No. A16-0736

State of Minnesota

In Supreme Court

Tony Webster,

Appellant,

vs.

Hennepin County &
Hennepin County Sheriff's Office,

Respondents-Relators.

BRIEF OF *AMICI CURIAE* PUBLIC RECORD MEDIA & THE MINNESOTA COALITION ON GOVERNMENT INFORMATION IN SUPPORT OF APPELLANT TONY WEBSTER

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Table of Contents

Table of Authorities

Cases

Statutes

Administration Commissioner Opinions

Other Authorities

Amici Identity, Interest, & Authority to File[1]

A. The Identity of the Amici: Public Record Media & The Minnesota Coalition on Government Information.

The Amici are two non-partisan nonprofit organizations concerned with the proper interpretation and enforcement of the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01–13.99.

Public Record Media (PRM) advances "transparency and democracy through the use, application, and enforcement of freedom of information laws."[2] PRM has used the Data Practices Act to inspect and publish thousands of government documents. This includes documents on the military's use of the Twin Cities metro area for urban warfare training and documents on St. Paul's retention of drivers' license-plate tracking data.[3] PRM also holds public workshops on the Act. Finally, PRM pursues legal and administrative actions to enforce the Act.[4]

The Minnesota Coalition on Government Information (the Coalition or MnCOGI) is "dedicated to government transparency and public access

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1 The Amici certify under Minn. R. Civ. App. P. 129.03 that: (1) no counsel for a party authored this brief in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of this brief other than Amici, its members, and its counsel.

2 *About PRM,* PUBLIC RECORD MEDIA, http://bit.ly/2dwKOaS; *see* Kevin Duchschere, *A Need to Know Drives St. Paul Nonprofit's Mission*, MINNEAPOLIS STAR TRIB., July 23, 2015, http://strib.mn/1CTdnZN.

3 *See* Jay Olstad, *Downtown Military Training Exercises Scrutinized*, KARE-11, July 15, 2015, http://kare11.tv/2cTPxFS; Eric Roper, *St. Paul Meets Minneapolis on Vehicle Tracking Data Retention*, MINNEAPOLIS STAR TRIB., Nov. 14, 2012, http://strib.mn/1cTf9IC.

4 *See, e.g.,* Minn. Dep't of Admin. Adv. Op. 14-011 (Sept. 17, 2014).

to information."[5] The Coalition has testified before the Minnesota Legislative Commission on Data Practices.[6] Coalition board member Don Gemberling is also a leading authority on the Data Practices Act, having overseen Act compliance at every level of state and local government for over 30 years as Director of the Information Policy Analysis Division at the Minnesota Department of Administration.[7]

B. The Amici's Interest in *Webster v. Hennepin County.*

As users and caretakers of the Data Practices Act, the Amici are dedicated to safeguarding the Act's "presumption that government data are public and are accessible by the public." Minn. Stat. § 13.01, subd. 3. The vitality of this presumption depends on consistent judicial and administrative enforcement of the duties that the Data Practices Act imposes on government entities in regard to facilitating data access, including the duty to comply with genuine data requests. The Amici are interested in *Webster* because this case turns on this principle.

C. The Amici's Authority to File in *Webster v. Hennepin County.*

On June 15, 2017, this Court granted the Amici's motion to file a joint amici brief in *Webster v. Hennepin County*, No. A16-0736.

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5 Letter from Gary Hill, Chair, MnCOGI, to Minneapolis City Council Member Andrew Johnson (July 14, 2014), http://bit.ly/2cV4fas.

6 *See, e.g., Overview of Health Plan Data Classification*, MINN. COAL. ON GOV'T INFO. (Oct. 28, 2014), http://bit.ly/2dN6hQp.

7 *See generally* Mike Mosedale, *Data Man*, CITY PAGES, Jan. 9, 2002, http://bit.ly/2dzcI5F; *see also, e.g., Montgomery Ward v. Cnty. of Hennepin*, 450 N.W.2d 299, 307 (Minn. 1990) (citing Gemberling).

Summary of Argument

The Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01–13.99, protects the "right of the public to know what the government is doing." *Montgomery Ward v. Cnty. of Hennepin*, 450 N.W.2d 299, 307 (Minn. 1990). The Act does this in three critical ways: (1) by requiring government entities to adopt procedures ensuring that data requests will be handled promptly and appropriately; (2) by requiring government entities to keep their records easily accessible: and (3) by requiring government entities to comply with all genuine data requests.

In this case, an administrative law judge found that Hennepin County and the Hennepin County Sheriff's Office violated all three of these requirements. This Court should affirm that decision. In doing so, the Court should conclude that: (1) the Data Practices Act's procedure-adoption mandate merits strict enforcement; (2) the Data Practices Act's easy-accessibility mandate turns on the practical experience of data requesters with a government entity's recordkeeping system; and (3) the Data Practices Act permits any genuine data request and does not allow government denials of such requests based on burden.

