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THE MINNESOTA GOVERNMENT DATA PRACTICES ACT: A PRACTITIONER'S GUIDE AND OBSERVATIONS ON ACCESS TO GOVERNMENT INFORMATION

Margaret Westin†

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I. INTRODUCTION

Minnesota has a unique approach to handling access to public records. In 1993, the Minnesota Legislature enacted a law amending the Minnesota Government Data Practices Act (MGDPA), establishing an unusual method of handling questions and disputes about access to government data by authorizing the Minnesota Commissioner of Administration (Commissioner) to issue written opinions on questions relating to public access to government data or disputes with government agencies about data practices. This article will discuss the MGDPA and the Commissioner’s opinions in the context of Minnesota administrative law and compare other states’ procedures for access to government data and disputes over access. Although many states have an established procedure for administrative review of agency decisions, this article will focus

2. In this article, the written opinions will be referred to as interpretive opinions, adjudicative opinions, or opinions.
3. Opinions concerning public access to government data will be referred to as interpretive opinions.
4. Opinions concerning disputes with government agencies about data practices will be referred to as adjudicative opinions.
5. See ALASKA STAT. ANN. § 09.25.129 (Michie 1995) (stating that agencies have rule-making authority to handle disputes about record access and copying); CONN. GEN. STAT. ANN. § 1-211(b)(1) (West Supp. 1995) (covering appeal of agency denial to Freedom of Information Commission); D.C. CODE ANN. § 1-1527 (1992) (petition to Mayor); HAW. REV. STAT. § 92F-15.5 (1996) (appeal to Office of Information Practices);
on the procedures used in Connecticut, New York, Utah, and the Uniform Code only.

II. THE MINNESOTA GOVERNMENT DATA PRACTICES ACT—AN OVERVIEW OF ORGANIZATION, CONSTRUCTION, AND RIGHTS OF DATA SUBJECTS

When you come to a fork in the road—take it.  
-Casey Stengel

A. Competing Interests

The MGDPA is legislation that regulates the collection, creation, receipt, maintenance, and dissemination of all government data maintained by Minnesota state agencies, political subdivisions, and statewide systems such as the

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ILL. ANN. STAT. ch. 5 para. 140/10 (Smith-Hurd 1993) (appeal to head of agency); IOWA CODE ANN. § 22.11 (West 1995); MISS. CODE ANN. § 25-53-55 (1991) (requiring investigation and hearing before members of the central data processing authority); N.Y. PUB. OFF. LAW § 89.4 (McKinney 1995) (requiring appeal to head of agency with copy to committee on open government); UTAH CODE ANN. § 63-2-403 (Supp. 1995) (appeal to Records Committee); VT. STAT. ANN. tit. 1, § 318.(a)(2) (1995) (appeal to head of agency); WASH. REV. CODE ANN. § 42.17.320 (West 1996) (establishing that agencies have rule-making authority for review and denial of requests); WYO. STAT. ANN. § 16-4-203 (1995) (explaining appeal must be made to the district court). Other states have delegated to administrative agencies the authority to promulgate rules for access that may include additional administrative review. See, e.g., DEL. CODE ANN. tit. 29 § 10008(b) (1991) (indicating that "it shall be the responsibility of the public body to establish rules and regulations regarding access to public records.").

6. CONN. GEN. STAT. § 1-21i-21j (West 1995).
7. N.Y. PUB. OFF. LAW § 89.4 (McKinney 1995).
10. MINN. STAT. § 13.03, subd. 1 (1994).
11. MINN. STAT. § 13.02, subd. 7 (1994) (defining government data as "all data collected, created, received, maintained or disseminated by any state agency, political subdivision or statewide system regardless of its physical form, storage media or conditions of use.").
12. MINN. STAT. § 13.02, subd. 17 (1994) (defining "state agency" as "the state, the University of Minnesota, and any office, officer, department, division, bureau, board, commission, authority, district or agency of the state."); MINN. R. 1205.0200, subp. 6 (1995) (defining state agency as "any entity which is given power of statewide effect by statute or executive order.").
13. Minnesota Statutes § 13.02, subdivision 11 (1994) defines "political subdivision" as:

any county, statutory or home rule charter city, school district, special district and any board, commission, district or authority created pursuant to law, local ordinance or charter provision. It includes any nonprofit corporation which
statewide welfare system administered by the Minnesota Department of Human Services and the Criminal Justice Information System. The Minnesota Court of Appeals noted that "[t]he Act is intended to regulate every aspect of how the government manages information it collects and records."6

Almost all open records laws mandate openness in government and access to government information. The MGD-PA, while containing provisions requiring freedom of information or open access to government information, also contains provisions protecting the privacy interests of citizens who must

is a community action agency organized pursuant to the economic opportunity act of 1964 . . . to qualify for public funds, or any nonprofit social service agency which performs services under contract to any political subdivision, statewide system or state agency, to the extent that the nonprofit social service agency or nonprofit corporation collects, stores, disseminates, and uses data on individuals because of a contractual relationship with state agencies, political subdivisions or statewide systems.

Minnesota Rule 1205.0200, subpart 6 (1995) contains a definition of political subdivision including "those local government entities which are given powers of less than statewide effect by statute or executive order."

14. Minnesota Statutes § 13.02, subdivision 18 (1994) defines "statewide system" as "any record keeping system in which government data is collected, stored, disseminated and used by means of a system common to one or more state agencies or more than one of its political subdivisions or any combination of state agencies and political subdivisions." Minnesota Rule 1205.0200, subpart 6 (1995) defines a "statewide system" as:

includ[ing], but not limited to, recordkeeping and data-administering systems established by statute, federal law, administrative decision or agreement, or joint powers agreement. 'Statewide systems' shall include, but not be limited to, Criminal Justice Information System administered by the Bureau of Criminal Apprehension, the Statewide Accounting System, and the various welfare systems primarily administered by the Department of Public Welfare.

The Department of Public Welfare is now known as the Department of Human Services.


17. Freedom of information acts, open records laws, and other information practices acts often contain a statement of policy such as the one found in Kansas Statutes Annotated § 45-216(a) (1994), which states, "[i]t is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act and this act shall be liberally construed and applied to promote such policy." Another example is the Arkansas Code Annotated § 25-19-102 (1987), which states that "[i]t is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy."

18. MINN. STAT. § 13.03, subd. 1 (1994) (providing that "[a]ll government data . . . shall be public unless classified" by other law or temporary classification as not public).
provide private information to various governmental entities covered by the MGDPA.\textsuperscript{19} Because of the elaborate and comprehensive classification scheme, the provision that requires openness works more as a default provision than a statutory presumption.

The goals of openness in government and protection of privacy cannot both be accomplished without some sacrifice to each.\textsuperscript{20} The determination of where the public’s right to know ends and the individual’s right to privacy begins involves drawing lines that may seem obvious in cases where either the goal of openness in government or protection of privacy is unquestionably paramount, but becomes increasingly difficult in cases where there are strong state interests in both an individual’s right to privacy and the public’s need to monitor its government. This tension is apparent when considering personnel information about police officers and other law enforcement officials. A police officer is a public official,\textsuperscript{21} and Minnesota, like most states, recognizes that the public has a right to know certain information about its public officials such as their names, salaries and qualifications.\textsuperscript{22} The Legislature also recognized recently

\begin{itemize}
  \item \textbf{19.} MINN. STAT. § 13.04, subd. 2 (1994). The statute provides as follows: An individual asked to supply private or confidential data concerning the individual shall be informed of: (a) the purpose and intended use of the requested data within the collecting state agency, political subdivision, or statewide system; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from supplying or refusing to supply private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data.
  
  \textit{Id.} Minnesota Statutes § 13.05, subdivision 4 (1994) places restrictions on use of data collected about individuals. Minnesota Statutes § 13.05, subdivision 5 (1994) requires governmental entities to establish appropriate security and safeguards for records containing data on individuals.
  
  \textbf{20.} This tension has been discussed in many places. \textit{See, e.g., JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS, (2d ed. 1995); Dale F. Rubin, State Government Records and Individual Privacy: Theoretical and Comparative Approaches, 26 URB. LAW. 589, 589-90 (1994) (stating that at “both the federal and state levels there is a continuing interplay between Freedom of Information Act type statutes and provisions prohibiting disclosure of ‘private information.’”).}
  
  \textbf{21.} Minnesota Statutes § 13.43, subdivision 1 (1994) defines personnel data in pertinent part to include “data on individuals collected because the individual is or was an employee of . . . a state agency, statewide system or political subdivision . . . .”
  
