Minnesota Journal of Law, Science & Technology

Volume 19 | Issue 2 Article 6

6-2018

Governing Behind the Cloud: Is Transparency Too "Burdensome" in the Digital Age?

Sam Louwagie

Note

Governing Behind the Cloud: Is Transparency Too "Burdensome" in the Digital Age?

*Sam Louwagie**

In the summer of 2015, Minneapolis resident and independent journalist Tony Webster began researching law enforcement use of biometric technologies.[1] On August 12, 2015, he sent a data request to Hennepin County and the Hennepin County Sheriff's Office.[2] Webster sought, among other information, any and all e-mails since January 1, 2013 that included any of 20 specifically requested terms relating to biometric technology.[3]

Over the next three months, Webster asked the County several times for updates on his request.[4] The County repeatedly told him that the request was still "processing."[5] On November 25, the County sent Webster a letter in response.[6] It told him that his request for e-mails was "too burdensome with which to comply."[7] The County told Webster that his request would require it to search 868 employee mailboxes and seven million total e-mails for his requested terms.[8] That would occupy its servers for more than fifteen months,[9] the County said, and

---

* J.D. Candidate, 2019, University of Minnesota Law School.

1. Brief of Appellant at 3, Webster v. Hennepin Cty., 891 N.W.2d 290 (Minn. 2017) (No. A16-0736).
2. *Id*.
3. Respondents Hennepin County's and Hennepin County Sheriff's Office's Brief and Addendum at 5–6, Webster v. Hennepin Cty., 891 N.W.2d 290 (Minn. 2017) (No. A16-0736).
4. Brief of Appellant, *supra* note 1, at 4–6.
5. *Id*.
6. *Id*. at 7.
7. *Id*.
8. Respondents Hennepin County's and Hennepin County Sheriff's Office's Brief and Addendum, *supra* note 3, at 12–14.
9. Brief of Appellant, *supra* note 1, at 7.

would result in around 8,700 responsive e-mails.[10] To review those e-mails for disclosure would then take an employee 290 hours of work.[11] Unable to dedicate such massive resources to one person's data request, the County told Webster that unless he narrowed his request, it would not be complying.[12]

Webster considered the County's estimates of the time required to search its e-mails "laughable."[13] He eventually sued, claiming the County was violating the Minnesota Government Data Practices Act (MGDPA) by not keeping its records readily accessible enough to comply with data requests in a prompt, reasonable manner.[14] An administrative law judge (ALJ) found that Hennepin County's response had violated the MGDPA, and ordered it to begin producing the e-mails on a "rolling basis."[15] But Hennepin County appealed the ALJ's order and requested a stay pending appeal.[16] The ALJ granted the stay, and the Minnesota Supreme Court upheld it, meaning the County does not need to produce further data until the case is resolved.[17]

Hennepin County asked the Minnesota Court of Appeals to read an "unduly burdensome" exception into the MGDPA, asserting that data are too numerous in modern times to require compliance with even the most onerous requests.[18] The Court of Appeals acknowledged that "the nature of government data has evolved and expanded," creating a possibility that "the time is right for a reassessment of competing rights to data within the context of effective government operation."[19] But it declined to read a burden exception into the law, instead holding that either

---

10. Respondents Hennepin County's and Hennepin County Sheriff's Office's Brief and Addendum, *supra* note 3, at 14.

11. *Id*. at 15.

12. Brief of Appellant, *supra* note 1, at 7–8.

13. Tony Webster, *Minnesota Court of Appeals Upholds Freedom of Information Win Against Hennepin County Sheriff*, TONY WEBSTER, https://tonywebster.com/2017/04/minnesota-court-of-appeals-data-practices-burden/ (last visited Nov. 28, 2017).

14. *See generally* Webster v. Hennepin County, No. A16-0736, 2017 WL 1316109 (Minn. Ct. App. Apr. 10, 2017).

15. Webster v. Hennepin County, 891 N.W.2d 290, 291 (Minn. 2017) (describing the order granted by the administrative law judge).

16. *Id*.

17. *Id*. at 294 (holding that the ALJ's issuance of a stay pending appeal was not an abuse of discretion).

18. *Webster*, 2017 WL 1316109, at *3.

19. *Id*. at *6.

the legislature or the state supreme court must create one.[20] The case is now pending an appeal at the Minnesota Supreme Court. The County did not raise the burden issue in its appeal to the Court, but the Court of Appeals' opinion and an amicus brief by the Minnesota League of Cities[21] suggest the Court could rule on the issue. Such a ruling could have dramatic effects, as more state agencies claim that skyrocketing amounts of data make storing and furnishing that data to citizens increasingly burdensome.[22]

While the increase in data generated presents a challenge for government agencies to confront, government transparency is important to democracy and citizen self-government. Government agencies must find a solution to help them overcome the increasing burden of storing data, rather than citing that burden to excuse their lack of transparency.