These positions advance the Legislature's mandate that "[e]very law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16. The Data Practices Act is a carefully woven statute meant to maximize public data access and prevent government gamesmanship. The Court of Appeals failed to take this into account in rejecting the ALJ's decision in part. This Court should correct that error, thereby reaffirming the central role of legislative intent in construing the Act.

Argument

I. Government entities violate the Minnesota Government Data Practices Act (MGDPA) when they fail to establish the specific data access procedures required by the Act.

The Minnesota Government Data Practices Act, Minn. Stat. § 13.01–13.99, "establishes a presumption that government data are public and are accessible by the public for both inspection and copying." Minn. Stat. § 13.01, subd. 3. The Act then gives life to this presumption by requiring government entities to have certain procedures in place to address public requests to inspect and copy government data. When government entities neglect their duty to properly establish these procedures, they undermine the Act's "fundamental commitment to making the operations of our public institutions open to the public." *Prairie Island Indian Cmty. v Minn. Dep't of Pub. Safety*, 658 N.W.2d 876, 884 (Minn. App. 2003).

A. The MGDPA requires set procedures for data requests.

The Data Practices Act mandates that "every government entity shall establish procedures, consistent with this chapter, to insure that requests for government data are received and complied with in an appropriate and prompt manner." Minn. Stat. § 13.03, subd. 2(a). This is not an idle or abstract command. Rather, the Act imposes certain "discrete obligations upon government[] entities" in terms of having fixed procedures in place to handle data requests.[8] These discrete obligations include:

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[8] Donald A. Gemberling & Gary A. Weissman, *Data Practices at the Cusp of the Millennium*, 22 WM. MITCHELL L. REV. 767, 788 (1996).

- Government entities must "prepare a written data access policy and update it no later than August 1 of each year, and at any other time as necessary to reflect changes in personnel, procedures, or other circumstances that impact the public's ability to access data." Minn. Stat. § 13.025, subd. 2.
- Government entities must "prepare a written policy of the rights of data subjects under section 13.04"—i.e., individuals. Minn. Stat. § 13.025, subd. 3. This policy must detail "the specific procedures used by the government entity for access by the data subject to public or private data on individuals." *Id.*
- Government entities must "make copies of the [above] policies … easily available to the public." Minn. Stat. § 13.025, subd. 4. This is to be accomplished "by distributing free copies to the public or by posting the policies in a conspicuous place within the government entity that is easily accessible to the public or by posting it on the government entity's Web site." *Id.*

These government obligations are significant not only in terms of what they affirmatively require but also in terms of what they necessarily forbid. For example, as noted above, the Data Practices Act obligates government entities to "prepare a *written* data access policy." Minn. Stat. § 13.025, subd. 2 (italics added). This necessarily requires government entities to set out their data access procedures in a comprehensive written format, rather than relying on *unwritten* or ad hoc policies. *Cf.* Minn. Dep't of Admin. Adv. Op. 01-036 (Apr. 3, 2001) ("Sheriff Gliszinski stated that [his] Office's policy is not to accept data requests via e-mail. Assuming this is the case, [his] Office is required [under the Act] … to include such information in its data access procedures.").

The Data Practices Act also gives teeth to its procedure-adoption mandate. The Act allows lawsuits and administrative actions to be filed against government entities to compel compliance with the Act. *See* Minn.

Stat. § 13.08, subd. 4(a) (civil actions); § 13.085 (administrative remedies). The Act further allows civil penalties to be imposed against government entities in these proceedings. *See* Minn. Stat. § 13.08, subd. 4(b); § 13.085, subd. 5(b). The Act then dictates that "[i]n determining whether to assess a civil penalty … the court or other tribunal *shall consider*"—among other factors—"whether the government entity has … developed [the] public access procedures" that the Act requires. Minn. Stat. § 13.08, subd. 4(b)(4) (italics added). Taken together, these provisions demonstrate the central textual importance of the Act's procedure-adoption mandate.

B. The Legislature required government establishment of data access procedures to advance public access.

The Legislature had good reason to mandate under the Data Practices Act that "every government entity shall establish procedures … to insure that requests for government data are received and complied with in an appropriate and prompt manner." Minn. Stat. § 13.03, subd. 2(a). The Act defines "government data" in broad terms, including "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." *Id.* § 13.02, subd. 7. The Act then establishes "a presumption that government data are public and are accessible by the public … unless there is federal law, a state statute, or a temporary classification of data" that says otherwise. *Id.* § 13.01, subd. 3.

