary action against them is being considered. The plain language of the DPA, case law and opinions of the commissioner of Administration all support this conclusion.

My purpose here is not to demonstrate that I ought to still be accorded the title of guru. Instead, I want to supplement published reports that, in my view, either contained incorrect information or did not offer enough information to educate those involved or the public. Why? I always felt that educating was the most important thing I did. Hopefully, this commentary begins to fill a current void in that educational role

Second, I hope to spark a dialogue among and between citizens, the media, government officials and the Legislature on methods of better educating members of the public about their rights under the DPA. This hope is tempered by the systemic reality that government, except for a few enlightened folks, hopes that the public will continue to be ignorant of the power the DPA gives them.

There is also a current situational reality, involving access to information about incidents like the bridge collapse, that causes government officials to be very nervous about public access to government data.

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Administration for 36 years, 30 of which he focused on freedom of information and privacy issues. He is on the board of directors of the Minnesota Coalition on Government Information, which promotes public access to government information. More information about these issues is available on the Web at www.ipad.state.mn.us. and at www.mncogi.org.

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SUNSHINE WEEK - ACCOUNTABLE GOVERNMENT REQUIRES ACCESSIBLE INFORMATION

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Author: Don Gemberling

During "Sunshine Week," which is this Monday through Friday, various civic, media and government accountability groups celebrate the March 16 birth date of President James Madison and his clear statement of the principle that a democracy cannot function if citizens do not have the means and take the opportunity to look at the records and data that document just what their government is doing.

This principle assumes even greater importance in the 21st century, when all levels of government exert vast power over our everyday lives and spend large sums of the tax dollars that most of us pay.

At the end of each election cycle, citizens are asked to make a judgment on the decisions and direction taken by those in power. Elections are the ultimate way that citizens hold their government accountable. The Founding Fathers, particularly Jefferson and Madison, expected that those judgments would be made by a well-informed citizenry. That was a reasonable expectation when citizens often had direct contact with elected and other government officials. But the rise of physical and bureaucratic distance from most governments makes the process of holding elected and other government officials accountable more problematic.

As a partial solution, direct physical contact with elected and other government officials has been replaced with a framework of laws intended to give citizens access to government information. These statutes go by various names, including "freedom of information" and "fair information practices" laws.

In Minnesota, we have a statute that combines freedom of information and fair information practices principles. Officially, it has the less-than-glamorous name "Minnesota Government Data Practices Act."

This statute contains a number of important principles that advance the cause of governmental accountability. These principles have come into existence as a largely nonpartisan exercise in legislative decision-making. Except in very limited instances, both Republicans and Democrats have fully supported the openness and accountability principles that underlie the Data Practices Act.

Some level of knowledge about the statute is critical if you, as citizen, really want to hold your government and its officials accountable.

The act states a presumption that all "government data" are public unless the Minnesota Legislature has stated otherwise or as dictated by federal law. The presumption principle is important for a number of reasons. First, most decisions to deny the public access to government data must be made by the Legislature after open debate and discussion. If the media and advocacy groups are doing their job of alerting the public to legislative developments, citizens can express their concerns to legislators about the closure of government data.

Because of the presumption, many of the documentary tools of government operation, especially those tools that may be of public interest, are public.

- Budget, accounting and other types of financial information are almost always public.

- Contracts, planning documents, staff studies, evaluations, white papers, minutes, drafts of studies and most of the detailed types of both paper and electronically created documents that government uses to function are public.

Think your school district is wasting money on consulting contracts? Ask to see the vendor invoices, the contract itself and any work product generated on account of the contract. Wondering if political interference caused a staff study to be changed? Ask to see all versions of the study, including drafts. The presumption makes documents such as these public in most instances.

The presumption also puts into law the principle that when government in this state collects and creates data, it must do so with the idea that those data will presumptively be available to the public. Once data are in the hands of the government, the principle establishes the basic legal framework for disputes over public access. When a government entity decides to deny public access to certain information, it should know that if challenged, the denial will be upheld only if there is a statute or federal law that supports the entity's position.