Part I of this Note introduces the relevant background information and evolution of the Minnesota Government Data Practices Act (MGDPA). Within Part I, the history, policy, and enactment of this law will be examined. This section also discusses how the law has changed as state agencies transitioned to digital record-keeping and the difficulties state agencies can have responding to data requests in the information age. Part II examines what is required of agencies under the MGDPA and the arguments for and against a possible "burden" exemption to the law. Part III argues that state agencies should not be allowed to cite burden in order to avoid complying with data requests and should instead be held to data production standards used for e-discovery in civil litigation.

---

20. *Id*.

21. Brief of Amici Curiae League of Minnesota Cities et al., Webster v. Hennepin County, 891 N.W.2d 290 (Minn. 2017) (No. A16-0736).

22. *See* James Eli Shiffer, *Governing Goes Off the Record in Minnesota,* STAR TRIB. (Mar. 20, 2017), http://www.startribune.com/growing-web-of-laws-keeps-minnesotans-in-the-dark/415693713/ ("The cost of managing the surge of new information is increasingly cited as a reason for withholding and even destroying public records. Elected officials and agency leaders say it is too expensive and time-consuming to weed out e-mails, text messages and other records deemed confidential.").

I. BACKGROUND

A. THE VALUE OF A TRANSPARENT GOVERNMENT AND AN INFORMED PUBLIC

Public access to information is "an essential component of effective democracy."[23] An informed citizenry was crucial to many of the successful social movements that changed America throughout its history.[24] For example, a spotlight on monopolistic practices and corruption led to antitrust legislation that ended the Gilded Age of the late 19th Century, when barons often bribed politicians and judges.[25] In the 1960s and 1970s, immediately following the enactment of the Freedom of Information Act (FOIA), "social movements and disruptive politics . . . brought on a new wave of progressive reforms."[26] Required disclosure of information about fracking has helped citizens who live near drilling sites check the safety of their water.[27] At all times, public access to information allows citizens to "understand what their government is doing in their name" and to play a role in deciding "how society's assets are distributed."[28] As Louis Brandeis wrote, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[29]

The importance of public access to information has been painfully felt as newspapers, the institutions which have most often uncovered and disseminated important information, decline financially.[30] Shrinking budgets at newspapers have led to less "obviously democracy-enhancing" investigative reporting,

---

23. Katherine McFate, *Keynote Address: The Power of an Informed Public*, 38 VT. L. REV. 809, 809 (2014).

24. *Id*. at 826 ("All the periods of advancement in this country came when we had a mobilized, engaged citizenry challenging . . . the status quo . . . . Information is a crucial ingredient in feeding reform movements . . . .").

25. *Id*. at 813.

26. *Id*. at 818 ("[FOIA, along with the Truth in Lending Act and the FEC Act] codified the cultural notion that citizens have a right to information, and that information will allow and empower citizens to make their *own* choices and hold their government to account.").

27. *Id*. at 823.

28. *Id*. at 825.

29. *Id*. at 816 (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 92 (1914)).

30. *See generally* RonNell Andersen Jones, *Litigation, Legislation and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557 (2011).

which has had a "deleterious" effect on the nation's democracy.[31] But in addition to less news-gathering, newspapers' struggles have also made them less able to pursue litigation against government agencies that violate open-records laws, a task they had historically taken on as "bulwarks of public accountability."[32] In 1980, for example, a small newspaper in Richmond, Virginia fought a court battle that led the Supreme Court to declare that all criminal trials in the country must be open to the public.[33] And in every state around the country, press organizations lobbied for—and in some cases drafted—open-records laws.[34] Journalists worry that as news outlets lose the capacity to pursue open-records lawsuits, "secrecy and denials" will increase.[35] Minnesota Governor Mark Dayton has spoken out in favor of government transparency, saying, "[i]f there's public money involved, there should be public disclosure."[36] From the press to the government, few would argue that a democracy is worse when its citizens know more about what their government is doing.

B. THE MINNESOTA GOVERNMENT DATA PRACTICES ACT[37]

The MGDPA is a unique state open-records law in both structure and scope. Unlike most other states' data laws, it attempts to simultaneously protect two "antagonistic principles": government transparency and individual privacy.[38] When originally enacted in 1974, the law was a four-page document focused on establishing the rights of data *subjects*—i.e., allowing someone to know what information the government had collected on them and protecting that person from having their data disclosed.[39] America had evolved into a "complex credit society" and seen huge increases in social welfare, leading

---

31. *Id*. at 558.

32. *Id*. at 590–91.

33. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

34. *See generally* Jones, *supra* note 30, at 586–91.

35. *Id*. at 597.