  \textbf{22.} \textit{See MINN. STAT. § 13.43, subd. 2 (1994) (stating that data about public employees is accessible to any member of the public); see also Minneapolis Fed’n Teachers, AFL-CIO, Local 59 v. Minneapolis Pub. Sch. Special Sch. Dist., 512 N.W.2d}
that public access to personal identifying information about a police officer who has been working in an undercover capacity, not only undermines the officer's ability to work effectively, but increases the danger to the officer as well. As a result of weighing these competing interests, the Legislature extended the time during which personnel information about an undercover police officer may not be released to the public. 

A third public interest provided for in many states' freedom of information acts and the Minnesota Rules on Data Practices is the public's interest in the orderly and efficient operation of government. This goal is balanced against the public's right of access in statutes that set strict limits on the turnaround time for information requests, but allow the time limits to be

107, 112 (Minn. Ct. App. 1994) (stating that the Legislature weighed privacy rights and public's right to know in determining which personnel disciplinary data is public).

23. See MINN. STAT. § 13.43, subd. 5 (1994) (classifying information about undercover officers as private). Personnel data about undercover officers is to remain not public so as to protect the officer's safety and any ongoing criminal investigation. Act of June 1, 1995, ch. 259, art. 1, § 8, 1995 Minn. Laws 2739, 2742-43.


25. See COLO. REV. STAT. § 24-72-203(1) (1990) (requiring records custodians to make rules and regulations for inspection of records as are reasonably necessary to protect records and prevent "unnecessary interference with regular discharge of the duties of the custodian or his office."); D.C. CODE ANN. § 1-1522(d) (1992) (extending response time for an access request if records are voluminous or if there is a need for consultation before release); ILL. ANN. STAT. ch. 5 para. 140/3(f) (Smith-Hurd 1993) (stating agency may deny burdensome request); KAN. STAT. ANN. § 45-218(e) (1994) (explaining a request may be denied if unreasonable burden or a reason to believe repeated requests intended to disrupt other essential functions); KY. REV. STAT. ANN. § 61.872(6) (Michie/Bobbs-Merrill 1993) (refusing access if unreasonable burden or intent by requester disrupts essential functions of agency); ME. REV. STAT. ANN. tit. 1, § 408 (West 1989) (declaring access can be limited so as not to disrupt regular activities of agency); OKLA. STAT. ANN. tit. 51 § 24A.5.5 (West 1996) (explaining that an agency can prevent excessive disruption of essential functions); VA. CODE ANN. § 2.1-342 (Michie 1995) (stating that a court may grant agency additional time to respond if extraordinary volume and response would prevent the public body from meeting operational responsibilities); WASH. REV. CODE ANN. § 42.17.290 (West 1996) (providing that agencies shall adopt rules on access to prevent excessive interference with other essential functions of an agency).

26. MINN. R. 1205.0100, subp. 2 (1995). The rule states, in part, that "[t]his chapter is intended to guide entities so that while protection is given to individual privacy, neither necessary openness in government nor the orderly and efficient operation of government is curtailed." Id.

27. See, e.g., COLO. REV. STAT. ANN. § 24-72-203 (West 1990 and Supp. 1995) (stating that if records are in active use or storage, custodian shall inform requester and set time and date within three days for inspection); CONN. GEN. STAT. ANN. § 1-21i(a) (West 1988 & Supp. 1995) (requiring four business days for denial and allowing 10 business days for public personnel or medical files); D.C. CODE ANN. § 1-1522(c) (1981)
changed where the information request would result in an
unwarranted interference with the agency’s primary function.\textsuperscript{28} Extensions are often granted when a considerable amount of
information is requested or the files are in use.\textsuperscript{29}

\textsuperscript{28} See supra note 26.

\textsuperscript{29} See ILL. ANN. STAT. ch. 5, para. 140/3(d) (Smith-Hurd 1993) (extending time
to respond by seven days for specified reasons); IOWA CODE ANN. § 22.8(4) (West 1994)
(defining and allowing good faith delay); KY. REV. STAT. ANN. § 61.872(5) (Michie/-
Bobbs-Merrill 1993) (allowing three day delay if file in active use); LA. REV. STAT. ANN.
§ 44:33.B (West 1982) (setting date within three additional days if file in use); Md.
CODE ANN. STATE GOV’T § 10-614(b)(4) (1995) (providing for extension of not more
than 30 days with consent of applicant); MICH. COMP. LAWS ANN. § 15.235(2)(d) (West 1994)
(allowing 10 additional days in unusual circumstances as defined in § 15.232); MISS.
CODE ANN. § 25-61-5(1) (1991) (allowing up to 14 days if needed); MO. REV.
STAT. § 610.023 (Vernon 1988) (allowing extension beyond three business days for
reasonable cause); N. M. STAT. ANN. § 14-2-8 (Michie 1995) (allowing response with
time available within three days); N. Y. PUB. OFF. LAW § 89(3) (McKinney 1995)
(providing that a response to request may be to set later date when access available);
S. C. CODE ANN. § 30-4-30(c) (Law. Co-Op. 1991) (allowing 15 days for response); TEX.
GOV’T CODE ANN. § 552.221(d) (West Supp. 1996) (providing that if a request cannot
be produced, a reasonable date will be set for access); UTAH CODE ANN. § 63-2-204(3)
(1993) (providing extension for extraordinary purposes as defined in § 63-2-204(4))
(1993); VT. STAT. ANN. tit. 1, § 318(a)(5) (1995) (extending time in defined unusual
circumstances); W. VA. CODE § 29B-1-3(4) (1993) (allowing date to be set beyond five
days); see also supra note 26. But see MINN. STAT. § 13.04, subd. 3 (1994) (providing that
B. Categories and Classification System

The federal government and the various states have several ways of dealing with the inherent conflict among these important public goals of openness in government, protection of privacy interests, and the orderly and efficient operation of government. The Minnesota Legislature has expressly drawn the lines between access and privacy and between unlimited access and efficient operation. The MGDA establishes a system in which every type of information maintained by any state or local governmental entity is broadly categorized. These categories typically include the identity of the agency gathering the information or the reason the information was gathered, such as educational data or law enforcement data. Each piece of information within the broad categories is then classified.
The Legislature initially divided the universe of governmental data into two main classifications: data on individuals and data not on individuals.\textsuperscript{37} Each of these two classifications was divided into three subclasses.\textsuperscript{38} Data on individuals were classified as either public data on individuals,\textsuperscript{39} private data on individuals,\textsuperscript{40} or confidential data on individuals.\textsuperscript{41} Data not on individuals were divided into three parallel classifications: public data not on individuals,\textsuperscript{42} nonpublic data,\textsuperscript{43} and protected nonpublic data.\textsuperscript{44} The Legislature also created a hybrid category of summary data.\textsuperscript{45} Summary data is based on private or confidential data from which all identifying characteristics have been removed.\textsuperscript{46} Once the information that could identify a data subject has been removed, there are no longer any privacy rights to protect, and summary data are public.\textsuperscript{47}

The Legislature added another broad category of information in 1985 when it created the category of data on decedents.\textsuperscript{48} Prior to that time, because “individual” was defined as

\textsuperscript{37} See MINN. STAT. § 13.02, subds. 4, 5 (1994).
\textsuperscript{38} See infra notes 39-47 and accompanying text.
\textsuperscript{39} See MINN. STAT. § 13.02, subd. 15 (1994) (defining “public data on individuals” as data that is accessible to the public pursuant to Minnesota Statutes § 13.03).
\textsuperscript{40} See MINN. STAT. § 13.02, subd. 12 (1994) (defining “private data on individuals” as data that is made by statute or federal law applicable to the data (a) not public, and (b) accessible to the individual subject of that data).
\textsuperscript{41} See MINN. STAT. § 13.02, subd. 3 (1994) (defining confidential data on individuals as “data which is made not public by statute or federal law applicable to the data and is inaccessible to the individual subject of that data.”).
\textsuperscript{42} See MINN. STAT. § 13.02, subd. 14 (1994) (defining public data not on individuals as “data which is accessible to the public pursuant to § 13.03.”).
\textsuperscript{43} See MINN. STAT. § 13.02, subd. 9 (1994) (defining nonpublic data as “data not on individuals which is made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the subject, if any, of the data.”).
\textsuperscript{44} See MINN. STAT. § 13.02, subd. 18 (1994) (defining protected nonpublic data as “data not on individuals which is made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data.”).
\textsuperscript{45} See MINN. STAT. § 13.02, subd. 19 (1994) (defining summary data as “statistical records and reports derived from data on individuals but in which individuals are not identified and from which neither their identities nor any other characteristic that could uniquely identify an individual is ascertainable.”). Minnesota Rule 1205.0200, subpart 16 (1995) expands on this definition to include “data which has been extracted, manipulated, or summarized from private or confidential data, and from which all data elements that would link the data to a specific individual have been removed.”
\textsuperscript{46} MINN. R. 1205.0200, subp. 16 (1995).
\textsuperscript{47} MINN. STAT. § 13.02, subd. 9 (1994).
\textsuperscript{48} Act of June 4, 1985, ch. 298, 1985 Minn. Laws 1368 (codified at MINN. STAT. § 13.10 (1994)).
a living person, data about decedents was not specifically classified and, therefore, under the default provision of the MGDPA became public data. The treatment of data on decedents is similar to that of data on individuals, and decedent data classifications mirror classification of data on living persons.