This presumption of public access—and all the data that it makes available—cannot stand unless government entities know what data they

have and how the public may access this data. *Cf.* Minn. Dep't of Admin. Adv. Op. 94-058 (Dec. 28, 1994) ("Hennepin County clearly has a duty … to understand what types of data it collects, how those data should be classified, and to whom those data can be disseminated."). The Act thus requires government entities to set up data access procedures, keeping the Act from being swallowed whole by bureaucratic neglect. *See* Minn. Dep't of Admin. Adv. Op. 03-025 (July 31, 2003) ("[I]f the County has established … procedures, it would not have needed to enact a policy that applies to a particular document."). Once these procedures are in place, it becomes possible for government entities to avoid late, inconsistent, and baseless responses to data requests—i.e., "appropriate and prompt" compliance is ensured. Minn. Stat. § 13.03, subd. 2(a); *see* Minn. Dep't of Admin. Adv. Op. 03-025 (July 31, 2003) ("Government entities must apply their data access policies and procedures consistently….").

The Legislature affirmed this game plan in 1999 when it amended the Data Practices Act, effective January 1, 2001, to expressly require that government entities "prepare public [data] access procedures in written form." Minn. Dep't of Admin. Adv. Op. 01-026 (Feb. 7, 2001) (noting the initial codification of this requirement at Minn. Stat. § 13.03, subd. 2(b) (2001)); *see* Minn. Stat. § 13.025, subd. 2 (present codification of this requirement). The 1999 amendment also required government entities to update their data access procedures annually and to make copies of them easily available to the public. *See* Minn. Dep't of Admin. Adv. Op. 01-026 (Feb. 7, 2001); *see also* Minn. Stat. § 13.025, subds. 2, 4.

At the same time in 1999, the Legislature instructed the Information Policy Analysis Division (IPAD) of the Minnesota Department of Administration "to prepare model policies and procedures concerning public access to data and rights of subjects of data."[9] The genesis of this instruction was an Information Policy Task Force recommendation which advised that IPAD preparation of model data access policies could help to increase government compliance with the Act by reducing the burden that government entities faced in developing data access policies from scratch.[10] The Legislature agreed. *See* Minn. Stat. § 13.073, subd. 6 ("The commissioner shall, in consultation with affected government entities, prepare model policies and procedures to assist government entities….").
The Legislature wanted to ensure "that every government entity … ha[d] in place those policies and procedures that are most critical to assuring that the public is given access to public data."[11]

Against this backdrop, the full legislative function of the Data Practices Act's procedure-adoption mandate becomes clear. The Act is a reflection of the Legislature's systematic effort to leave "no discretionary wiggle room for governmental officials to assert that information … cannot be made available."[12] The procedure-adoption mandate forms an integral part of this effort, preventing government entities from stymying

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9 Donald A. Gemberling, *New Developments in Data Practices* 9–10 (2000) (summary report), http://bit.ly/2sS3bwW.

10 *Id.*

11 *Id.* at 10.

12 Gemberling & Weissman, *supra* note 8, at 773.

public data requests through a lack of established data access procedures. But the mandate cannot do this job unless it is strict enforced—and the Court of Appeals erred in this case by failing to grasp that.

C. Strict enforcement of the MGDPA's procedure-adoption mandate is vital to the Act's effectiveness.

Any judicial or administrative enforcement of the Data Practices Act must ultimately account for the following reality: "this is the statute to which all government[] entities in this state … are supposed to look for guidance" on "handling … [all the] information [they] maintain[].[13] This likewise applies to the Act's procedure-adoption mandate. The level of vigor applied in enforcing this mandate sends a message to government entities about the level of effort they should put into establishing data access procedures that ensure "appropriate and prompt" compliance with data requests. Minn. Stat. § 13.03, subd. 2(a).

In this regard, the Administration Commissioner has established that the procedure-adoption mandate merits strict enforcement. *See* Minn. Stat. § 13.072, subd. 1 (authorizing the Commissioner to issue opinions about the Act). This may be seen in two main respects:

First, the Commissioner has refused to permit deviation from the Act's plain terms governing data access policies. For example, the Commissioner has declared that none of the following complies with the Act's plain requirement that government entities must have in place "a written data access policy." Minn. Stat. § 13.025, subd. 2.

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13 *Id.* at 816.