36. Shiffer, *supra* note 22.

37. MINN. STAT. §§ 13.01–.99 (2017).

38. Donald A. Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, *in* GOVERNMENT LIABILITY 241, 243 (Oct. 1981).

39. *Id*.

the government to collect more data on individuals.[40] The result was a widespread concern for privacy, which spurred the state to enact the law.[41]

At the time, the Minnesota media community actually opposed the MGDPA for fear it might lead to more restriction of government records.[42] And at the state legislative session the year following the law's enactment, media representatives were "outraged prophets" claiming that agencies were using the law to deny access to what had previously been public records.[43] So in response to the press's insistence that the concept of government transparency be incorporated into the state's data law,[44] the legislature developed open-records components to the MGDPA that are among the most favorable to requestors in the country.[45] Thanks to the MGDPA, "people in [Minnesota] had access to a lot more forms of information than people of other states."[46]

The modern MGDPA is an uncommonly requestor-friendly law in that it expressly establishes a "presumption that government data are public."[47] In order to overcome this presumption and deny a data request, a government agency must cite a federal law, state statute, or temporary classification showing that the data are not public.[48] The burden is on the agency to inform the requesting citizen of the legal ground upon which it makes that determination. This burden is "intended to make it easier for the requestor to determine if the agency's

---

40. *Id*. at 244.

41. *Id*.

42. *Id*. at 247.

43. *Id*. at 249.

44. 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, 580 (1982).

45. For example, Minnesota's is the only freedom-of-information law to specifically regulate *data*, not *documents*. This was a conscious choice by the legislature to prevent agencies from protecting "computerized and seemingly disconnected bits of information" that had not been compiled into a record. *See* Gemberling, *supra* note 38, at 258.

46. Bob Shaw, *John Finnegan, Former Pioneer Press Editor, Pioneer for Open Government, Dies*, PIONEER PRESS (Oct. 1, 2012), http://www.twincities.com/2012/10/01/john-finnegan-former-pioneer-press-editor-pioneer-for-open-government-dies/ (quoting Don Gemberling).

47. MINN. STAT. § 13.01, subd. 3 (2017).

48. *Id*; *see also* MINN. STAT. § 13.02 (2017) (classifying all government data as either public, private, nonpublic, confidential, or protected nonpublic).

denial is based on proper authority."[49] The explicit presumption that data is available to the public sets the MGDPA apart from many other states' data practices laws, many of which use a "balancing test, which weighs a variety of policy reasons that justify for non-disclosure against the requestor's wish for access."[50] The Minnesota law's presumption "is intended to leave no discretionary wiggle room" for agency officials to deny requests.[51]

Beyond the law's initial presumption, it also tilts the balance toward data requestors by intentionally blocking gamesmanship by agency officials. To prevent those officials from coming up with "ingenious bureaucratic roadblocks," the legislature added a number of "anti-gamesmanship provisions" to the MGDPA to ensure public access.[52] For example, agencies must keep government records "in such an arrangement and condition as to make them easily accessible for convenient use"[53] so that requestors do not have to dig through difficult filing systems to find data.[54] Agencies must also inform data requesters about the requested data's meaning[55] and make all data available "regardless of its physical form."[56]

Minnesota courts have erred on the side of public access in construing the MGDPA, recognizing that it reflects a "fundamental commitment to making the operations of our public institutions open to the public"[57] and that the explicit presumption of public access is "at the heart" of the law.[58] The legislative history of the Act, its express textual provisions, and its interpretation in state courts all point toward an interpretation strongly favoring the rights of citizens to access government data.

---

49. Gemberling, *supra* note 38, at 263.

50. Donald A. Gemberling & Gary A. Weissman, *Data Practices at the Cusp of the Millennium*, 22 WM. MITCHELL L. REV. 767, 773 (1996).

51. *Id*.

52. Gemberling & Weissman, *supra* note 44, at 583.

53. MINN. STAT. § 13.03, subd. 1 (2017).

54. Gemberling & Weissman, *supra* note 44, at 583.

55. MINN. STAT. § 13.03, subd. 3(a) (2017).

56. MINN. STAT. § 13.02, subd. 7 (2017).

57. Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety, 658 N.W.2d 876, 884 (Minn. Ct. App. 2003).

58. Demers v. City of Minneapolis, 468 N.W.2d 71, 73 (Minn. 1991).

C. GOVERNMENT TRANSPARENCY BECOMES MORE DIFFICULT IN THE INFORMATION AGE

However, the work of collecting, storing, sorting, and retrieving data today bears almost no resemblance to the papers-and-filing-cabinets world of the early 1980s, when the open-records concepts in the MGDPA were being developed. Government agencies used to have to store banker's boxes full of paper in basements, but now a $120 flash drive can store "half the print collection of the Library of Congress."[59] The speedy development of internet and mobile technology has led to much more data being created—in fact, a full ninety percent of all data in the world has been generated since late 2016.[60] As more government business is conducted online, exponentially more data is created and must be stored in order to comply with disclosure laws. Government agencies need robust data storage to avoid being "buried under an avalanche of data."[61]

This has led critics in government agencies to argue that the MGDPA no longer reflects the realities of responding to data requests. The Municipal Legislative Commission has urged that the law must be "modernized to reflect today's data-intensive society" and that cities should be protected from harassing requests or compensated for overly burdensome ones.[62] Bloomington's city manager told the *Star Tribune* in 2017 that the law "was passed long before we had e-mail and websites and all this other electronic information."[63] Government officials say

---

59. *See* Briana Bierschbach, *Public Record or Public Burden? As Legislature Seeks to Clarify Email-Retention Rules, Local Agencies Push Back*, MINNPOST (Mar. 6, 2017), https://www.minnpost.com/politics-policy/2017/03/public-record-or-public-burden-legislature-seeks-clarify-email-retention-rul. To illustrate this stark contrast, State Rep. Peggy Scott held up a banker's box and a thumb drive in front of the Minnesota State Legislature last year while introducing a proposed government e-mail retention bill.

