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Chair, Legislative Issues Committee
Minnesota Coalition on Government Information
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August 6, 2013

SUBMITTED VIA COURIER DELIVERY AND ELECTRONIC MAIL

Commissioner Spencer Cronk
IPAD Division
Department of Administration
200 Administration Building
50 Sherburne Avenue
St. Paul MN 55155

RE: Comments in opposition to MNSure's application for a temporary classification of government data

Dear Commissioner Cronk,

The Minnesota Coalition on Government Information (MNCOGI) respectfully submits the following comments in opposition to MNSure's recently filed application for a temporary classification of government data.

MNCOGI is a tax exempt, nonprofit entity organized under the laws of Minnesota. MNCOGI undertakes educational and advocacy work on behalf of government transparency, and regularly makes public comments regarding matters of information policy and data access.

As a matter of board policy, MNCOGI opposes changes to the classification of presumptively public government data unless those changes serve a compelling public interest. It is MNCOGI's position that MNSure's proposed change to the classification of its "marketing theme" data does not rise to meet such a threshold. MNCOGI also notes that MNSure's application contains certain defects, the existence of which are sufficient for you to reject or disapprove it.

MNSure's Application

On July 8, 2013, MNSure submitted a request for a temporary classification of government data to your office. On July 22, 2013, MNSure submitted a supplement to its original filing in order to further clarify and define the data that it was seeking to classify.

Per its application and supplement, MNsure is seeking a temporary, “nonpublic” classification for “marketing theme” data related to MNsure publicity campaigns. MNsure defines such data as “unique, creative, and proprietary themes ... such as tagline, colors, characters, and images.” The application also seeks to classify materials “related” to this marketing theme data as not public.

MNsure asserts that the current, public status of such data would cause “economic harm” to MNsure, and would “waste public funds if released.” MNsure also claims that its need for a nonpublic classification is necessary and compelling, since there is “widespread misinformation regarding the Affordable Care Act, MNsure, and health exchanges being circulated at this time.” MNsure asserts that a nonpublic classification would “prevent improper alignment with MNsure by unaffiliated groups ... and the spread of misinformation to the public.”

Under the terms of the temporary classification that MNsure is seeking, the “nonpublic” designation would adhere during the period when MNsure’s marketing campaigns were under deliberation and creation. Marketing theme data would subsequently become public once MNsure’s marketing campaigns were released to the public.

MNCOGI’s Comments

MNCOGI makes the following comments in opposition to MNsure’s application:

1. MNsure’s application does not conform to the purpose or procedure of the temporary classification process

The classification of Minnesota government data as “not public” is - with the exception of federal law - a function of the Minnesota Legislature. The Legislature has given the Commissioner of Administration the authority to issue temporary data classifications for a limited period of time. The Commissioner’s authority to issue such classifications is derived from Minn. Stat. 13.06, a provision of the Minnesota Government Data Practices Act (MGDPA).

The Minnesota Legislature’s most recent session ended only a few weeks before MNsure submitted its temporary classification application. During the session, the Legislature debated the enabling legislation that created MNsure at great length, and discussed many provisions related to the treatment of government data by MNsure. During that time, MNsure had ample opportunity to raise issues related to marketing theme data, but it chose not to do so.

Both the legislative history of the MGDPA and the long-standing practice of the Commissioner demonstrate that the purpose of the temporary classification process is to provide a mechanism for making classification determinations when the Legislature is unable to act, and then to afford that body an opportunity to debate the merits of the Commissioner’s provisional classifications at a later time. The temporary classification

process should not be used as a method for escaping legislative input into the classification of government data.

Per the terms of its temporary classification application, MNsure notes that the data it seeks to classify will be “nonpublic” during the time of its creation, but will then become public in a matter of weeks or days, upon the public release of MNsure marketing campaigns. Specifically, MNsure cites the planned release of its State Fair marketing campaign later this year as an example of how the proposed treatment of its marketing data would function.

MNsure’s request for the treatment of its data is at variance with Minn. Stat 13.06, subd. 1, which states that data that is the subject of a temporary, “nonpublic” classification will be nonpublic “on a temporary basis until a proposed statute can be acted upon by the legislature.” MNsure’s proposed treatment of its marketing data - first nonpublic, then public - would vary from the temporary classification process set forth by the MGDPA, and would deny the legislature a role in evaluating the classification status of particular government data (for instance, marketing theme data used in conjunction with the 2013 State Fair).

Accordingly, you should use your authority under Minn. Stat. 13.06 subd. 1(c) to reject MNsure’s application for a temporary classification, as its application is not consistent with the purpose of the temporary classification process as articulated in the MGDPA.

2. A temporary classification should only be approved if the data to be classified are clearly stated

Under the terms of Minn. Stat. 13.01, all government data is presumptively public unless otherwise classified. MNsure’s description of the data it seeks to classify is neither clear nor specific, and would engender confusion about the “public” or “not public” status of specific data during the period of the temporary classification.

Particularly in the temporary classification process, an application should be held to a strict standard in how it describes the data to be classified. MNsure’s use of broad terms like “marketing themes” and “related materials” fail to tell the Commissioner or the public precisely what data will be subject to classification. This is another ground for either rejecting or disapproving MNsure’s classification.

3. MNsure’s arguments in support of the application do not meet the standard required by Minn. Stat. section 13.06

MNsure argues that there is a compelling need to classify its “marketing theme” data as nonpublic. It also argues that keeping the data public would make various of its programs unworkable. Other than conjecture and speculation, MNsure offers no detailed argument or proof in support of its contentions. Instead, the application generally suggests that insurance companies might use the data to cause harm to MNsure. However, no proof or substantial specifics are offered. Instead, the application merely

offers a list of possible negative results, but never clearly connects those results to the public status of its “marketing theme” data, nor precisely describes how the public availability of such data would render its programs unworkable.

MNSure’s failure to support its “compelling need” and “unworkability” arguments should also cause this application to be rejected or disapproved.

Summary

Transparency in governmental operations is a pillar of democratic governance, and necessary for public accountability. The presumption of openness is foundational to Minnesota’s treatment of government data under the MGDPA. That presumption is narrowed and limited each time that a new “not public” classification is created and applied. Because of this, MNCOGI urges that such classifications be made sparingly, and only in the face of compelling circumstances. We see no such circumstances here.

In addition, not public classifications that are novel in nature (such as the one that MNSure’s application calls for) often serve as templates for the creation of additional not public classifications. Thus, MNCOGI seeks to limit the scope and number of not public classifications (including temporary classifications), so as to prevent the spread of their rationales to new categories that may not legitimately deserve not public treatment.

Finally, as a technical matter, MNCOGI notes that MNSure’s application for a temporary classification of government data is inconsistent with the purpose and procedure of the temporary classification process under the MGDPA.

For the foregoing reasons, MNCOGI respectfully requests that MNSure’s application for a temporary classification of government data be rejected or disapproved.

Sincerely,

A handwritten signature in black ink, appearing to be the name of the chair of the Legislative Issues Committee.

Chair of Legislative Issues Committee
Minnesota Coalition on Government Information