



A Discussion of the Open Meeting Law and the Minnesota Government Data Practices Act

2010 BWSR Academy – October 26, 2010

Jennifer Wolf

Sonya Guggemos

Minnesota Counties Intergovernmental Trust

The information contained in this handout is intended for general information purposes only and does not constitute legal or coverage advice on any specific matter.

Goals

- Understand the basic provisions of the Open Meeting Law (OML) and the Minnesota Government Data Practices Act (MGDPA)
- Recognize potential issues and mitigate risks under the OML and MGDPA
- Avoid violations of the OML and the MGDPA

MGDPA Overview

- Classifies data
- Establishes procedural rights and obligations for government entities
- Provides for penalties, fines and damages

MGDPA Procedural Requirements

- A government entity must:
 - Designate a responsible authority (RA);
 - Prepare a public document that names the RA;
 - Designate a data practices compliance official;
 - Establish an inventory for data on individuals;
 - Develop public access procedures;
 - Provide ongoing training to personnel

Classifying Data

Data on Individuals

- Public Data
- Private Data
- Confidential Data



Classifying Data

Data Not on Individuals

- Public Data
- Non-Public Data
- Protected Non-Public Data

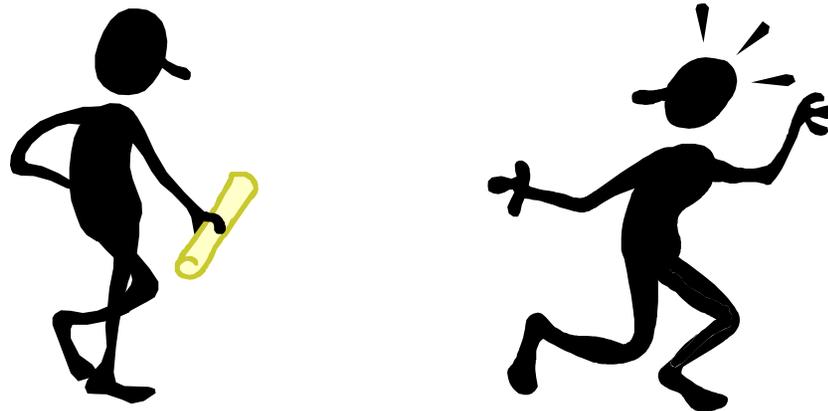


MGDPA

- Generally, there is a presumption that government data is public data, unless otherwise classified by state or federal statute. (*Minn. Stat. § 13.01, subd. 3*)
- *Exception: Personnel data – presumption that data is private unless otherwise classified by state or federal statute. (Minn. Stat. § 13.43)*

Requests for Data

Requests for data should be directed to the appropriate RA or RA's designee.



Who has Access?

| <u>Data On Individuals</u> | <u>Data Not On Individuals</u> | <u>Who has access</u> |
|----------------------------|--------------------------------|---|
| Public | Public | Anyone |
| Private | Non-Public | Data Subject; gov't employees and officials whose work assignments reasonably require access. |
| Confidential | Protected Non-Public | Only government employees and officials whose work assignments reasonably require access. |

Timeline for Responding to Requests

| | MEMBER OF PUBLIC | SUBJECT OF DATA |
|--------------------|--|--|
| INSPECTION OF DATA | As soon as reasonably possible Minn. Stat. §13.03; Minn. R. 1205.0300, subp. 3 | Immediately if possible or within 10 business days Minn. Stat. § 13.04, subd. 3 |
| COPIES OF DATA | As soon as reasonably possible Minn. Stat. § 13.03; Minn. R. 1205.0300, subp. 3 | Immediately if possible or within 10 business days Minn. Stat. § 13.04, subd. 3 |

Costs and Fees

| | MEMBER OF PUBLIC | SUBJECT OF DATA |
|--------------------|---|---|
| INSPECTION OF DATA | No charge or fee allowed | No charge or fee allowed |
| COPIES OF DATA | <ul style="list-style-type: none"> ■ \$0.25 per page (100 or fewer, black & white, legal/letter size paper copies) ■ Actual Cost (all other copies, no charge to separate public & not public data) <p>Minn. Stat. § 13.03, subd. 3</p> | <ul style="list-style-type: none"> ■ Actual cost <ul style="list-style-type: none"> ■ no charge to search for & retrieve data; ■ no charge to separate public & not public data; ■ no charge to redact private or confidential data about others <p>Minn. Stat. § 13.04, subd. 3</p> |

Personnel Data

- Defined by Minn. Stat. §13.43
- Government data on individuals maintained because individual:
 - Was/is an employee or an applicant for employment;
 - Performs services on a voluntary basis; or
 - Acts as an independent contractor
 - With a government entity

PUBLIC Personnel Data

- Name
- ID Number (can not be social security nos.)
- Actual gross salary
- Salary range
- Terms and conditions of employment relationship
- Contract fees
- Actual gross pension
- Value/nature fringe benefits
- Basis for/amount added remuneration (expense reimbursement)