60. Jack Loechner, *90% of Today's Data Created in Two Years*, MEDIAPOST (Dec. 22, 2016), https://www.mediapost.com/publications/article/291358/90-of-todays-data-created-in-two-years.html.

61. *Agencies Face Daunting Storage Challenges*, 1105 PUB. SECTOR MEDIA GROUP (last visited Dec. 1, 2017), https://gcn.com/microsites/2014/download-the-virtualization-playbook/04-agencies-face-daunting-storage-challenges.aspx (surveying agency Information Technology professionals about operational data gathered by their agency).

62. MUNICIPAL LEGISLATIVE COMM'N, 2017 LEGISLATIVE PROGRAM 1, 6 (2017), http://mlcmn.org/wp-content/uploads/2014/10/2017-MLC-Legislative-Program.pdf.

63. *See* Shiffer, *supra* note 22.

it is "too expensive and time-consuming to weed out e-mails, text messages, and other records deemed confidential."[64]

But the law has developed since it was first enacted. The original four-page law has reached 176 pages.[65] More than 660 exemptions to the presumption of public access have been added, from state inspections and enforcement on dog breeders to which businesses receive tax cuts.[66] The exceptions, some experts warn, "threaten to swallow the rule."[67] And as the law gets more complex, confused officials decide to err on the side of non-disclosure when facing difficult classification questions.[68] "From a requestor's perspective, obtaining public data may become more and more difficult."[69]

Tony Webster's dispute with Hennepin County is illustrative of a common conflict between government transparency and the burden it causes in the information age. The MGDPA is friendly to data requestors and is influenced by press organizations zealously guarding the principle that citizens have a right to know what their government is doing. But does that principle mean that governments should have to devote disproportionate resources and slow their other important operations to respond to one person's data request? As the Court of Appeals has said, it may be time to "reassess" those competing interests.[70] If the Minnesota Supreme Court decides to resolve the question, its answer will have wide impact on how the state's agencies operate, and how much its citizens know.

II. ANALYSIS

A. THE MGDPA REQUIRES AGENCIES TO ESTABLISH PROACTIVE DATA-REQUEST PROCEDURES, WHICH SHOULD REDUCE THE BURDEN OF RESPONDING

The criticisms of the MGDPA from government entities like Hennepin County and the Municipal Legislative Committee paint a picture of government agencies receiving requests to

64. *Id*.
65. *Id*.
66. *Id*.
67. Gemberling & Weissman, *supra* note 50, at 826.
68. *Id*.
69. *Id*.
70. *See Webster*, 2017 WL 1316109, at *6.

access a massive trove of e-mails out of the blue and then scrambling to determine how to locate responsive data in a vast digital archive. Indeed, Hennepin County describes receiving Webster's "extremely sweeping request" which required officials to "perform a significant amount of internal inquiries."[71] Lost, however, in this kind of criticism is that the MGDPA does not merely require government entities to respond to requests once they receive them. It also provides agencies with affirmative, proactive duties that should make for a smoother response to data requests. For example, the MGDPA requires 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."[72] Additionally, the law requires that each entity must "prepare a written data access policy and update it no later than August 1 of each year."[73] These requirements, if followed, should ease the burden felt by officials at government agencies in responding to digital records requests. They are "anti-gamesmanship provisions," meant in part to "prevent agencies from interposing technology as a barrier to access."[74]

Advisory opinions from the Commissioner of the Information Policy Analysis Division (IPAD)[75] illustrate how the easy-access and proactive procedure requirements of the MGDPA are meant to keep government agencies from pleading burden and denying requests. In a 2000 opinion, a petitioner complained to the commissioner that the Department of Public Safety (DPS) did not include any e-mails in response to a request for all department data on the requestor.[76] The DPS said that it had to order a new server and that until the server arrived the DPS could not search its archives for responsive e-mails.[77] The Commissioner opined that this explanation meant that DPS was

---

71. Respondents Hennepin County's and Hennepin County Sheriff's Office's Brief and Addendum, *supra* note 3, at 7–8.

72. MINN. STAT. § 13.03, subd. 1 (2017).

73. MINN. STAT. § 13.025, subd. 2 (2017).

74. Gemberling & Weissman, *supra* note 44, at 583.

75. Note that IPAD changed its name in July of 2017, and is now the Data Practices Office. *IPAD Is Now the Data Practices Office (DPO)*, MINN. DEP'T OF ADMIN. (July 28, 2017, 9:11 AM CDT), https://content.govdelivery.com /accounts/MNADMIN/bulletins/1ad139d. However, because it was known as IPAD at all times relevant here, this article will refer to it by its former name.