- **Mere citation of the Act.** *See* Minn. Dep't of Admin. Adv. Op. 14-013 (Oct. 13, 2014) ("Reference to Chapter 13 is not sufficient to satisfy the requirement for written access policies.").
- **Ad-hoc explanations about how data requests are handled.** *See* Minn. Dep't of Admin. Adv. Op. 13-007 (Mar. 19, 2013) (rejecting a school district's assertion that it had a written data access policy in place insofar as the district sent a letter to a data requester that attempted to explain the district's data access policies).
- **Draft policies.** *See, e.g.*, Minn. Dep't of Admin. Adv. Op. 04-049 (Aug. 6, 2004) ("As of the date Mr. Stengrim requested this opinion, it appears the RRWMB had not adopted its public access procedures and, therefore, was not in compliance…."); Minn. Dep't of Admin. Adv. Op. 05-003 (Jan. 7, 2005) ("Rock County is working on, but has not yet adopted its public access procedures. Therefore, the County is not in compliance….").

Second, the Commissioner has determined that government entities must be proactive in their observance of the procedure-adoption mandate. Consider Advisory Opinion 01-087 (Oct. 25, 2001). At issue was the Data Practices Act's requirement that government entities "shall make copies of the[ir] written public access procedures easily available to the public." Minn. Stat. § 13.025, subd. 4. The Commissioner found that a city did "not necessarily fulfill[] th[is] requirement" merely by providing copies on demand. Minn. Dep't of Admin. Adv. Op. 01-087 (Oct. 25, 2001). The city also had to take "proactive measure[s] to make its policy available" like "publishing the policy in a newsletter or web site." *Id.*; *see* Minn. Dep't of Admin. Adv. Op. 01-001 (Jan. 3, 2001) (noting proactive steps for a city to take in formulating a data access policy).

In light of these Administration Commissioner opinions—and many more like them—the need for strict enforcement of the Data Practices

Act's procedure-adoption mandate becomes manifest. "[A] substantial number of governmental agencies have chosen to ignore their data practices obligations, evidently deciding to risk being sued rather than making the effort, or spending the money, to comply."[14] Absent strict enforcement of these obligations, government entities are free to reduce the Data Practices Act to "a form of words." *Indep. Sch. Dist. No. 639 v. Indep. Sch. Dist. No. 893*, 160 N.W.2d 686, 689 (Minn. 1968).

This case is no exception. By their own testimony, Hennepin County and the Hennepin County Sheriff's Office (collectively, "Hennepin County") "did not have complete written procedures" and Hennepin County's data access policies "had not been updated in … nearly two years." (Webster Br. 12.) This evidence alone supports the administrative law judge's ("ALJ") finding that the County was not in compliance with the procedure-adoption mandate (A.Add.31–32). *See* Minn. Stat. § 13.025, subd. 2 (government entities must "prepare a written data access policy" and update this policy annually); Minn. Dep't of Admin. Adv. Op. 13-007 (Mar. 19, 2013) (school district was not in compliance with the Act where school district had admitted that its "[d]etailed procedures for access to public data do not exist in a single written document").

The Court of Appeals thus erred in reversing the ALJ on this point. (*See* A.Add.6.) This error stemmed from two flawed assumptions. The panel first assumed that the procedure-adoption mandate is met when a government entity has some set of procedures for data requests. Hence,

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[14] Gemberling & Weissman, *supra* note 8, at 773.

the panel noted Hennepin County's interpersonal arrangements for data requests and that "[t]he ALJ did not identify any deficiencies." (A.Add.6.) But the procedure-adoption mandate demands more than this: it requires the establishment of procedures that are "consistent with" the Act. Minn. Stat. § 13.03, subd. 2(a). As such, the panel's analysis should have started with the specific procedures that all government entities must adopt under the Act, leading to a simple yes/no inquiry based on the record—e.g., did the County have a "written data access policy." Minn. Stat. § 13.025, subd. 2. And if the answer was ever 'no,' the panel would then have to find that the County violated the mandate.

The panel also assumed that non-compliance with the procedure-adoption mandate cannot be inferred from "a failure in a particular case," because "poor execution of a proper procedure is an equally plausible explanation for failure." (A.Add.6.) But poor execution shows the insufficiency of a government entity's data access procedures, no matter how proper these procedures might otherwise seem to be. Put another way, poor execution shows that a government entity's procedures are not ensuring "appropriate and prompt" responses to data requests, which then violates the procedure-adoption mandate. Minn. Stat. § 13.03, subd. 2(a). The Administration Commissioner has acknowledged this reality in enforcing the Data Practices Act. *See* Minn. Dep't of Admin. Adv. Op. 01-001 (Jan. 3, 2001) ("It appears that no … procedures are in place as [the requester] did not receive a response to his October 20, 2000 request."). The Court of Appeals should have done the same here.

II. Government entities fail to keep records "easily accessible for convenient use," as the MGDPA requires, when their electronic records cannot be reviewed in a practical manner.