PUBLIC Personnel Data

- Job title/description
- Bargaining unit
- Education and training background
- Previous work experience
- First and last date employment
- Existence/status of complaints (regardless of disciplinary action)

PUBLIC Personnel Data

- Work location
- Work telephone number
- Badge Number
- Work related continuing education
- Honors and awards received
- Payroll sheets (except to the extent that release would show reasons for use of sick or medical leave or other not public data)

PUBLIC Personnel Data

- Terms of any agreement settling any dispute arising out of an employment relationship
 - Must include specific reasons if involve the payment of more than \$10,000 of public money
- Final disposition of any disciplinary actions
 - Specific reasons for the action
 - Data documenting the basis of the action
 - Does not include data that would identify confidential sources who are employees of the public body

Final Disposition

- Occurs when the government entity makes final decision about disciplinary action
 - Most future court proceedings do not matter
 - Arbitration proceedings under CBA do matter
 - Final disposition includes a resignation by an individual when the resignation occurs after the final decision of the government entity or arbitrator

- When arbitration is an option, final disposition occurs:
 - Conclusion of arbitration; or
 - Failure to elect arbitration within time outlined in CBA

- A disciplinary action does not become public data if an arbitrator sustains a grievance and reverses all aspects of the disciplinary action

Applicant Data

- Public Data
 - Veteran status
 - Relevant test scores
 - Rank on eligibility list
 - Job history
 - Education and training
 - Work availability
 - Name of “certified applicants” and “finalists”



Applicant Data

- “Certified Applicant”
 - Been certified for appointment to a vacancy in the government

- “Finalist”
 - Selected to be interviewed by the appointing authority prior to selection

Hypothetical:

An SWCD Supervisor (who does not serve on the personnel committee) wants access to an employee's personnel file. May it be released?

Intergovernmental Access to Data

A responsible authority shall allow another responsible authority access to data classified as “not public” only when the access is authorized or required by statute or federal law.

Hypothetical

- An SWCD is having a disciplinary issue with an employee. The SWCD wants to discuss the employee's interactions with an employee from BWSR.
 - Is this allowed?
 - How may the SWCD achieve its goals?

Collection of Not Public Data on Individuals

- Tennessee Warning
 - Required when collecting private/confidential data from an individual
 - Purpose: informed decision regarding whether to provide data
- Generally, may not collect data on individuals unless data is necessary to carry out organization's duties

Rights of the Person Providing Data

Tennessee Warning should include:

- The purpose and intended use of the data
- Whether the individual is legally required to provide the data;
- Known consequences from either providing or refusing to provide the information; and
- The identity of other persons and/or entities with statutorily authorized access to the data.

Minn. Stat. § 13.04, subd. 2.

Informed Consent / Release of Information

Informed consent is:

- A written permission from an individual that allows a government entity to:
 - Release the individual's private data to a 3rd party
 - Use the individual's private data within the entity in a different purpose than originally collected

MGDPA

WHEN IN DOUBT, DON'T GIVE IT OUT

- Consult with responsible authority
- Consult with legal counsel
- Obtain opinion from Department of Administration

Penalties for Violating the MGDPA

- Civil lawsuit to recover damages sustained, plus costs and reasonable attorney's fees.
 - If a willful violation, the government entity may also be liable for exemplary damages of not less than \$1,000 and not more than \$15,000 for each violation
 - Injunctive relief may also be sought.
- Civil lawsuit to compel compliance
 - May recover costs and reasonable attorney fees
 - Civil penalty of up to \$1,000.

Penalties for Violating the MGDPA

- Criminal Penalty: an intentional violation of the MGDPA is a misdemeanor
- Employment Penalty: an intentional violation of the MGDPA constitutes just cause for suspending the employee without pay or dismissal from employment.

Expedited Data Practices Complaint Process

- Beginning July 1, 2010, persons seeking to compel a government entity to comply with the MGDPA can file a complaint with Office of Administrative Hearings. (*Minn. Stat. § 13.085*)
- The law provides strict timelines for complaints filed under this process.
 - The deadline for a responding to a notice of complaint under this process is 15 business days after notification.
- Upon finding a violation, the administrative law judge may:
 - Impose a civil penalty against the respondent of up to \$300;
 - Issue an order compelling compliance and may establish a deadline for production of data, if necessary;
 - Refer the complaint to the appropriate prosecuting authority for consideration of criminal charges;
 - Award of reasonable attorney fees, not to exceed \$5,000, to a complainant who substantially prevails on the merits.