76. Op. Minn. Dep't Admin. No. 00-067 (Dec. 5, 2000).

77. *Id.*

not in compliance with subdivision 1 of section 13.03.[78] He wrote that "[a]gencies need to act proactively to prepare their computer systems so that they are easily able to respond for requests for data . . . . Waiting for a request and then determining that data are not accessible is not responsive to the statutory authority."[79] In a 2003 opinion, the Commissioner wrote that a County's delay in responding because responding to the request caused computer crashes and paper jams was "problematic."[80] These government agencies did face real burdens in responding to the data request, but the IPAD Commissioners did not find that to excuse them from the requirements of the MGDPA. The law required them to be prepared for these kinds of requests, and the fact that they were not is what caused them the burden.

Webster's requests to Hennepin County may be another example of a request that could have been complied with had the agency been more organized and prepared for sizeable data requests. Webster extensively details the County's "ham-handedness" in using its e-mail technology and in establishing an orderly data-response practice.[81] The County admitted that it did not keep any written procedures,[82] it did not consider the MGDPA's requirements in setting up its e-mail servers,[83] and the County's record-keeping system did not have full search capabilities turned on.[84] The ALJ who heard Webster's initial challenge found that while the County claimed the search would have taken it 10,800 hours, if it had used its full built-in search technology, the request would only have taken around eighteen hours.[85] This, of course, would be a much lighter burden for the County's technology and employees to bear.

So while it is not desirable for government agencies to find themselves entirely overwhelmed by a single data request, that

---

78. *Id*. ("Having 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.").

79. *Id*. The Commissioner also opined that "[u]nfortunately for DPS, the [MGDPA] does not recognize good faith efforts to comply. Rather, the provisions must be followed as set forth by the Legislature."

80. Op. Minn. Dep't Admin. No. 03-025 (July 31, 2003).

81. Brief of Appellant, *supra* note 1, at 33.

82. *Id*. at 31.

83. *Id*. at 44–45.

84. *Id*. at 45.

85. *Id*. at 35.

is not what the MGDPA asks. Rather, it asks them to be proactive about setting up procedures ensuring data is easily-accessible—so that retrieving it is not a burden for either the requestor or the agency. This provision of the law lessens the need for a burden exemption to the MGDPA.

B. ARGUMENTS FOR A 'BURDEN' EXEMPTION

1. The Text of the MGDPA Can Be Read to Allow for Such an Exemption

The state's municipalities and other government entities can face real problems if required to respond to even the broadest data requests with no ability to reduce their scope.[86] The League of Minnesota Cities and other government entities have argued that to require this of them would mean the MGDPA had been "interpreted in an absurd or unreasonable way."[87] Those entities urge the Minnesota Supreme Court to decide that the statutory language of the MGDPA supports a contrary interpretation:[88] the law requires government entities to promptly comply with requests in an "appropriate" manner,[89] where "appropriate" means "'suitable' or 'fitting' based on the 'particular' facts."[90] The cities argue that this means that in some circumstances, the appropriate response to a data request is to instruct the requestor to narrow it. In particular, they argue that any request applying to "all public data" should be considered "unduly burdensome on effective government operation."[91]

This is because state law requires government entities to retain large amounts of data. Minnesota law imposes a duty on all officers of cities, counties, and school districts to "make and preserve all records necessary to a full and accurate knowledge of their official activities."[92] As a result, government entities

---

86. Brief of Amici Curiae League of Minnesota Cities et al., *supra* note 21, at 11. *See also* Webster v. Hennepin Cty., 891 N.W.2d 290 (Minn. 2017) (No. A16-0736) (August 17, 2017).

87. *Id.*

88. *Id*. at 15 ("This court should reject Mr. Webster's proposed interpretation of the MGDPA because it would be bad law and public policy.").

89. MINN. STAT. § 13.03, subd. 2(a) (2017).

90. Brief of Amici Curiae League of Minnesota Cities et al., *supra* note 21, at 19.

91. *Id*. at 13, n. 23.

92. MINN. STAT. § 15.17, subd. 1 (2017).

"commonly maintain over 100 years' worth of government records," in forms ranging from paper to video to e-mail.[93]

2. E-mails Are Too Numerous and Difficult to Classify as "Public" or "Private"

E-mails present a particular challenge to agencies because of the sheer volume that is generated each day and the mixture of public and private information within them.[94] Agencies are beginning to respond to this problem by acting as if e-mails are not records pertaining to their official activity and therefore do not need to be preserved. Until September 1, 2016, for example, Hennepin County retained its e-mails indefinitely,[95] but on that date it changed its policy to automatic deletion after just thirty days.[96] The County's actions illustrate the difficulty felt by government entities in complying with data-retention laws: officials claimed the County had 210 million e-mails and amasses six million more each month, and that the policy change saves $2 million per year in storage.[97] The City of St. Paul changed its policy in 2015 from retaining e-mails for three years to retaining them for only six months.[98] But at the same time, a spokesman for the Minnesota Coalition on Government Information criticized the policy changes as allowing "public employees the ability to . . . get rid of stuff that's embarrassing."[99] The Coalition wants state lawmakers to "clarify that emails are indeed official records" under the MGDPA.[100] And Representative Peggy Scott introduced a bill requiring government e-mails to be preserved for at least three

93. Brief of Amici Curiae League of Minnesota Cities et al., *supra* note 21, at 13.

94. *See* Bierschbach, *supra* note 59 ("'Email is by its nature is [sic] going to be a mix of public and not public data all the time,' said Laurie Beyer-Kropuenske, who works for the state Department of Administration. 'Every email really has to get pulled apart. It can't be automated now. It has to be done by people who read and understand the classification of the data.'").