To guarantee the "right of the public to know what the government is doing," the Data Practices Act does more than just require government entities to establish data access procedures. *Montgomery Ward v. Cnty. of Hennepin*, 450 N.W.2d 299, 307 (Minn. 1990). The Act also works to keep government entities from "interposing technology as a barrier to access" or turning their recordkeeping systems into "ingenious bureaucratic roadblocks."[15] One way the Act accomplishes this is by mandating that "every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use." Minn. Stat. § 13.03, subd. 1.[16]

A. The MGDPA's easy-accessibility mandate is an anti-gamesmanship provision.

In responding to data requests, government entities often have "the advantage of knowing what types of data are maintained, how they are maintained, and how the data can be made accessible."[17] This opens the door to an "infinite variety of gamesmanship advantages."[18] To combat

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15 Donald A. Gemberling & Gary A. Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act – From "A" to "Z,"* 8 WM. MITCHELL L. REV. 573, 583 (1982).

16 *See id.*

17 Donald A. Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, in GOVERNMENT LIABILITY 241, 257 (Minn. CLE Cmte. ed., 1981).

18 *Id.*

these advantages, the Legislature included several anti-gamesmanship provisions in the Data Practices Act.[19] For example, the Act enables data requesters to inquire about the "meaning" of data. Minn. Stat. § 13.03, subd. 3(a). This ensures that government entities are not able to use "jargon and computer symbols" to hinder data access.[20]

One of the Data Practices Act's most significant anti-gamesmanship provisions is that "every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use." Minn. Stat. § 13.03, subd. 1.[21] This easy-accessibility mandate obligates "government agencies to design data storage, data retrieval, records storage, records retrieval and filing systems in such a way that those systems will assist and not hinder the public in gaining access to government data." Minn. Dep't of Admin. Adv. Op. 94-032 (Aug. 11, 1994). In doing so, this mandate advances a directive that has existed in Minnesota for quite some time.

The need for government records to be kept "easily accessible for convenient use" has been "a part of legislatively enacted public policy in [Minnesota] since 1941." *Id.* As a result, "[v]irtually all of the modern record-keeping and management information systems, both manual and electronic, that have come into existence" in Minnesota over the last 75 years "have been subject to th[is] requirement." *Id.* The Administration

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19 *See* Gemberling & Weissman, *supra* note 15, at 583–84.

20 *Id.*

21 *See id.* at 583.

Commissioner, in turn, has been primarily responsible for enforcing this easy-accessibility mandate throughout the state.[22]

A December 2000 opinion by the Administration Commissioner exemplifies this reality. *See* Minn. Dep't of Admin. Adv. Op. 00-067 (Dec. 5, 2000). A data requester asked the Minnesota Department of Public Safety (DPS) for all data that the DPS had related to him. *See id.* The DPS answered this data request by providing a number of records, but no emails. *See id.* The data requester then asked the Administration Commissioner to address this deficiency. *See id.* The DPS responded to this opinion request by stating that the DPS had been "unable to review all of the computer back-up tapes containing email messages because [the DPS] did not have the proper equipment in place." *Id.*

The Administration Commissioner rejected this excuse. Citing the Data Practices Act's easy-accessibility mandate, the Commissioner observed that forcing a data requester "to wait three months or more for a new server to be ordered, delivered and installed so that a back-up tape can be reviewed is not keeping records in a way that makes them easily accessible for convenient use." *Id.* The Commissioner then put all government entities on notice that they "need[ed] to act proactively to prepare their computer systems so that they are easily able to respond for requests for data, including review of backup tapes." *Id.*

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[22] *See, e.g.*, Minn. Dep't of Admin. Adv. Op. 10-016 (June 1, 2010) (enforcing the access mandate against St. Paul); Minn. Dep't of Admin. Adv. Op. 04-033 (June 1, 2004) (enforcing the access mandate against Minneapolis); Minn. Dep't of Admin. Adv. Op. 03-025 (July 31, 2003) (enforcing the access mandate against Nobles County).

This warning highlights the anti-gamesmanship importance of the Data Practices Act's easy-accessibility mandate. *See* Minn. Stat. § 13.03, subd. 1. Through this mandate, the Legislature aimed to put an end to the many games that government entities could play with physical records by "making inquirers run the gauntlets of multiple storage locations or obscure agency filing practices."[23] The Legislature also crafted this mandate in contemplation of the digital revolution, as the above opinion by the Administration Commissioner demonstrates.

B. The Legislature had the digital age in mind when it crafted the MGDPA's easy-accessibility mandate.

When the Legislature undertook the considerable task of developing the Data Practices Act in the late 1970s, computers had already begun to transform the face of government data. To meet this revolution, "[m]uch of the advice to the Legislature in its development of the initial Act" came from "public administrators and academics who were data processing professionals."[24] These experts helped the Legislature to ensure that the Data Practices Act would stand the test of the digital age.