Records Retention

- Minnesota Official Records Act provides that government entities “shall make and preserve all records necessary to a full and accurate knowledge of their official activities.” Minn. Stat. § 15.17
- Official records may only be disposed of or destroyed in conjunction with an approved records retention schedule or with approval from the Minnesota State Archives.
 - Official records determined to be archival must be transferred to the State Archives when they no longer have administrative value.
- Minnesota State Archives information on records retention: <http://www.mnhs.org/preserve/records/recser.html>

EEOC

- EEOC regulations require that employers keep all personnel/employment records for one year
- If employee is involuntarily terminated, personnel records must be maintained for one year from the date of termination

ADEA

- Employers must keep:
 - payroll records for three years
 - employee benefit plan (such as benefit and insurance plans) and any written seniority or merit system for the full period of the plan or system in in effect or for one year after terminations

ADA/FMLA/MHRA

- Medical records must be kept in a file separate from personnel file
- Restrictions on who may have access to and request such information (more limited than MGDPA)

Open Meeting Law Overview

- Prohibits action being taken at secret meetings where the public is unable to become informed about decisions of the public body or to detect improper influences.
- Assures the public's right to be informed.

Open Meeting Law

Open Meeting Law applies to:

- All meetings of the public body
- Committees or subcommittee if:
 - Public body members comprise a quorum of the (sub)committee; or
 - Public body delegated authority to the (sub)committee

Open Meeting Law

Do not use to build a consensus outside of a public meeting:

- Serial meetings
- Telephone conversations, email or letters



Meeting Types and Notice Requirements

- Regular meetings
- Special meetings
- Emergency meetings
- Recessed and continued meetings



Open Meeting Law

Meetings *MAY* be closed if the following is discussed:

- Labor negotiations
- Performance evaluations
 - Open if the employee being evaluated requests it to be
 - Advance notice to the employee should be given so that the employee can make an informed decision on whether (s)he wants the meeting open
- Attorney-client privilege

Open Meeting Law

Meetings **MAY** be closed if the following is discussed:

- Preliminary consideration of the purchase or sale of real or personal property
- Review of confidential or non-public appraisal data
- Security briefings and reports
- Issues related to security systems
- Security deficiencies in or recommendations regarding public services, infrastructure and facilities
- Emergency response procedures

Open Meeting Law

Meetings ***MUST*** be closed if the following data is discussed:

- Preliminary consideration of charges against an employee
 - Must be open if the employee who is the subject of the charges requests
 - If the members of the governing body conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must be open

- Data identifying alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minor or vulnerable adults

Open Meeting Law

Meetings ***MUST*** be closed if the following data is discussed:

- Active criminal investigation data as defined in Minn. Stat. § 13.82, subd. 7, or internal affairs data relating to allegations of law enforcement personnel

- Not public data under MGDPA for:
 - Education (Minn. Stat. § 13.32)
 - Health (Minn. Stat. § 13.3805, subd. 1)
 - Medical (Minn. Stat. § 13.384)
 - Welfare (Minn. Stat. § 13.46, subd. 7)
 - Mental health (Minn. Stat. § 13.46, subd. 2)

- Medical records governed by Minn. Stat. § 144.291 to 144.298

Open Meeting and Not Public Data

- Unless required to be closed, not public data may be discussed at an open meeting if the disclosure:
 - Relates to a matter within the scope of the public body's authority
 - Is reasonably necessary to conduct the business or agenda item before the public

- Data discussed retains its original classification

- The record of the meeting, but not the data, must be available to the public

How to Close a Meeting

- A motion to close the meeting must be made in open session
 - Reference applicable statutory provision
 - Describe subject to be discussed
- Withhold from public, any materials discussed in closed session
- Closed meetings must be recorded
 - Do not record meeting closed under attorney-client privilege
 - Preserve recordings for at least three (3) years
 - Unless another time period is provided by an existing law
- Meeting minutes
 - Should **not** reflect closed session discussion
 - Should simply state closed meeting was held and the reason for closing

Hypothetical

The SWCD board has advertised for an open district manager position.

- May the board close the meeting to review the applications and resumes?
- May the board close the meeting to interview candidates?
- May the board close the meeting to discuss the candidates and to choose to whom the position will be offered?

Hypothetical

The SWCD Board is planning to conduct a personnel evaluation of an employee.

- May the Board close the meeting?
- Does the employee have to know about the evaluation?
- What if the employee objects to closing the meeting?
- What if the personnel evaluation coincides with a preliminary allegation or charge of misconduct?

Penalties for Violating the OML

- If a court finds a member of the SWCD board violated the Open Meeting Law with specific intent to do so, the member may be fined up to \$300 for each violation.
 - The SWCD **cannot** indemnify the member from these penalties.
- If the member has been found to have intentionally violated the law three or more separate and unrelated times he/she may be removed from office.
- The court may order the member to pay costs and attorney's fees, up to \$13,000, to the claimant.
 - The SWCD **can choose** to indemnify the member for these expenses.

Open Meeting Law

When In Doubt...

**Notice The Meeting
and
Comply With OML Requirements**

If a Question Arises:

- Consult with the county attorney or other legal counsel
- Seek an opinion from the Commissioner of the Department of Administration
- Look at the resources available on the Department of Administration's website:
www.ipad.state.mn.us

Questions/Discussion