95. *See* Kelly Smith, *Hennepin County to Follow Sheriff's Office in Automatically Deleting E-mails Sooner*, STAR TRIB. (Nov. 29, 2016, 10:57 PM), http://www.startribune.com/hennepin-county-sheriff-s-office-automatically-deleting-e-mails-sooner/403686806/.

96. *Id*.

97. *Id*.

98. *Id*.

99. *Id*.

100. *Id*.

years.[101] If either of those laws is enacted, it will lead to greater taxpayer expense going toward e-mail retention. Storage costs "rose from $1 million in 2013 to $3 million [in 2016]," and are increasing up to thirty percent each year.[102] Local officials have said a three-year retention law would "requir[e] new technology and incur significant costs" and that the time required to respond to data requests when so many records are kept on file would be "even more burdensome."[103]

3. The MGDPA Makes It Difficult for Agencies to Recoup the Cost of Complying with Data Requests

The burden of e-mail storage and searching is exacerbated by another aspect of the MGDPA: the fact that it limits the ability of a government entity to collect fees or recover the cost of the staff-time needed to comply with data requests.[104] The law prohibits governments from imposing any charge or fee for the "inspection" of government data, which is when a requestor comes to a specific place to view the records but does not take copies of his or her own.[105] Agencies say that requestors almost always choose to inspect data rather than pay for copies of it, so the agencies are left with no way to recoup the cost of responding to the data request.[106] Government agencies argue that this forces them to comply with, for example, sweeping requests by any "simply curious and thorough" citizen to inspect all data a city has ever collected on him or herself, devoting heavy time and resources to the task, without receiving any compensation.[107] This is an even greater concern because city officials sometimes feel that data requests are simply a means of harassment or obstruction,[108] and the expansive portions of the MGDPA allow them to be a uniquely effective means.

---

101. *See* Bierschbach, *supra* note 59.

102. Tim Nelson, *Hennepin Co. Email Deletion Policy Worries Government Watchdogs*, MPRNEWS (Nov. 30, 2016), https://www.mprnews.org/story/2016/11/30/hennepin-county-email-deletion-policy-worries-government-watchdogs.

103. *See* Bierschbach, *supra* note 59.

104. *See* MINN. STAT. § 13.03, subd. 3(a) (2017).

105. MINN. STAT. § 13.03, subd. 3(b) (2017).

106. Brief of Amici Curiae League of Minnesota Cities et al., *supra* note 21, at 13.

107. *Id.* at 14–15

108. *See* Shiffer, *supra* note 22 ("Filing data requests are 'a way that people who are against things can cause you issues and trouble,' said Bloomington Mayor Gene Winstead.").

4. Federal Courts Have Read an 'Unduly Burdensome' Exception into FOIA

A final argument in favor of a burden exception to Minnesota's freedom-of-information law is that federal courts have read an "unduly burdensome" exception into FOIA.[109] Federal courts have used this exception to stop both data requests that were too broad in scope and requests that required a search of too many documents. A district court held that a request for "any and all" documents was "impermissibly broad and [did] not comply with FOIA's requirement that the request for records 'reasonably describe[] such records.'"[110] But courts have also occasionally contemplated that even when a FOIA request "identifie[s] . . . with great specificity" the records sought, a request can still be "unreasonably burdensome."[111] Examples include a "page-by-page search through the 84,000 cubic feet of documents in the [CIA] Records Center," and a "search through every file in the [IRS'] possession to see if a reference to Scientology appeared."[112] Another court found that a FOIA request which encompassed 44,000 documents located in ninety-three offices was unreasonably burdensome.[113] It is unclear how federal courts would apply a burden exception to a FOIA request for digital records such as e-mails, through which a search can be done automatically. But there is at least precedent for a court to hold that a request could require a search so vast and time-consuming that it must not be enforced. Minnesota state government agencies would thus appear to have

---

109. The main provision through which courts have done so is in 5 U.S.C. § 552(a)(3)(A), which requires that the government make available records responsive to any request for records which "(i) reasonably describes such records . . . .". 5 U.S.C. § 552(a)(3)(A) (2012).

110. Exxon Mobil Corp. v. U.S. Dep't of Interior, Civil Action No. 09-6732, 2010 WL 4668452 at *1 (E.D. La. 2010) (second alteration in original); *see also* Freedom Watch, Inc. v. C.I.A., 895 F.Supp.2d 221, 229 (D.D.C. 2012) (holding that a request for "anything 'relating to'" a group of countries was too broad, because it asked government officials to use their judgment in determining what was "related to" the topic).