One example of this is the Legislature's "conscious decision … to direct the regulatory features of the [Data Practices] Act to the most basic level of information organization which is maintained by agencies": the "data element level."[25] This decision stemmed from the Legislature's

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23 Gemberling & Weissman, *supra* note 15, at 583.

24 Gemberling, *supra* note 17, at 257–58.

25 *Id.* at 258.

recognition that the alternative—focusing the Act on "records"—would not survive the digital age.[26] Government entities could freely withhold "computerized and seemingly disconnected bits of information" so long as this information was not compiled into a "record."[27]

The easy-accessibility mandate is another way the Legislature put the Data Practices Act ahead of the digital curve. The mandate imposes an affirmative duty on government entities to ensure their use of digital technology—or any other data storage method—does not obstruct public access to government data. In concrete terms, this means (for example) that while the Data Practices Act may "not contain specific language that says that government entities shall design their computer systems to accommodate public access," the easy-accessibility mandate fills this gap. Minn. Dep't of Admin. Adv. Op. 96-032 (July 24, 1996) (explaining that government entities must design their computer systems in a manner that guarantees these entities "are able to meet their statutory obligations to provide full, convenient access to the data in those systems").

C. Compliance with the MGDPA's easy-accessibility mandate turns on a data requester's experience accessing records.

Given the easy-accessibility mandate's anti-gamesmanship purpose and essential gap-filling role in the digital age, government compliance with this mandate cannot be gauged simply based on abstract evaluations of government recordkeeping practices. For instance, the mere fact that a

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26 *See id.*

27 *Id.*

government entity has multiple state-of-the-art email servers reveals nothing about whether the government data contained on these servers is "easily accessible for convenient use." Minn. Stat. § 13.03, subd. 1.

As for the right way to gauge government compliance with the easy-accessibility mandate, the answer is simple: the test is whether the rubber meets the road. No matter how sophisticated a government entity's recordkeeping system may look on paper, what really matters is how this system works *in practice*. To this end, if a data requester's practical experience in dealing with a government entity's recordkeeping system is one of substantial hardships, costs, or delays, then the government entity has failed to comply with the easy-accessibility mandate.

The Administration Commissioner has consistently applied this practical-experience test in determining government compliance with the easy-accessibility mandate. As noted above, the Commissioner has found non-compliance where a data requester's practical experience revealed a three-month wait "for a new server to be ordered, delivered and installed so that a backup tape can be reviewed." Minn. Dep't of Admin. Adv. Op. 00-067 (Dec. 5, 2000). The Commissioner has also found non-compliance where practical experience revealed "the computer containing the data [at issue] often 'crash[ed]' during printing." Minn. Dep't of Admin. Adv. Op. 03-025 (July 31, 2003); *see also* Minn. Dep't of Admin. Adv. Op. 04-033 (June 1, 2004) (non-compliance where practical experience revealed delay from failure of recordkeeping system to collect all relevant data, requiring "extensive review" by a special government employee).

When this practical-experience test is applied here, it is clear the ALJ had ample basis to find that Hennepin County was not in compliance with the easy-accessibility mandate. The evidence in the record reveals a "nearly 19 week span of time between [a] request for data and the initial inspection of only a small part of the requested data." (A.Add.29–30.) And yet, the Court of Appeals reversed because "the ALJ did not identify any specific ways" in which the technological elements of the County's recordkeeping system (e.g., the County's use of "19 state-of-the-art servers") violated the easy-accessibility mandate. (A.Add.7–8.) The panel assumed in effect that the easy-accessibility mandate is to be enforced against government entities in a vacuum, without regard for the practical experience of data requesters in dealing with these entities.

This was error. The whole point of the easy-accessibility mandate is to elevate substance over form: to cut through the games that government entities are otherwise capable of playing in forging their recordkeeping systems. The Court of Appeals' decision in this case thus risks unraveling one of the Legislature's most important achievements in passing the Data Practices Act. This Court should not allow that to stand.

III. The MGDPA permits data requests based on keywords.

In this case, Tony Webster sent a written request under the Data Practices Act to Hennepin County for data relating to the "use of mobile biometric technologies." (A.Add.18 at ¶6.) In relevant part, Webster requested "any and all data since January 1, 2013, including e-mails, which reference biometric data or mobile biometric technology." (*Id.*)

Webster then explained this request "include[d], but [was] not necessarily limited to e-mails containing the following keywords" and listed 20 keywords related to biometric technology. (*Id.*) The Data Practices Act embraces such a keyword-based request, as the Court of Appeals and the ALJ correctly found below.[28] (*See* A.Add.8–15; A.Add.28–29.)