The statute prescribes access rules for each classification of data, according to assigned definitions. For example, public data on individuals is defined in pertinent part as "data which is accessible to the public." Data which are classified as public (for either individuals or other entities) are accessible to anyone because they are defined as such. As a general matter, data that are classified as private data on individuals or nonpublic are accessible only to the subject of the data. Finally, data that are classified as confidential or protected nonpublic data are data that are unavailable to the data subject but accessible to government employees who must have access to the information

49. *See Minn. Stat. § 13.02, subd. 8 (1994)* (defining individual as a "natural person," which includes a parent or guardian in the case of a minor or someone adjudged mentally incompetent); *Minn. R. 1205.0200, subp. 8 (1995)* (defining an individual as "any living human being").

50. *See Minn. Stat. § 13.03, subd. 1 (1994)* (stating that all government data not otherwise classified is public).

51. *Compare Minn. Stat. § 13.10, subd. 1(a) (1994)* (providing that confidential data on decedents is data which was classified as confidential prior to the death of the data subject) *with Minn. Stat. § 13.02, subd. 5 (1994)* (providing that confidential data on individuals is inaccessible to the individual subject of the data); *compare Minn. Stat. § 13.10, subd. 1(b) (1994)* (providing that private data on decedents is classified as private prior to the death of the subject) *with Minn. Stat. § 13.02, subd. 12 (1994)* (providing that private data on individuals, be made "(a) not public, and (b) accessible to the individual subject of that data.").

52. *See Minn. Stat. § 13.02, subd. 15 (1994)* (defining public data on individuals as "data which is accessible to the public in accordance with the provisions of § 13.03.").

53. *See Minn. Stat. § 13.03, subd. 1 (1994)* (defining public data as "all government data collected, created, received, maintained or disseminated by a state agency, political subdivision or statewide system," unless specified otherwise by state or federal law).

54. *See Minn. Stat. § 13.02, subds. 9, 12 (1994)* (defining nonpublic data not on individuals as "data not on individuals that is made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data."); *see also Minn. R. 1205.0200, subp. 9 (1995)* (defining private data to include only data expressly classified by either a state statute, including Minnesota Statutes § 15.06 (1994), or federal law).

55. *See Minn. Stat. § 13.02, subds. 3, 13 (1994)* (defining confidential data that is made not public by statute or federal and is inaccessible to the subject of the data).
in order to do their jobs.\textsuperscript{56}

When first enacted, the statute did not provide categories and classifications for each type of information, but relied on categories and classifications used elsewhere in Minnesota law.\textsuperscript{57} As discussed in Section II-C below, the legislation and later administrative rules provided guidance to governments attempting to impose the MGDPA requirements on collecting, creating, receiving, maintaining, and disseminating government information.

In addition to setting up categories of information and a system to classify all government data, the Minnesota Legislature reserved for itself the monumental task of classifying each piece of information as either public, private, confidential, nonpublic, protected nonpublic, summary, or data on decedents.\textsuperscript{58} A statutory scheme that attempts to classify every type of information collected, created, received, maintained, and disseminated by hundreds of different government offices and contractors is going to have shortcomings. Some pieces of information are going to be unclassified. Some are going to fit into more than one classification. The Commissioner of Administration, in reviewing a dispute over access to government data, stated:

The basic operational logic of the MGDPA, particularly in the variety of specific statutory provisions that define and then classify various types of data, can often lead to situations in which the exact same data can be classified as private by one section of the MGDPA and as confidential by another section.\textsuperscript{59}

It seems obvious that:

\textsuperscript{56} See Minn. R. 1205.0200, subp. 3 (1995) (explaining that data is confidential if provided by state statute or federal law).


\textsuperscript{58} Since it was enacted, the MGDPA has been amended every year, adding many categories with specific classifications for data in each category. See Minn. Stat. § 13.99 (1994). See generally Gemberling & Weissman, supra note 33. The Minnesota Supreme Court noted that "[t]he scope of data which can properly be made public is almost always defined by statute." Doe v. State Bd. of Medical Examiners, 485 N.W.2d 45, 50 (Minn. 1989).

\textsuperscript{59} Op. Comm'r Dep't Admin. 93-008, at 10 (1993). Minnesota Statutes § 13.072 (1994) requires distribution of the opinions. The Minnesota Department of Administration distributes copies of opinions periodically to people who have asked to be on a mailing list for that purpose. In addition, selected opinions are occasionally published in Finance & Commerce, the state's legal newspaper.
It is probably not possible to draft statutory provisions which will set forth, with a requisite specificity, clear and unambiguous standards regarding when a record is deemed so private as to preclude disclosure. . . . Information technology is changing so rapidly that no statute can anticipate the uses to which information derived by such technology will be employed. Thus, broad standards employing a public interest versus personal privacy weighing test, or language referring to a 'clearly unwarranted invasion of privacy' may be necessary to enable courts and public agencies to retain the flexibility they need to decide upon future requests for such information on a case-by-case basis.60

Because of these difficulties, it is helpful to look to guidelines to statutory construction found in the MGDPA.

C. Construction

The MGDPA contains several guidelines to construction and implementation of the Act. The first is a presumption that government data is public "unless classified by statute, or temporary classification pursuant to section 13.06, or federal law" as not public.61 A general statement of this type is found in all but one state's freedom of information statutes and makes explicit the goals of the laws.62 These statutes often include a

60. Rubin, supra note 20, at 595.
61. See MINN. STAT. § 13.03, subd. 1 (1994) (stating that an authority in every state agency, political subdivision, and statewide system "shall keep records containing government data" to make them "easily accessible for convenient use.")
policy statement and rationale that citizens need to be informed of the workings of their government. The MGDPA contains no specific rationale for the presumption that government information is public unless otherwise classified and does not specify whether the statute should be strictly or liberally construed. Any court or administrative body required to weigh competing interests under the statute is left to infer the goals of the legislation.

The MGDPA is fundamentally different from other state statutes and the Federal Freedom of Information Act (FOIA) in its approach to meeting the competing goals of openness, protection of privacy, and efficient government. Unlike the FOIA and other states' open records laws, the exceptions to the general requirement of open access are stated in specific terms. While the FOIA prohibits disclosure that would constitute "an unwarranted invasion of personal privacy," the

27-1 (1992); TENN. CODE ANN. § 10-7-503 (1992); TEX. GOV'T CODE ANN. § 552.001, .021(b) (West 1994); UTAH CODE ANN. § 63-2-201 (1993); VT. STAT. ANN. tit. 1, § 316 (1995); VA. CODE ANN. § 2.1-342 (Michie 1995); WASH. REV. CODE ANN. § 42.17.260 (West 1991); W. VA. CODE § 29B-1-3 (1993); WIS. STAT. ANN. § 19.35 (West 1986); WYO. STAT. ANN. § 16-4-203 (1992). Georgia's statute is the only one not making this statement explicitly.

63. Cf. KY. REV. STAT. ANN. § 61.871 (Michie/Bobbs-Merrill 1993) (providing that exceptions are strictly construed); MO. REV. STAT. § 610.011 (1988) (providing that exceptions are strictly construed); NEB. REV. STAT. ANN. § 84-712.01(3) (1995) (providing that right to access is liberally construed). Indeed, with the structure of the MGDPA, it would be next to impossible to define which sections should be liberally or strictly construed.

64. See Annandale Advocate v. City of Annandale, 435 N.W.2d 24, 29 n.2 (Minn. 1989) (declaring that privacy rights need to be protected); Northwest Publications, Inc. v. City of Bloomington, 499 N.W.2d 509, 511 (Minn. Ct. App. 1993) (stating that information generally should be released); Pathmanathan v. St. Cloud State Univ., 461 N.W.2d 726, 728 (Minn. Ct. App. 1990) (stating that the statute's purpose is to allow access to government records).