111. *See* Ruotolo v. Dep't of Justice, Tax Div., 53 F.3d 4, 9 (2d Cir. 1995) ("We have no doubt that there is such a thing as a request that calls for an unreasonably burdensome search.").

112. *Id*. (collecting cases).

113. People for Am. Way Found. v. U.S. Dep't of Justice, 451 F. Supp. 2d 6, 13 (D.D.C. 2006) ("The Court is persuaded that defendant has met its burden of providing a sufficient explanation for its contention that a manual search of the 44,000 files would be unduly burdensome.")

a reasonable argument that the MGDPA should also be subject to such a limitation, even if theoretical. A Minnesota Supreme Court justice appeared to agree, scoffing at a suggestion from Webster's attorney during oral argument that a review of all Hennepin County employees' e-mails for a full calendar year would be legitimate.[114]

III. SOLUTION

A. GOVERNMENT TRANSPARENCY IS TOO IMPORTANT TO ALLOW A "BURDEN" EXEMPTION

While courts and lawmakers can be sympathetic to the idea that some data requests tie up a government agency's resources longer than the agency would like, they should not read or write a burden exemption into the MGDPA. The law was intentionally written to restrict government officials' wiggle room and opportunities for gamesmanship[115] by establishing a rare explicit presumption that all government data is public. It is easy to see how a burden exemption would allow for exactly that kind of gamesmanship. An agency could claim a request is too burdensome anytime it wanted, and if it had legal backing, that claim could only be combatted through costly and time-consuming litigation. Many data requestors—sadly including many news media outlets[116]—are unable to pursue such litigation.

The importance of preserving the full protection of the MGDPA can be seen through the information persistent reporters and researchers have uncovered through its use. Webster, for example, when allowed to inspect Hennepin County e-mails before a stay was granted, found important, enlightening, and potentially disturbing information. He discovered that the Hennepin County Sheriff's Office was considering use of "real-time facial recognition against live surveillance-camera streams, possibly including those of privately owned security cameras, for the 2018 Super Bowl in Minneapolis."[117] He also found that it was looking into "iris

---

114. *See* Kevin Featherly, *Supreme Court Justices Hear Hennepin Data Case*, MINN. LAW. (Nov. 9, 2017), http://minnlawyer.com/2017/11/09/justices-hear-hennepin-data-case/.

115. *See* Gemberling & Weissman, *supra* note 44.

116. *See supra* Section I.A.

117. Brief of Appellant, *supra* note 1, at 21.

scanning and crowd-iris analysis."[118] Troublingly, he also found Sheriff's Office staffers emailing each other that "[i]t is in our best interest to stay out of [the] limelight with this technology," that technology being explored was "scary," and that the technology should not be "advertised to anyone other than Sheriff's Office employees."[119]

The kind of technology being described in this data may certainly have its benefits in crime prevention, and those benefits may even outweigh any privacy concerns critics would raise. And Webster's request to view the data was likely voluminous enough to have caught county officials off-guard and cause them serious inconvenience. But the public should be able to weigh in on, or at least know about, the ways in which its law enforcement is monitoring it. And while the staffers writing amongst themselves were not necessarily speaking for county officials, their instinct to hide the technology at least illustrates what *could* motivate agencies to cite a "burden" exemption.

The transparency protected by the MGDPA is "under siege."[120] The state legislature exempts itself from the requirements of that law, government agencies routinely mass-delete e-mails, investigations of patient harm at nursing homes are among the things exempted from the law, and the appeals process is ineffective when agencies "drag their feet."[121] Minnesota courts should not exacerbate the problem by allowing agencies to cite burden and refuse data requests. While a county can claim that a data request interferes with its business, "providing the public with appropriate access to public government data . . . *is* County business."[122]

B. E-DISCOVERY STANDARDS FROM CIVIL LITIGATION SHOULD GOVERN RESPONSES TO DATA REQUESTS

The MGDPA carries a mandate that agencies keep their data "easily accessible for convenient use."[123] This provision should be read in the modern age as a requirement that agencies

---

118. *Id*.

119. *Id*. at 21–22.

120. James Eli Shiffer, *Minnesota Open Records Law Needs a Name Equal to Its Purpose*, STAR TRIB. (Jan. 6, 2018, 4:43 PM), www.startribune.com/open-records-law-needs-a-name-equal-to-its-purpose/468220483/.

121. *Id*.