An example: The city of Minneapolis once denied a reporter access to data that identified people who claimed they were victims of police misconduct. The reporter wanted to see if people felt they had been treated fairly by the system. Because of the presumption, and after a legal battle that went all the way to the Minnesota Supreme Court, the reporter got the information he sought.

This principle also sets up the context in which the Legislature discusses open or closed government. The discussion always starts from the premise that most government data should be public. Therefore, the Legislature discusses what ought to be closed -- not what ought to be opened. In most cases, it is representatives of the government who seek to close public access; this principle requires that they make their case to the Legislature in public. (In too many current instances involving information held by the federal government, the case for closing data to public access is made behind closed doors and only in front of a judge, with no members of the public present.)

The presumption that public information should be available to the public is also important because of the definition of the term "government data" in the Data Practices Act. "Government data" is defined as any data collected, created, received or maintained, no matter what its physical form. Increasingly, government conducts its business using computers. E-mail has replaced most forms of written communication and phone calls. In many situations, it will be the e-mail that tells us the real scoop on what government is doing and why.

For example: A few years ago, then-Rep. Phil Krinkie became convinced that MnDOT was not giving the Legislature reliable figures for the estimated cost of the Hiawatha Corridor light-rail project. He asked MnDOT for all government data, including all e-mails, discussing cost and related issues. After a long battle with MnDOT, he got the data he sought -- and validation for his position.

In addition to the presumption of openness, the Data Practices Act also provides other principles and features designed to promote openness and government accountability. I'll discuss some of that next week. My goal is to emphasize the importance of public access to public information, and to encourage you to use the tools you have to hold your government accountable.

Don Gemberling, an attorney who lives in St. Paul, worked for the state Department of Administration for 36 years, during 30 of which he focused on freedom of information and privacy issues. He is on the board of directors of the Minnesota Coalition on Government Information, which promotes public access to government information. More information about these issues is available on the Web at www.ipad.state.mn.us and at www.mncogi.org.

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YOUR GOVERNMENT, YOUR INFORMATION - A QUICK GUIDE TO MINNESOTA'S OPEN-GOVERNMENT LAWS

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Author: Don Gemberling

For most citizens, gaining access to government data is not a direct and common experience. But access to information is crucial if citizens are to know what Minnesota governments are doing and how they are spending taxpayers' dollars.

Last Sunday, I wrote about access to public information to mark the beginning of Sunshine Week, an annual effort to recognize the importance of open-government laws. This week, I want to discuss several features of the Minnesota Government Data Practices Act designed to help citizens get data held by state agencies, cities, counties, school districts, urban townships and the wide variety of other public boards and commissions.

In our Data Practices Act, the Legislature has set up two sets of policy and principles intended to flow together. One establishes the right of the public to gain access to government data. The second sets forth the requirements that government agencies must follow to assure or facilitate public access. Knowledge of these features is critical to getting access.

The "who": Certain features of the Data Practices Act are intended to help citizens who want access to public information learn whom to contact in what can seem like a faceless bureaucracy.

The act says every government entity has to have a human being who is the "responsible authority" for assuring compliance with the act. Generally, the responsible authority in a state agency or constitutional office, like the governor, is the head of the agency or office. For counties, cities, school districts and urban townships, the responsible authority is appointed by the governing body.

Determining the identity of the responsible authority is critical because the act assumes all requests for access to information will be made to the responsible authority. To find out who the responsible authority is, call the entity to ask or search for the identity on its Web site.

Sometimes the government entity may make it difficult. Sometimes, the government employee you are dealing with will not know the term "responsible authority." Recently, I asked a very competent and responsible elected school board member for the name of the district's responsible authority. The board member had no idea what I was talking

about.

To deal with these kinds of issues, the act says the government entity has to publicize the name, address and phone number of its responsible authority in a public document. That may take the form of a piece of paper available from the agency or a notice posted on the wall of the principal offices of the entity, or it may appear in a data practices compliance policy on the entity's Web site.