A. The MGDPA regulates data—not documents.

Unlike any other state freedom-of-information law, the Data Practices Act regulates "*data*, not documents." *KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 789 (Minn. 2011). "A focus on data and not on files or records must [therefore] be ever present in analyzing issues arising out of the Act."[29] This Court has implicitly acknowledged this point through its reliance on broad dictionary definitions to establish the meaning of "data" under the Act. *See Westrom v. Minn. Dep't of Labor & Indus.*, 686 N.W.2d 27, 34 (Minn. 2004) ("'[D]ata' usually is said to mean 'individual facts, statistics, or items of information[.]'") (quoting the RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 508 (2d ed. 1987)).

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[28] Government entities also of their own volition often use keywords when performing searches for material responsive to Freedom of Information (FOI)-type requests. Amici's direct experience with FOI requests shows that government agencies frequently used keywords to locate responsive content in electronic databases. *See, e.g.*, Declaration of John Bies (Deputy Ass't Att'y Gen., Office of Legal Counsel (OLC), U.S. Dep't of Justice) at ¶ 17, *Pub. Record Media v. U.S. Dep't of Justice*, No. 12-cv-1225 (D. Minn. filed Nov. 21, 2012) (ECF No. 16-1) ("[A] paralegal … perform[ed] additional keyword searches of the OLC's central storage system of all unclassified, final OLC advice.").

[29] Gemberling, *supra* note 17, at 258.

This has "enormous" implications for the Data Practices Act.[30] "If data is what the Legislature intend[ed] to regulate, then it is reasonable, for example, for the public to request access to a single piece of public data which is contained in a file of data which is otherwise not available to the public."[31] This proposition cannot be sustained, however, unless members of the public are also free to ask for data in a diversity of ways that can engage "the millions of individual bits and items of information maintained by government agencies."[32] *See, e.g.*, Minn. Dep't of Admin. Adv. Op. 05-032 (Oct. 25, 2005) ("[T]he [Administration] Commissioner encourages data requestors to ask for specific data rather than asking for documents. … The ensuing discussion [will] then … revolve[] around whether the [requested] data [does] or [does] not exist.").

B. The MGDPA allows any genuine data request.

The Data Practices Act establishes that "[u]pon request to a responsible authority or designee, a person shall be permitted to inspect and copy public government data at reasonable times and places." Minn. Stat. § 13.03, subd. 3(a). Only one inherent limit on data requests can be drawn from this language: a request must aim to inspect or copy public government data. "The expenditure of public resources to gather public data that the requestor will not review is an absurd and unreasonable result." Minn. Dep't of Admin. Adv. Op. 01-031 (Mar. 22, 2001).

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30 *Id.*

31 *Id.*

32 *Id.* at 257.

In other words, the Data Practices Act allows any *genuine* data request. *See id.* The Act only imposes a bar against data requesters who have "demonstrated a clear and consistent pattern of asking for large volumes of data to be prepared and then, for all practical purposes, refus[e] to view the data." *Id.* Under this "unique and very specific" state of affairs—which evinces a clear intent to harass—government entities need not pull "huge amounts of data that might never be examined." *Id.* But where a data request is supported by a genuine intent to review the data, government entities must comply. They cannot avoid compliance just because complying "will be costly or time-consuming." *Id.*

Government entities also cannot avoid compliance based on the format of a data request—not unless the Act expressly allows this. For example, the Act requires that requests for "summary data" be made "in writing." Minn. Stat. § 13.05, subd. 7; *see also, e.g., id.* § 13.045, subd. 4b (requiring requests for the real property data of Safe-at-Home Program participants to state their "purpose"). But outside these few exceptions, the Act does not limit the format of data requests. The Act rather sends the exact opposite message insofar as it states that "[u]nless specifically authorized by statute, government entities may not require persons to identify themselves, state a reason for, or justify a request to gain access to public government data." Minn. Stat. § 13.05, subd. 12.

This message then underscores the reality that "[t]he Legislature, through the enactment of the MGDPA, and as evidenced by subsequent actions, has … retained the authority to classify data. It [has] removed

such discretion from government entities." Minn. Dep't of Admin. Adv. Op. 94-057 (Dec. 28, 1994). Only the Legislature may decide how data is classified, how data requests must be formatted, or when data may be withheld. This leaves no room for courts to read new limits into the Act, as this would "effectively override" the Legislature's sole authority over the Act. *State v. S.L.H.*, 755 N.W.2d 271, 279 (Minn. 2008).