65. See supra notes 37-51 and accompanying text.


67. 5 U.S.C. § 552(c)(6) (1988). New York law contains the same provision. The Executive Director of the New York Committee on Open Government noted that: [a]lthough the provision might be considered vague, it is also flexible, and it was agreed at the [National Privacy and Public Policy] Symposium [in Hartford, Connecticut, in 1995] that flexibility is necessary to accommodate changes in society and because the facts in any given situation may determine the extent to which release of information would result in an unwarranted invasion of privacy. In short, despite the inability to define what an unwarranted invasion of privacy might be, that standard was considered to be appropri-
Minnesota Legislature has essentially defined "unwarranted invasion of personal privacy." Data that might fit this description under the FOIA is classified as private, or possibly confidential, under the MGDPA. By establishing this rigid classification scheme, the Legislature has drawn many precise lines to determine which information is public and which information may not be released to the public. One example of this is the change in privacy interests determined by the Legislature between an applicant for a license and that same person after a license is granted. The Legislature determined, in essence, that it is an unwarranted invasion of personal privacy to release to the public information about an applicant for a professional license, thus classifying much information about license applicants as private. Nevertheless, it decided it is not an unwarranted invasion of personal privacy to release some of the same data once the person has been licensed. This is accomplished by classifying some data on license applicants as private, but classifying the same data on licensees as public. This precise line drawing by the legislature leaves no room for agency officials to determine if information should be released to the public and very little room to construe the statute. Once an agency identifies the category of information, the statute will specify to whom it may be released.

This lack of flexibility in Minnesota’s system has predictable results. Inevitably conflicts over classifications occur, and the MGDPA needs to be construed to resolve these conflicts. The MGDPA includes sections governing construction in situations where more than one classification appears to fit a piece of information. Minnesota Statutes section 13.03, subdivision

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68. MINN. STAT. § 13.41, subds. 2, 3 (1994).


71. See supra notes 52-56 and accompanying text.

72. See Annandale Advocate v. City of Annandale, 435 N.W.2d 24, 33-34 (Minn. 1989). The court stated that "we fully realize that the statutes we have considered in this opinion [MINN. STAT. §§ 19.03, subd. 4, 18.45, 471.705] may be open to differing interpretations. Our opinion, however, is an attempt to reconcile honestly all applicable statutes without judicial legislation." Id.

73. See infra text accompanying notes 74-82.
4(a) directs that the classification of government data change if it is required to do so to comply with either judicial or administrative rules or with a specific statute. This subsection recognizes that the judicial branch, other states, and the federal government all have separate and separately authorized schemes governing classification of data for which each is responsible. Minnesota Statutes section 13.03, subdivision 4(a) also recognizes that data may change categories, and thus necessarily classifications, after it is collected.

A second statute governing construction in the MGDPA is found in Minnesota Statutes section 13.03, subdivision 4(b), which establishes a presumption that data is private if it is classified as both private and confidential by any law. At first glance, Minnesota Statutes section 13.03, subdivision 4(b) appears to conflict with Minnesota Statutes section 13.03, subdivision 4(a). Both subsections (a) and (b) refer to "classification" of data, with subsection (a) directing that the classification change when there is a conflict, and subsection (b) directing that the classification always change to private when there is a conflict. The two sections can be reconciled, however, by referring to Minnesota Rules chapter 1205, the Rules on Data Practices promulgated by the Department of Administration pursuant to authority granted in Minnesota Statutes section 13.07.

74. Minnesota Statutes § 13.03, subdivision 4(a) (1994) states:

Change in classification of data.

(a) The classification of data in the possession of an agency shall change if it is required to do so to comply with either judicial or administrative rules pertaining to the conduct of legal actions or with a specific statute applicable to the data in the possession of the disseminating or receiving agency.

75. MINN. STAT. § 13.03, subd. 4(a) (1994).

76. See Doe v. State Bd. of Medical Examiners, 435 N.W.2d 45, 50 (Minn. 1989) (construing MINN. STAT. § 13.03, subd. 4 (1986) to provide that "[i]n limited situations administrative rules and judicial rules pertaining to the conduct of legal actions can operate to change the classification of data.").

77. Minnesota Statutes § 13.03, subdivision 4(b) (1994) states: "If data on individuals is classified as both private and confidential by this chapter, or any other statute or federal law, the data is private."

78. MINN. STAT. § 13.03, subd. 4(b) (1994).

79. MINN. STAT. § 13.03, subd. 4(a)(b) (1994).

80. The rules were promulgated in the early 1980s. Minnesota Statutes § 13.03, subdivision 4(a) was enacted in 1980. Act of April 24, 1980, ch. 603, 1980 Minn. Laws 1145. Subsections (b) and (c) of § 13.03 were enacted in 1984. Act of April 24, 1984, ch. 496, 1984 Minn. Laws 195.
Minnesota Rule 1205.0200, subpart 3 attempts to reconcile statutes that define government information as "confidential," but treat the information as private data on individuals as that term is defined in the MGDPA.\textsuperscript{81} Minnesota Rule 1205.0200, subpart 3 states that "[d]ata is confidential only if a state statute or federal law provides substantially that certain data shall not be available either to the public or to the data subject."\textsuperscript{82} This is further clarified in Minnesota Rule 1205.0200, subpart 9, which provides "[d]ata is private if a state statute or federal law provides substantially that: ... E. Certain data is confidential, but the context of the statute or federal law in which the term confidential appears reasonably indicates the data is accessible by the individual who is the subject of the data."\textsuperscript{83} With this administrative clarification, Minnesota Statutes section 13.03, subdivision 4(a) and Minnesota Statutes section 13.03, subdivision 4(b) can be reconciled. Minnesota Statutes section 13.03, subdivision 4(b) applies when a statute defines a term as confidential without reference to the definitions in the MGDPA, however context indicates that the data would be private under the term as it is defined in the MGDPA.\textsuperscript{84} Minnesota Statute

\textsuperscript{81} MINN. R. 1205.0200, subp. 3 (1995).
\textsuperscript{82} MINN. R. 1205.0200 (1995). The definition of "confidential data" found in Minnesota Rule 1205.0200, subpart 3 (1995) reads in full as follows:

\textit{Confidential data.} "Confidential data," as defined in Minnesota Statutes, section 13.02, subdivision 3 shall only include data which is expressly classified as confidential by either a state statute, including the provisions of Minnesota Statutes, section 13.06, or federal law.

Data is confidential only if a state statute or federal law provides substantially that certain data shall not be available either to the public or to the data subject; or certain data shall not be available to anyone for any reason except agencies which need the data for agency purposes. Certain data shall be confidential if a state statute or federal law provides that the data may be shown to the data subject only at the discretion of the person holding the data, and if such state statute or federal law provides standards which limit the exercise of the discretion of the person maintaining the data.

Data is not confidential if a state statute or federal law provides that the data is confidential, but the context of the statute or federal law, in which the term confidential appears, reasonably indicates the data is accessible by the data subject, or if the data subject is given access to the data only upon the discretion of the person holding the data and the state statute or federal law does not provide any standards which limit the exercise of such discretion. In such cases, the proper classification of the data is private.

A state agency rule, an executive order, an administrative decision, or a local ordinance shall not classify data as "confidential" or use wording to make data inaccessible to the data subject unless there is a state statute or federal law as the basis for the classification.

\textsuperscript{83} MINN. R. 1205.0200, subp. 9 (1995).
\textsuperscript{84} MINN. STAT. § 13.03, subd. 4(b) (1994).
section 13.03, subdivision 4(a) applies to change the classification when the data is placed in a different category of data, or when data is moved from one entity to another where use may change. Classification may change either from confidential to private, or from private to confidential or any other category if required by law or judicial rule.

Minnesota Statutes section 13.03, subdivision 4(b) is necessary given the rigid structure of the MGDPA and the changing needs of government. For instance, investigative data are confidential or protected nonpublic data. The classification of data collected for an investigation changes to public (unless otherwise classified) when the investigation is closed. The investigation may reopen, changing the data classification from public back to confidential. Minnesota Statutes section 13.03, subdivision 4(a) allows the classifications to be consistent with the data's current use.

A third guideline to construction of the MGDPA is found in Minnesota Statutes section 13.03, subdivision 4(c), which provides that data maintains the same classification when transmitted from one entity to another. Again, this subsection appears to conflict with Minnesota Statutes section 13.03, subdivision 4(a). Data transmitted from one entity to another cannot both change classification as required by Minnesota Statutes section 13.03, subdivision 4(a), and keep the same classification, as required by Minnesota Statutes section 13.03, subdivision 4(c). The conflict is illustrated by arrest warrants and arrest warrant indices. Arrest warrants issued by courts are

85. See supra note 74.
86. MINN. STAT. § 13.03, subd. 4(a) (1994).
87. See MINN. STAT. § 13.03, subd. 4 (1994).
89. See MINN. STAT. § 13.39, subd. 3 (1994) (describing civil investigative data); MINN. STAT. § 13.82, subd. 5 (1994) (describing law enforcement investigative data).
90. MINN. STAT. §§ 13.39, subd. 3, 13.82, subd. 5 (1994).
91. MINN. STAT. § 13.03, subd. 4(c) (1994). This section states that:
[t]o the extent that government data is disseminated to state agencies, political subdivisions, or statewide systems by another state agency, political subdivision, or statewide system, the data disseminated shall have the same classification in the hands of the agency receiving it as it had in the hands of the entity providing it.
92. Id.
public in most court files. The warrants are indexed and compiled for law enforcement purposes by county sheriffs' offices. Once the individual arrest warrants have been compiled and placed in arrest warrant indices in law enforcement agencies, the information on each warrant is classified as confidential. The apparent conflict between the classifications is resolved by applying Minnesota Statutes section 13.03, subdivision 4(c) only in instances where the data is not already classified, and applying Minnesota Statutes section 13.03, subdivision 4(a) if a specific classification exists in the receiving agency. This interpretation is consistent with the general legislative direction that statutes be construed to give meaning to the entire statute.