The "how": Once the identity of the responsible authority is known, the citizen is positioned to request access to information. The Data Practices Act is very clear: Any person may gain access to the public data of any government entity in this state. Providing access to public data is not a favor done by the government. It is both the right of the citizen to gain access and the obligation of the government to provide access.

However, reality requires some attention to detail and formalities. In the Data Practices Act, the Legislature tries to facilitate access. Government entities must have, for example, written policies that explain in detail what steps must be followed.

Typically, that explanation should tell:

- Whether a request should be made to the responsible authority or to "designees" who are in charge of the type of information being sought.
- What times of day requests will be received and processed.
- If a request must be made in writing, and what content is required in the request.
- How all types of requests, by phone, mail, in person or electronically, will be handled. (For an example of a good, but not perfect, procedure, visit the Department of Natural Resources Web site, www.dnr.state.mn.us/aboutdnr/index.html and click on "Access to government data").

There are two things a government entity may not require of a person seeking access to public information. First, it may not require the citizen to identify him or herself. Second, it may not require a reason for seeking access to the information in question. The Legislature specifically outlawed those possibly intimidating actions.

If requesting identifying information helps the citizen get the requested information -- by mail, for example -- it may be valid.

But the question "Why do you want the data?" is never legal.

The "what": There is a lot of government data that are public. Practically, a citizen must be able to describe the data being sought with some reasonable particularity.

Broad requests, such as for all data relating to inspections of bridges by the Department

of Transportation, are appropriate under the act. But it is important to not make a request that is so broad that a response will overwhelm both the requestor and the government. For example, a campaign volunteer once asked to see all documents in which the name Hubert Humphrey III appeared. Honoring the request would have meant producing hundreds of thousands of documents. The campaign subsequently withdrew the request.

Under the Data Practices Act, the public has the right to go to an agency and physically inspect government data, no matter its form: on paper, in a computer or other electronic storage device, on tape or DVD, or in any other form. The government entity is obliged to record government data in a way that facilitates public access.

This physical inspection and viewing of public government data is at no charge to the public. The act is very clear on this point: It's free to look.

People also have the right to get copies of public government data. But government entities may recover the reasonable and actual costs they incur in providing the copies.

For paper copies of up to 100 pages, entities may charge no more than 25 cents per page. For electronic copies, entities are required to provide copies only if they can do so without special programming or the purchase of reproduction software.

The Legislature has set certain copying fees for the sake of more revenue. The exorbitant fee for a copy of a birth certificate, for example, is a legislative mandate.

Access denied? By law, not all government information is public. If a citizen requests information that isn't public, the appropriate response from a government entity is to deny the request.

However, if a citizen thinks the entity's position is wrong, there's some recourse. The Data Practices Act requires the entity to tell the citizen, in writing if asked, precisely what state or federal law makes the data not public.

If a citizen believes that decision is wrong, the act provides some inexpensive ways of attempting to resolve the dispute.

- An appeal to the entity's compliance official. The state Data Practices Act requires every government entity to designate someone to assure the agency complies with the act and to help resolve disputes.

- A citizen may also direct concerns to the responsible authority for the government entity. It's common for a responsible authority to uphold the decisions of other government employees, but that person's involvement may be helpful.

- If these steps fail, a citizen may ask the state Commissioner of Administration for an opinion. Although the commissioner's opinions are not binding, they have some legal effect and are often helpful. There's more information about this step on the Web site of

the Information Policy Analysis Division of the state of Minnesota (www.ipad.state.mn.us). If you don't have Internet access, call the division at 651-296-6733.

The final recourse for resolving disputes is to sue the government. It is best to consult an attorney who is knowledgeable about Data Practices law before doing so. There are a few such attorneys, but not many.

What is public?