122. Op. Minn. Dep't Admin. No. 03-025 (July 31, 2003) (emphasis added).

123. MINN. STAT. § 13.03, subd. 1 (2017).

keep up with evolving best practices in the area of electronic discovery and electronically-stored information (ESI). The IPAD Commissioner indicated as much when he wrote that government entities must "act proactively to prepare their computer systems" to respond to data requests.[124] In the context of civil litigation discovery, it is becoming increasingly acknowledged that best practices do not include manual review by humans of large numbers of documents to find which documents are responsive and which are not.[125] Experts call the idea that manual review is a safer and more accurate method a "myth" that has been "strongly refuted."[126] "Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort."[127] Indeed, an authoritative guide to best practices[128] has stated that "the continued use of manual search and review methods may be infeasible or even indefensible" in light of developing ESI technology.[129]

While there is a variety of complex methods of technology-assisted review, the most common involve predictive coding: a process "involving the use of a Machine Learning Algorithm to distinguish Relevant from Non-Relevant documents."[130] A basic description is that, rather than junior staff reviewing all the documents requested, a team reviews a "seed set" of documents and a computer program identifies properties of the documents

---

124. Op. Minn. Dep't Admin. No. 00-067 (Dec. 5, 2000).

125. *See generally* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011) (discussing a study showing that certain types of Technology-Assisted Review produced more responsive documents more quickly than manual review did).

126. *Id*. at 61.

127. *Id*.

128. *See* Brief ACLU of Minnesota and Electronic Frontier Foundation as Amici Curiae, Webster v. Hennepin County, 891 N.W.2d 290 (Minn. 2017) (No. A16-0736) (July 14, 2017) ("For a decade, lawyers and judges have looked to the *Sedona Best Practices* . . . as the benchmark for best practices governing the retrieval of ESI.").

129. The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217, 230 (2014).

130. Paul E. Burns & Mindy M. Morton, *Technology-Assisted Review: The Judicial Pioneers*, 15 SEDONA CONF. J. 35, 36 (2014) (quoting Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. COURTS L. REV. 1 (2013)).

and then predicts how the reviewer would code them.[131] Once the program has enough information to reliably, consistently predict how the reviewer would code the documents, it reviews the whole universe of documents and indicates which ones it believes are responsive.[132] In effect, the technology "allow[s] humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request."[133]

In recent years, courts have begun to strongly encourage litigants to use this kind of technology in civil discovery.[134] Courts have come to a "virtual unanimous consensus of support" for two reasons: empirical data establishes that it is at least as reliable as human manual review, and also much cheaper.[135] One judge held in 2012 that despite a plaintiff's objection, a defendant could use technology-assisted review in responding to discovery requests.[136] And in a 2012 case related to a FOIA request, while a judge did not require the FBI to use such techniques in responding, it "would have given the Court significantly more confidence" if it had.[137] These cases illustrate that Minnesota government entities should not be allowed to claim that data requests are too burdensome based upon flawed estimates of how long it would take to manually search through a vast volume of documents. Courts encourage litigants to use best practices in responding to electronic discovery requests, and the evidence is clear that such practices are reliable and cost-saving.

It will surely be costly for government entities to implement and install such technology. And there are important differences between civil discovery and government responses to data requests that complicate any adoption of ESI standards: for instance, a lawsuit must have some merit in order to be allowed to reach discovery, and cost-shifting provisions also exist in many cases in litigation. Nonetheless, civil litigation provides a template to follow in the data-request context; litigants dealt

---

131. *See generally id*. at 37–38 (quoting *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183–84 (S.D.N.Y. 2012)).

132. *Id.*

133. Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency, 877 F. Supp. 2d 87, 109 (S.D.N.Y. 2012).

134. Burns & Morton, *supra* note 130, at 36.

135. *Id*. at 51.

136. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012).

137. Nat'l Day Laborer Org. Network, 877 F. Supp. 2d at 107, n.103.

with the ever-increasing amounts of documents by adopting new best practices for reviewing those documents. In the data-request context, there are two alternatives: the entities continue to respond to data requests without such ESI practices, which will be costlier and more burdensome in the long run, or the entities are allowed simply to refuse to respond to the most voluminous data requests, which often seek vitally important information of relevance to all citizens. Neither alternative is appealing. The wide availability of, and judicial support for, technology-assisted review programs renders a potential burden exemption to the MGDPA needless and harmful.

IV. CONCLUSION

A 2017 case, *Webster v. Hennepin County*, illustrates a growing clash between transparency advocates and government entities. Requests for "all data relating to" any particular topic include massive amounts of e-mails and digital records that would not have existed at the time the MGDPA was first written. Government groups insist that the MGDPA, which establishes a uniquely forceful presumption that all government data is public, does not acknowledge this new reality and forces officials to respond to requests that excessively weigh down their staff and resources. These groups have asked the Minnesota Supreme Court to read an undue burden exemption into the MGDPA's presumption of public access.

This Note has argued, however, that such an exemption would allow agencies to engage in just the kind of gamesmanship the MGDPA was designed to prevent—opening the door for officials to claim a request is too burdensome when it would reveal information they prefer to keep from the public. This Note has further argued that government transparency is too important a value to erode with such an exemption, as illustrated by the remarkable results of Webster's request for information about law enforcement's use of biometrics. And lastly, this Note has argued that sophisticated technology exists—and has been encouraged by courts—that could greatly reduce the burden of responding to data requests. Agencies that do not employ such technology should have to do so rather than block requests that they be transparent and accountable to the public.