In summary, Minnesota Statutes section 13.03, subdivision 4, reveals a statutory construction scheme that fills in some gaps and answers some questions when specific information appears to have either more than one classification or none at all.

Minnesota Statutes section 13.03 also contains additional guidelines of general applicability to data maintained by government entities. A court may order that no public data be released after an in-camera inspection in accordance with statutorily-outlined procedures. In addition, the Legislature has directed that data classification will change to conform with changes in the law.

D. Applying Classifications and Determining Who Has Access

Identifying the correct classification is only the first step in determining whether access to particular data is allowed. Data

93. See MINN. STAT. § 13.82, subd. 12 (1994).
94. See MINN. STAT. § 645.16 (1994).
95. The 1996 Minnesota Legislature amended MINN. STAT. § 13.03, subd. 4, to add subdivision 4(d). This section states:
   [i]f a state agency, statewide system, or political subdivision disseminates data to another state agency, statewide system, or political subdivision, a classification provided for by law in the hands of the entity receiving the data does not affect the classification of the data in the hands of the entity that disseminates the data.
   Act of April 11, 1996, ch. 440, 1996 Minn. Laws 868. This section, which became effective August 1, 1996, appears to cover the same cases governed by MINN. STAT. § 13.03, subd. 4(a) from the perspective of the disseminating agency.
97. MINN. STAT. § 13.03, subd. 9 (1994).
classified as private, confidential, nonpublic, or protected nonpublic must be analyzed to determine who can have access to information that is not public.\(^{98}\) In most instances, the various statutes that list categories of information, such as welfare data,\(^{99}\) corrections and detention data,\(^{100}\) or law enforcement data,\(^{101}\) also identify those who can access information that is not public. For example, Minnesota Statutes section 13.46, subdivision 2(a) lists twenty categories of people other than the data subject who can have access to welfare data about an individual.\(^{102}\)

In addition to the specific listings of people with access to various categories and classifications of data, the MGDPA contains some general provisions regarding access. A data subject may give informed consent to release private data to another specified entity.\(^{103}\) Finally, some laws allowing access exist outside the MGDPA.\(^{104}\)

If an agency recognizes that another classification for data is more appropriate than the one assigned (or not assigned) by the Legislature, the agency can either apply to the Minnesota Department of Administration for temporary classification of that data\(^{105}\) or to the courts for an order overriding the classification.\(^{106}\) Neither avenue leads to permanent classification of data.\(^{107}\)

\(^{98}\) See Minn. Stat. § 13.05, subd. 4 (1994).
\(^{100}\) See Minn. Stat. § 13.85 (1994).
\(^{103}\) See Minn. Stat. § 13.06, subd. 2(a) (1994 & Supp. 1995).
\(^{104}\) See Minn. R. 1205.0400, subp. 2 (1995) (allowing the data to be released by "express written direction").
\(^{105}\) See Minn. Stat. § 241.441 (1994) (permitting the ombudsman of the Minnesota State Department of Corrections to have access to corrections, detention, and medical data).
\(^{107}\) See Minn. Stat. § 13.03, subd. 4(a) (1994).

Any temporary classification expires and must be adopted by the Legislature as part of the statute. Minn. Stat. § 13.06, subd. 7 (1994 & Supp. 1995). Any classification by the courts applies only to the specific piece of information before the court and not to the type of data generally. See Minnesota Medical Ass’n v. State, 274 N.W.2d 84, 89 (Minn. 1978). The Minnesota Supreme Court stated as follows: [Minnesota statutes allowing public records to be available to the public except as expressly determined by law] evidence legislative intent to retain full control of public access to information. The power to restrict access is given to administrative agencies only in emergency situations, and even that power is subject to legislative action. No power to restrict access is given to the courts.
E. Other Rights of a Data Subject

1. Tennessen Warning

The MGDPA not only regulates who may have access to government data, but also sets out procedural requirements for the collection of private or confidential data from the data subjects.108 The law requires that when a governmental entity asks an individual to supply private or confidential data about himself or herself, the government shall inform the individual about the following:

(a) the purpose and intended use of the requested data within the collecting state agency, political subdivision, or statewide system;
(b) whether the individual may refuse or is legally required to supply the requested data;
(c) any known consequence arising from supplying or refusing to supply private or confidential data; and
(d) the identity of other persons or entities authorized by state or federal law to receive the data.109

This requirement is applicable to all collection of private or confidential information from an individual about himself or herself, except when a law enforcement officer is conducting an investigation and asking an individual to supply investigative data.110 To implement this requirement, a governmental entity must know the classification of the information at the time it is being collected, and must be able to predict accurately the parties with whom the information may be shared, and the use to which it will be put. In the case of an individual asked to supply welfare data, the Tennessen Warning would necessarily include all of the twenty types of individuals who would be able to receive the information under Minnesota Statutes section 13.46, subdivision 2.111

2. Appeal Accuracy and Completeness of Data

Another function of the MGDPA is to provide individuals
with information that the government has about them.\textsuperscript{112} The MGDPA describes the subject of data’s right to be informed about whether he or she is the subject of stored data, as well as the data’s classification and the content and meaning of the data. It also provides a procedure for contesting the accuracy and completeness of the data, and for possibly changing the data.\textsuperscript{113} To contest the accuracy and completeness of the data, an individual must first appeal to the responsible authority\textsuperscript{114} within each entity that maintains the data, and then appeal to the Department of Administration.\textsuperscript{115} The Department of Administration is required to attempt to resolve any disputes without holding a contested case hearing.\textsuperscript{116}

\section*{III. Disputes/Remedies}

\subsection*{A. Judicial Remedies}

Since its inception, the MGDPA has provided for both civil and criminal remedies for MGDPA violations.\textsuperscript{117} A civil remedy is available to any person who has been damaged by a

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\bibitem{112} Minn. Stat. § 13.04, subd. 3 (1994).
\bibitem{113} Minn. Stat. § 13.04, subd. 4 (1994).
\bibitem{114} Minn. Stat. § 13.02, subd. 16 (1994). This statute provides as follows: "\text{Responsible authority.} "Responsible authority" in a state agency or statewide system means the state official designated by law or by the commissioner as the individual responsible for the collection, use and dissemination of any set of data on individuals, government data, or summary data. "Responsible authority" in any political subdivision means the individual designated by the governing body of that political subdivision as the individual responsible for the collection, use, and dissemination of any set of data on individuals, government data, or summary data, unless otherwise provided by state law. Id.; see also Minn. R. 1205.0200, subps. 12, 13, 14, 15 (1995) (describing the role and function of the responsible authority).
\bibitem{115} See Hennepin County Social Servs. Dep’t v. Hale, 470 N.W.2d 159, 164 (Minn. Ct. App. 1991) (providing that the MGDPA vests final authority to determine the accuracy and completeness of data in the Commissioner of Administration).
\bibitem{116} See Minn. Stat. § 13.04, subd. 4 (1994) (outlining the procedure for an individual data subject when data is inaccurate or incomplete). The Act of Aug. 1, 1995, 1995 Minn. Laws 259 art. 1, § 59 states as follows:
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The commissioner of administration in consultation with the commissioner of human services, county attorneys, legal services, local social service agencies, community agencies, and interested citizens shall develop a process for resolving disputes about the accuracy and completeness of data on individuals at the point where the disputed data is held and for the lowest possible cost. If the process requires legislation to implement, the commissioner of administration shall propose such legislation by February 1, 1996.
\end{quote}
\end{thebibliography}
violation of the MGDPA. If the court determines that there was a willful violation by the governmental entity, that entity shall be liable for exemplary damages of “not less than $100 nor more than $10,000 for each violation.” In addition, an individual may bring an action for equitable relief.

A willful violation of the MGDPA is a misdemeanor under Minnesota law. A willful violation by any public employee also constitutes “just cause for suspension without pay or dismissal of the public employee” responsible for the willful violation.