There are millions of pieces and types of Minnesota government data that are public. The following list is by no means exhaustive, but it highlights items that may be of interest:

- Tax assessments of real property
- Detailed curriculum information for public schools
- Salaries and expense records of public officials and employees
- Contracts with most government vendors
- Agendas for meetings of public bodies
- Records of expenditures
- Specific items of data that document arrests and law enforcement incidents
- Final reports and records of regulatory enforcement actions
- Most data about police investigations that are completed
- Civil legal action files in completed cases where the government was either a defendant or a plaintiff
- Restaurant inspection reports
- Contracts for lobbying services
- Names and qualifications of finalists for public jobs
- The final sale price of real estate
- Names of individuals and companies delinquent on their property taxes and the amount of the delinquency
- Names of public employees, the nature of a final disciplinary action against the

employee and all data documenting that action

- Results of any investigation of a complaint against state agency management personnel
- A variety of data collected and used by local governments to make licensing decisions
- Most e-mail messages sent among members of governing bodies
- Most of the content of invoices submitted by private attorney and other professionals who perform services for government entities
- Parole and probation imposed on offenders and the extent to which they are complying

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OPEN GOVERNMENT - CITIZEN SUNSHINE

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Protecting public access to public business is, by and large, not a very sexy endeavor. No plunging necklines, no paparazzi, no red carpets, no adoring crowds.

Sure, there's the occasional headline, when an attempt by someone in government to keep secrets is so egregious that it provokes a court fight, or when some charismatic crusader uncovers corruption by using freedom of information laws.

But mostly there aren't headlines. Mostly, there are quiet squads of persistent citizens who bother to inform themselves of their rights, who bother to insist that the expenditure of their tax money and the exercise of the power they grant to government be accompanied by access to information that will allow them to determine if their money has been well spent and their power well exercised.

Today begins Sunshine Week, a national effort to emphasize the importance of the public's right to know what our governments are doing. (For more, see the column by Don Gemberling on the opposite page, and go to www.sunshineweek.org or elsewhere on the Web.) Public access to public information, as self-evident as the case for it may be, doesn't just happen. Human nature often drives people to seek unfair advantage, and unfair advantage breeds well in the dark, away from the sunlight of public scrutiny. It takes active, persistent people to resist that drive, to protect the principles of open government.

So here's to the little old lady who insists on seeing the fine print in the bus contract the school district signs. Here's to the grumpy old man who demands a clear answer when he asks the city council why it's getting up to go behind closed doors. Here's to the fed-up taxpayer who wants to see official e-mail to understand better why so-and-so got a tax break. Here's to the cranky partisans who scour the campaign contributions of political candidates and who raise hell when the reports thereof are late. Here's to the ornery bloggers who mine the Web for source documents and more.

Here's also to the many public officials and employees who understand that public information belongs to the people, not to the government, and here's to librarians, attorneys, reporters and civic groups who walk the beat for openness.

Here's to you all, you quiet squads of persistent citizens, you heroes of democracy.

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PROPOSED CHANGES TO DATA PRACTICES SHELVED - MORE COULD HAVE BEEN KEPT FROM PUBLIC

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Author: Martiga Lohn ; Associated Press

A proposal to tinker with Minnesota's open records law was temporarily shelved Tuesday after a two-hour Senate subcommittee hearing marked by warnings about unintended consequences.

The bill from Sen. Don Betzold, DFL-Fridley, would have expanded the definition of data governments can classify as private when they are expecting lawsuits. It would have removed a requirement that such lawsuits be "pending," potentially allowing government lawyers to suppress more data.

That provision and others prompted concern from Sen. Mary Olson, who heads the Senate Judiciary Subcommittee on Data Practices. She said it could be used to hold back vital information.

"If we have information related to a bridge and what happened to a bridge, and we don't know for sure that there might not be problems with other bridges later on, even though there isn't an active case pending, we could use that as a reason not to release the information," said Olson, DFL-Bemidji.

"It might be critical information that the public would want to know," she added.

Another provision would have sealed unsubstantiated complaints against businesses. That information is now public.

But Laurie Beyer-Kropuenske, who heads the state Information Policy Analysis Division, said the current law treats the owners of small businesses differently, depending on whether they're licensed as individuals or businesses. She said the current laws create too much confusion.

Her predecessor, Don Gemberling, spoke against the proposal. He said state laws on civil investigative data and licensing have been on the books for years and courts have a track record of decisions interpreting them. Betzold offered to back off on parts of the bill; in the end he agreed to keep working on it. He said more clarity about the law is needed.

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