C. Reading the MGDPA to bar keyword use is as wrong as reading an undue-burden exception into the Act.

Tony Webster had every right under the Data Practices Act to seek all Hennepin County e-mails with one of 20 keywords. As detailed above, a "request" under the Data Practices Act simply means asking to "inspect and copy public government data." Minn. Stat. § 13.03, subd. 3(a). Webster asked to "inspect and copy" all Hennepin County e-mails with certain keywords, and he inspected those emails that the County allowed him to see. (A.Add.21 at ¶20.) This places Webster's request well within the broad spectrum of genuine data requests that the Act has enabled over the years. *See, e.g.*, Minn. Dep't of Admin. Adv. Op. 09-009 (Apr. 17, 2009) (request for "[a]ll documents" that "contain[ed] the names, current addresses, and/or partners" of a private company); Minn. Dep't of Admin. Adv. Op. 00-019 (June 16, 2000) (request for "e-mails relating to a number of topics surrounding the Hiawatha [LRT] project").

The keyword-based format of Webster's data request thus furnishes no basis for this Court to read limits into the Data Practices Act that the Act itself does not provide. Nor does the fact that Webster's data request

implicates a large volume of electronic data. (*See* A.Add.21–22 at ¶23.) The Data Practices Act is meant to render accessible "all the millions of individual bits and items of information" held by the government.[33] The Act is also meant to keep government entities from "interposing technology as a barrier to access[ing]" government data.[34]

By extension, Webster's data request also furnishes no basis for this Court to read an undue-burden exception into the Act. The Legislature has never adopted such a provision. (*See* A.Add.28.) This Court also does not read into statutes "provision[s] that the legislature has omitted, either purposely or inadvertently." *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). Illinois and Maine, by contrast, have express undue-burden exceptions under their respective state freedom-of-information laws.[35] And Arkansas has recently observed that the addition of an undue-burden exception to its freedom-of-information law can only be achieved through the legislative process.[36] Minnesota is no different.

It also must be recognized that the Data Practices Act deals with "burden" in its own unique way: by working to prevent it. The Act

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33 Gemberling, *supra* note 17, at 257.

34 Gemberling & Weissman, *supra* note 15, at 583.

35 *See* 5 Ill. Comp. Stat. 140/3(g) (2016) ("Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome…"); Me. Rev. Stat. tit. 1, § 408-A (2016) ("A request for inspection or copying may be denied … on the basis that the request is unduly burdensome….").

36 *See, e.g.,* Ark. H.B. 1873 (2015) ("An Act to Create a Procedure for Addressing Unduly Burdensome Requests for Disclosure Under the [Arkansas] Freedom of Information Act of 1967….").

requires government entities to keep their data "easily accessible for convenient use," which means being prepared to handle data requests that would otherwise prove to be a burden. Minn. Stat. § 13.03, subd. 1; *see* Minn. Dep't of Admin. Adv. Op. 96-032 (July 24, 1996) (government entities that buy new computer systems must ensure that these systems "provide full, convenient access to the data" in them).

The Data Practices Act also prevents burden by allowing data inspections to take place at "reasonable times." Minn. Stat. § 13.03, subd. 3(a). When a data request implicates a large volume of data, government entities may respond on a "reasonable" rolling basis that "correlate[s] with the volume and/or complexity of [the] [data] request." Minn. Dep't of Admin. Adv. Op. 98-036 (July 2, 1998); *see, e.g.,* Minn. Dep't of Admin. Adv. Op. 95-006 (Feb. 2, 1995) ("Owing to the volume and complexity of Mr. Wolter's request … thirteen working days … is not an unreasonable time frame in which to make the data available.").

What government entities cannot do is spend a month procrastinating before answering a data request. Nor can they use less-efficient processes to inflate the burden of a data request. That is what Hennepin County did here. (*See* A.Add.28 & A.Add.23 at ¶29.) Such self-inflicted burdens do not merit judicial creation of an undue-burden exception, which can only invite more government gamesmanship in answering data requests. These self-inflicted burdens instead merit judicial reaffirmation of the Act's main goal: to leave no wiggle room for governmental entities to avoid genuine data requests.

Conclusion

Public access to government data is vital to a free society. The Minnesota Government Data Practices Act advances this principle by affirmatively establishing that any person who genuinely wishes to inspect or copy public government data is free to do so without having to format their request in any special way or prove that their request is not burdensome. This Court should not stand these important tenets on their head to excuse Hennepin County's systematic errors in handling a data request that it should have been prepared to answer. The Court should reinstate and affirm administrative law judge's decision in full.

Respectfully submitted,

Dated: July 14, 2017

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Certification of Brief Length

The undersigned counsel for Public Record Media and the Minnesota Coalition on Government Information certifies that this *amicus curiae* brief conforms to the requirements of Minn. R. App. P. 132.01 in that it is printed using 13–point, proportionally-spaced fonts. The length of this document is 6,607 words (including headings, footnotes, and quotations) according to the Word Count feature of the word-processing software used to prepare this brief (Microsoft Word 2010).

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