B. Commissioner’s Opinions

The need for precision in determining the category and classification of each piece of information maintained in government files, coupled with the additional restrictions and requirements for access to each piece of information that is classified as not public, has understandably resulted in disputes about whether an individual has access to a specific piece of government data. The lack of discretion given agencies in complying with the MGDPA makes compromise elusive. Disputes about classification and access take on added significance because the MGDPA imposes absolute liability for a miscalculation in making a determination on either classification.

118. MINN. STAT. § 13.08, subd. 1 (1994).
119. See, e.g., Pathmanathan v. St. Cloud State Univ., 461 N.W.2d 726, 729 (Minn. Ct. App. 1990) (denying attorney’s fees because losing party’s position “was a plausible, though incorrect, interpretation of the statute . . . .”).
120. MINN. STAT. § 13.08, subd. 1 (1994).
121. MINN. STAT. § 13.08, subd. 2 (1994).
122. Id.
123. MINN. STAT. § 13.09 (1994).
124. Id.
125. Given the complexity of the statute and the number of governmental entities governed by the MGDPA, the amount of litigation is surprisingly small. The number of disputes can be illustrated by the total requests for Commissioner’s Opinions since the authority was granted. Between August and December of 1993, the Commissioner issued 11 opinions. In 1994, the Commissioner issued 60 opinions. In 1995, the Commissioner issued 55 written opinions.
or access.126

Prior to 1993, if the person requesting access and the agency holding the information could not agree on the classification or the requester's right to access, the only remedy provided by the MGDPA was judicial review and decision.127

When 1993 Minnesota Laws chapter 192 section 38 was enacted, it gave the Minnesota Department of Administration the right to issue "written opinions" about "any question relating to public access to government data, rights of subjects of data or classification of data under this chapter or other Minnesota statutes governing government data practices"128 if requested by a governmental entity. This type of opinion is referred to as an interpretive opinion in this article. The legislation also authorized the Department of Administration to provide a written opinion to any person who disagrees with a determination regarding data practices, which is made by a state agency, statewide system, or political subdivision.129 These written opinions address "the person's right as a subject of government data or right to have access to government data."130 This type of opinion is referred to as an adjudicative opinion in this article.

C. Examples of Disputes

The problem of more than one potential classification for a particular type of information and the lack of agency flexibility in resolving conflicts is well illustrated by the disputes over access that have been presented to the Commissioner for opinion. One recurring question concerns the proper classification of information that can be fairly characterized as investigative data,131

126. See MINN. STAT. §§ 13.08, 13.09 (1994) (applying to civil remedies and criminal penalties).
127. See MINN. STAT. §§ 13.03, subd. 8 (person seeking access may bring action in district court); MINN. STAT. § 14.63 (1984) (stating that any person aggrieved by a final decision in a contested case is entitled to judicial review).
128. MINN. STAT. § 13.072, subd. 1(a) (Supp. 1995).
129. Id.
130. Id.
131. MINN. STAT. § 13.89, subd. 1 (1994). Subdivision 1 provides that "a 'pending civil legal action' includes but is not limited to judicial, administrative or arbitration proceedings. Whether a civil legal action is pending shall be determined by the chief attorney acting for the state agency, political subdivision or statewide system." Subdivision 2 provides as follows:

data collected by state agencies, political subdivisions, or statewide systems as
personnel data,\textsuperscript{132} or other data. Opinions 93-003, 95-028 and 94-004 illustrate some of these problems.

Opinion 93-003 framed this issue in the context of some sexually-explicit videotapes.\textsuperscript{133} The videotapes showed the head coach of the University of Minnesota’s women’s intercollegiate gymnastics team and her assistant coach husband engaged in sexual activity.\textsuperscript{134} The videotape segments of this sexual activity appeared at the end of a videotape showing the team in competition.\textsuperscript{135} There is apparently no specific finding that the coach’s husband intentionally distributed the tapes that included the segments showing the sexual activity, but somehow the tapes were distributed to gymnastics team members.

The University terminated the coach before the end of her contract.\textsuperscript{136} The termination notice included a statement that the dismissal was based on breaches of her contract and University policy.\textsuperscript{137} The notification mentioned the making and distribution of a videotape showing the coach and her husband engaged in sexual activity.\textsuperscript{138} The coach challenged her termination before a University of Minnesota grievance panel.\textsuperscript{139} The panel recommended no dismissal.\textsuperscript{140} The regent who reviewed the panel’s decision reversed this decision and sustained the original determination to terminate.\textsuperscript{141} The

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  \item part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are classified as protected nonpublic data pursuant to section 13.02, subdivision 13, in the case of data not on individuals and confidential pursuant to section 13.02, subdivision 3, in the case of data on individuals . . . .
  \end{itemize}

\textbf{MINN. STAT.} § 13.39, subd. 2 (1994).

\textsuperscript{132} Minnesota Statutes § 13.43, subdivision 1 (Supp. 1995) defines personnel data as follows:

data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a state agency, statewide system or political subdivision or is a member of or an applicant for an advisory board or commission.


\textsuperscript{134} The facts are derived from the Memorandum and Order of the District Court in Hennepin County, 4th Judicial District, File No. MC-94-2324, Order of June 14, 1994.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id. at 4.}

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} \textit{Id. at 4-6.}
regent's decision constituted the University's final determination. The regent did not view the videotape himself, although the termination decision referred to the videotape. 142

The University of Minnesota's paper, *The Minnesota Daily*, asked the University for a copy of the videotape. 143 The University refused. 144 *The Minnesota Daily* requested an adjudicatory opinion of the Commissioner of Administration about its ability to gain access to the videotape. 145 The University of Minnesota argued to the Commissioner that the videotape could not be released because it was civil investigative data related to other pending legal actions between the University and the head coach and her husband. 146 Civil investigative data is classified under the MGDPA as confidential data on individuals while an investigation is ongoing. 147 Civil investigative data can retain a classification of confidential after a matter is over if the release would jeopardize other ongoing investigations. 148

The Commissioner of Administration determined that the videotape was personnel data, not civil investigative data, and cited three reasons for this conclusion. In reaching this conclusion, the Commissioner did not specifically address the University's argument that the tape was being retained for possible use in defending the University in pending civil legal actions. Minnesota Statutes section 13.39, subdivision 2 classifies as civil investigative data any data collected or retained by a government body for defending a lawsuit or other similar proceeding. 149 None of the reasons cited by the Commissioner indicates why the tape did not fit this classification. The first reason cited by the Commissioner relates to the issue of data with two classifications. The Commissioner noted that if the data

142. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 3.
147. See Deli v. University of Minnesota, 511 N.W.2d 46, 54 (Minn. Ct. App. 1994) (holding that clear and convincing evidence established just cause for the termination of Katalin and Gabor Deli).
148. MINN. STAT. § 13.39, subd. 2(a) (1994).
149. MINN. STAT. § 13.39, subd. 3 (1994).
150. See MINN. STAT. § 13.39, subd. 2(a) (1994). The information is classified as "protected nonpublic data" pursuant to § 13.02, subdivision 13, for information not on individuals, and classified as confidential pursuant to § 13.02, subdivision 3, for information regarding data on individuals. MINN. STAT. § 13.39, subds. 3, 13 (1994).
were categorized as personnel data, the data's classification would be private.151 On the other hand, if the data were categorized as civil investigative data, the classification would be confidential.152 The Commissioner then cited Minnesota Statutes section 13.03, subdivision 4(b) which provides that if data on individuals is classified as both private and confidential, the data is private, and concluded that Minnesota Statutes section 13.03, subdivision 4(b) dictated the determination that the information be categorized as personnel data because that would result in a classification of private.153 This conclusion ignores Minnesota Rule 1205.0200, subparts 3 and 9.154 It also undermines the category of civil investigative data. Were this reasoning adopted in other cases, no information could maintain a classification of civil investigative data if it also happens to fall within another category of data classified as private. This conclusion runs contrary to the administrative rules and the directive that statutes be construed in order to give effect to all of their provisions.155

The Commissioner based her second reason for rejecting the category of civil investigative data for the videotapes on her theory about the legislative history of Minnesota Statutes section 13.39, which establishes the category of civil investigative data.156 Legislative history is properly invoked to interpret statutes when the statute is ambiguous.157 The difficulty in this case is that two provisions of the same law appear to be in conflict with each other. Before legislative history is invoked, Minnesota law directs that in such a case, "the two shall be

152. Id.
153. See Op. Comm'r Dep't Admin. 93-003, at 3 (1993) (concluding that for the data to be classified as private, it must also be "personnel data" pursuant to § 13.43).
154. See supra note 82 (defining confidential data).
155. See MINN. STAT. § 645.16 (1994); St. Peter Herald v. City of St. Peter, 496 N.W.2d 812, 814 (Minn. 1993) (citing MINN. STAT. § 645.16 (1990)).
In this case, it is possible to give effect to both Minnesota Statutes section 13.43, personnel data, and Minnesota Statutes section 13.39, civil investigative data. As noted in Section II-C above, the MGDPA contains its own provisions concerning a changing category of government data. Minnesota Statutes section 13.03, subdivision 4(a) directs an agency to change the classification of data if it is required to do so to comply with specific statutes applicable to the data in the possession of the receiving agency.\textsuperscript{159} In the case of the videotape, the investigation began in the context of an employee discipline matter.\textsuperscript{160} Other suits and investigations were later commenced. The provisions of Minnesota Statute section 13.03, subdivision 4(a) direct that the data classification change to acknowledge the evolution of the case.\textsuperscript{161} The matter that began as an employee disciplinary action with data classified under Minnesota Statutes section 13.43, subdivision 1, evolved into a civil investigation, so the data would today be classified under Minnesota Statute section 13.39.\textsuperscript{162} Resort to legislative history is not required.

Finally, the Commissioner offers an interesting reading of the term "collected" as the third basis for determining that the

\begin{footnotesize}
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\item MINN. STAT. § 645.26, subd. 1 (1994).
\item MINN. STAT. § 13.03, subd. 4(a) (1994).
\item MINN. STAT. § 13.39, subd. 2(a) (1994).
\item Id.
\item Id.
\item In addition, the legislative history cited by the Commissioner is referred to without reference to any contemporaneous statements of legislators or other bases used to determine legislative history. The Commissioner opined that the only reason the legislature enacted Minnesota Statutes § 13.39 was to prevent a litigant against the government from learning the government's case through use of the MGDPA access requirements. Because the man who prepared the videotapes knew what was in them, the Commissioner concluded that "there appears to be no practical reason why these tapes should be considered to be civil investigative data under § 13.39." Op. Comm'r Dep't Admin. 93-003, at 3 (1993).
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\end{footnotesize}
videotapes were not civil investigative data.\textsuperscript{164} The Commissioner, in essence, determined that evidence in a case is not collected unless it is first in the possession of the investigator after a formal investigation has begun.\textsuperscript{165}

The data's classification dictates who may have access to it. Personnel data documenting the basis for a disciplinary action is public.\textsuperscript{166} Civil investigative data is confidential during an active investigation;\textsuperscript{167} once inactive, the statute provides that the data become public "unless the release of the data would jeopardize another pending civil legal action, and except for those portions of a civil investigative file that are classified as not public data or by this chapter or other law."\textsuperscript{168} Clearly the Legislature anticipated that some data would temporarily change classifications depending on whether an investigation is ongoing. Videotapes that would be personnel data before and after an investigation would be civil investigative data during the investigation under Minnesota Statutes section 13.39.\textsuperscript{169} The statute establishing the category of civil investigative data provides the criteria for determining whether data is part of a pending civil legal action and thereby changes categories and classifications.\textsuperscript{170} The issue before the Commissioner was a common

\textbf{164.} See Op. Comm'r Dep't Admin. 93-003, at 3-4 (1993) (finding that the record showed that Gabor Deli provided the tapes to the members of the Women's Gymnastic Team).

\textbf{165.} The Commissioner relied on the Minnesota Supreme Court's decision in St. Peter Herald v. City of St. Peter, 496 N.W.2d 812 (Minn. 1993), which held that a notice of claim mailed to the City of St. Peter was not "collected" by the City and therefore was not within the provision of Minnesota Statutes § 13.39, subdivision 2. The court relied on the plain meaning of "collected" as "to bring together into a band, group, assortment or mass: Gather." \textit{Id.} at 814 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 557 (1981)). While receiving an unsolicited letter in the mail may not be "collecting," gathering evidence for the investigation of the coaches is squarely within the definition employed by the court in this case.

\textbf{166.} MINN. STAT. § 13.43, subd. 2(a) (1994). The Commissioner determined that the videotapes documented the basis for the disciplinary action even though the regent who made the final determination had not seen the videotapes. In one opinion, the Commissioner was asked to determine whether certain data in a personnel file documented the basis for disciplinary action. However, the Commissioner declined to do so. Op. Comm'r Dep't Admin. 94-051, at 2, 6 (1994).


\textbf{168.} MINN. STAT. § 13.39, subd. 3 (1994).


\textbf{170.} It is only when the chief attorney for the governmental entity determines that a civil action is pending that data related to the investigation can be confidential or protected nonpublic data. The Commissioner did not mention whether the chief
one involving data that may reasonably fit within several categories and classifications of data. Unfortunately, the Commissioner's opinion did little to assist the parties in sorting out the various provisions.

Commissioner's Opinion 95-028 illustrates internal inconsistencies in the way the MGDPA treats comparable data. This opinion was issued pursuant to a request for an adjudicatory opinion involving a public employer questioning a public employee about payroll timesheets. An auditor collected the data, which concerned possible improprieties in claims for overtime pay by an employee of the University of Minnesota. Arguably, this data could be personnel data, civil investigative data, or internal auditing data. The Commissioner determined that "[c]learly, the data ... were collected because she is an employee of the University" which dictated that the data collected would be personnel data unless the chief attorney for the University determined there was an investigation. The Commissioner rejected this position, however, and concluded that because the information had been gathered by an internal auditor, the data became internal auditing data at the time of its collection.

attorney for the University of Minnesota had determined that a civil action was pending.

In other opinions, the Commissioner has applied Minnesota Statutes § 13.39, subdivision 3 (1994) and taken the position that information gathered to investigate alleged wrongdoing by a public employee is classified under Minnesota Statutes § 13.43 (1994) as personnel data unless the chief attorney for the political subdivision has determined that a civil action is pending. See, e.g., Ops. Comm'r Dep't Admin. 95-050, 95-048, 95-041, 95-035 (1995).

172. Id. at 6.
173. See MINN. STAT. § 13.43 (1994) (defining personal data); MINN. STAT. § 13.39 (1994) (defining civil investigative data). In addition, Minnesota Statutes § 13.794, subdivision 1 (1994) defines internal auditing data as follows:

Data, notes, and preliminary drafts of reports created, collected, and maintained by the internal audit offices of state agencies or persons performing audits for state agencies and relating to an audit or investigation are confidential data on individuals or protected nonpublic data until the final report has been published or the audit or investigation is no longer being pursued actively.

MINN. STAT. § 13.794, subd. 1 (1994).


University's argument that the category and classification of the data change after being collected, noting that the statute governing internal auditing data classifies such data as confidential at the time it is collected. Unlike the statutes governing civil or, to some extent, criminal investigative data, the internal audit data statute fails to provide the chief attorney for the governmental entity conducting the audit the authority to determine that an investigation has begun before data may be classified as investigative data.

The classification of data in Commissioner's Opinion 95-028 was determined by the occupation of the person asking the question, not by the type of information solicited. This result makes administration of the MGDPA a trap for the unwary and seems to usurp agency discretion in assigning duties to employees.

Another type of case where data appears to fall in more than one category and does have more than one classification, is illustrated by Commissioner's Opinion 94-004. This interpretive opinion is issued in response to a request from the Crow Wing County Auditor. The question concerned the classification of logs of long distance telephone calls made from the telephone of a public employee. The Commissioner noted that the long distance telephone bills paid with public funds are specifically classified as public data under Minnesota Statutes section 10.46. The Commissioner also noted that other statutes could classify some of the information in the logs as not public. In those cases, presumably, information that would reveal the confidential data such as names of reporters of suspected child abuse or undercover officers acting in their undercover capacity should be classified as not public in accordance with their specific classifications and the canons of construction found in Minnesota Statutes section 13.03, subdivision 4 and Minnesota Statutes section 645.26. However, Minnesota Statutes section 10.46 does not recognize these

177. Id. at 10-11.
181. Id. at 1.
182. Id.; see also MINN. STAT. § 10.46 (1994).
exemptions specifically. Arguably, the general canons of construction should dictate that Minnesota Statutes section 10.46 and the specific statutes classifying some of the information in the telephone logs as not public, should be harmonized, notwithstanding that it is difficult to balance the Legislature's intent when Minnesota Statutes section 10.46 contains no reference to the MGDPA. 184

These opinions illustrate some of the problems inherent in a classification system that often results in more than one category and classification for every piece of information collected, created, received, maintained and disseminated by any governmental entity.

The Legislature granted the Commissioner of Administration the authority to resolve some of these conflicts without expensive court action through issuance of written opinions. The following is an analysis of this legislatively granted authority and a brief discussion of the way the Commissioner implements this power.

IV. COMMISSIONER OF ADMINISTRATION ADVISORY OPINIONS

The Legislature delegated to the Commissioner of Administration the authority to issue two types of opinions, interpretive and adjudicative opinions. 185 Interpretive opinions can be issued to a governmental entity on any question relating to public access of governmental data, rights of data subjects, or classification of data, whereas adjudicative opinions regarding a person's rights as a subject of data or right to have access to governmental data may be issued to any person who disagrees with a determination regarding data practices made by a governmental entity. 186 The Legislature also directed that the Commissioner's opinions be "given deference by a court in a proceeding involving the data." 187 It is not clear if "a proceeding involving the data" refers only to a proceeding brought after the Commissioner has issued an opinion involving an actual dispute over specific data between parties involved in an

184. See Doe v. Minnesota State Bd. of Medical Examiners, 435 N.W.2d 45, 49 (Minn. 1989) (holding that the MGDPA and the statute governing board of medical examiners should be read harmoniously).
186. See id.
187. MINN. STAT. § 13.072, subd. 2 (1994).
adjudicative type decision, or if the Legislature intended that deference also be given to the Commissioner's interpretive opinions, or if the Legislature meant for the opinions to have precedential effect.

The statute should be interpreted in a way consistent with the law in Minnesota. The deference given by courts to an agency decision varies with the type of decision rendered by the agency. The following sections attempt to answer the question of the appropriate level of deference by first identifying the types of decisions rendered by the Commissioner and then identifying the appropriate types of deference for each. The Minnesota Constitution provides that "[n]o person or persons belonging to or constituting one of [the legislative, executive or judicial] departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution."188 Because of Minnesota's express separation of powers, the delegated authority will be discussed in that context.189

A. Legislative Authority

Minnesota has defined legislative action as "action which will affect 'an open class of individuals, interests, or situations.'"190 The constitutional prohibition against the exercise of legislative power by any other branch is a prohibition against the delegation of what Minnesota courts have called "purely legislative" power.191 The Legislature necessarily delegates some power to enact rules. The Minnesota Supreme Court discussed the prohibition against delegation of purely legislative power in Lee v. Delmont.192 There, the court held that the constitutional prohibition applied to the delegation of "the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of

188. MINN. CONST. art. III, § 1.
190. In re Christenson, 417 N.W.2d 607, 611 (Minn. 1987) (quoting Barton Contracting Co. v. City of Afton, 268 N.W.2d 712, 715 (Minn. 1978)).
191. Id.
its enactment." In other words, pure legislative power is the "discretion to determine when and upon whom a law shall take effect. . . ." Recognizing the growing complexity of government, the Minnesota Supreme Court held that:

where it is impractical to lay down a definite comprehensive rule—such as, where the administration turns upon questions of qualifications of personal fitness, or where the act relates to the administration of a police regulation . . .—[and] it is not essential that a specific prescribed standard be expressly stated in the legislation. This is so because it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which it legislates, but must necessarily leave them to the reasonable discretion of administrative offices.

Accordingly, the Minnesota Supreme Court determined that a delegation of authority to the Commissioner of Public Safety to define the term "habitual violator of the traffic laws" was a proper delegation of authority. "To prescribe a more specific standard would only place the Commissioner in a straitjacket and interfere with the fair and efficient administration of his duties." The United States Supreme Court expressed a similar sentiment in upholding Federal Sentencing Guidelines where the Court stated that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." The United States Supreme Court expressed a similar sentiment in upholding Federal Sentencing Guidelines where the Court stated that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."

Separation of powers continues to be required by the Minnesota Constitution and the Legislature is prohibited from
delegating purely legislative power to an administrative agency. Yet, it is appropriate under Minnesota law to delegate to administrative agencies the authority to effect a law within a "sufficiently definite declaration of policy and standard." The Legislature has delegated some limited legislative powers by granting the Commissioner of Administration the authority to issue temporary classifications. On the other hand, the delegation of authority to issue written opinions is limited to answering questions about existing procedures, data subject rights, and classifications of data in Minnesota law. Any exercise of a legislative function in a written opinion, such as creating a new classification or law of general applicability, is unauthorized and inconsistent with Minnesota's constitutionally required separation of powers.

B. Administrative Authority

A precise definition of administrative action is elusive. In a traditional separation of powers framework, the executive branch alone would exercise administrative powers. In a somewhat circular definition of administrative law, Professor Schwartz states "that branch of the law that controls the administrative operations of government ... sets forth the powers that may be exercised by administrative agencies." The difficulty in defining administrative power is explained in part by Professor Schwartz's observation that "[t]he possession of legislative and judicial power is the hallmark of the agency ... [and] [i]t is through its exercise of rulemaking and adjudicatory authority that the administrative agency is able to determine private rights and obligations." However, Professor Schwartz defines

199. MINN. CONST. art. III, § 1 (stating that the powers of the government are divided into their respective departments and that one department cannot exercise the power accorded to another).
200. Thomas v. Housing and Redevelopment Auth. of Duluth, 234 Minn. 221, 247-48, 48 N.W.2d 175, 191 (1951); see also Anderson, 267 Minn. at 314, 126 N.W.2d at 781 (allowing a certain amount of discretion to administrators to make exceptions absent specific standards set by the Legislature).
201. See MINN. STAT. § 13.06 (1994).
202. See MINN. STAT. § 13.072, subd. 1 (1994 & Supp. 1995); see also Frost-Benco Elec. Ass'n v. Minnesota Pub. Util. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984) (stating that "[t]he extent of jurisdiction or authority bestowed upon an administrative agency is measured by the statute from which it derives its authority.").
204. Id. at § 1.5.
administrative action only in terms of the types of power exercised by the other branches of government. This section will discuss the confines of an agency’s rule-making authority. Further discussion on adjudicatory or judicial functions of the Commissioner of Administration’s opinions will be addressed in a later section.

Rule-making authority in Minnesota includes the authority to enact several types of rules, such as legislative, interpretive, and procedural rules. In these instances, the Commissioner’s interpretive opinions most resemble interpretive rule-making.

These interpretive opinions contain many characteristics of the interpretive rules of administrative agencies. These opinions are rendered at the request of a public entity concerning questions which may not be related to an actual controversy. Yet, the opinions are related to questions arising under the MGDPA and other Minnesota statutes “governing government data practices.”

Interpretive rules have been variously described as rules “promulgated to make specific the law enforced or administered by the agency” or rules issued by an agency to advise on how the agency intends to exercise discretionary power. As discussed earlier, the MGDPA leaves very little discretion in determining the appropriate category and classification of government data. This results in very little discretion for the Commissioner of Administration in issuing interpretive opinions. Consequently, the opinions are useful only to the extent they can illuminate how the MGDPA categorizes and classifies data.

In Minnesota, all rules, including interpretive rules, must be promulgated under the procedures of the Minnesota Administra-

205. Id.
206. See McKee v. Likins, 261 N.W.2d 566, 577 (Minn. 1977).
209. See Minnesota-Dakotas Retail Hardware Ass’n v. State, 279 N.W.2d 360, 364 (Minn. 1979).
The Commissioner's opinions are not promulgated, yet some exceptions to this general rule exist. Unpromulgated interpretive rules may be upheld, but only to the extent they reflect the plain meaning of the law interpreted, or constitute a long-standing interpretation of an ambiguous rule. Accordingly, these standards apply to determine if an interpretive Commissioner's opinion is valid. Legislation authorizing these opinions provides explicitly that the opinions are not binding and therefore are not given the force and effect of law. However, a departure from the plain meaning of the statute or the adoption of a new interpretation will also undermine a court's ability to give them any deference.

C. Quasi-Judicial Power

A quasi-judicial act is an act of a public officer, commission or board that is 'presumably the product or result of investigation, consideration and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of their discretionary power. It is the performance of an administrative act which depends upon and requires the existence or non-existence of certain facts which must be ascertained and the investigation and determination of such facts cause the administrative act to be termed quasi-judicial.'

Minnesota Statutes section 13.072, subdivision 1 grants the Commissioner of Administration the authority to issue advisory opinions which are quasi-judicial in nature. These opinions are issued at the request of a person in a dispute with a governmental agency over a determination regarding data practices made by the agency. The Commissioner of Administration conducts the hearing with written submissions by, or telephone calls.

211. *See, e.g.,* Cable Communication Bd. v. Nor-West Cable, 356 N.W.2d 658, 667 (Minn. 1984) (finding that all rules are subject to the rulemaking requirements of MAPA).


213. Neitzel v. County of Redwood, 521 N.W.2d 73, 75 (Minn. Ct. App. 1994) (quoting Oakman v. City of Eveleth, 163 Minn. 100, 108-09, 203 N.W.2d 514, 517 (1925)).

from, the parties involved in the dispute.\textsuperscript{215} The actual subject of the data may be a party to this dispute and may or may not even be notified of the request for access to information about that person.\textsuperscript{216} The procedure used by the Commissioner limits her ability to judge credibility and find facts which may be at issue.\textsuperscript{217} The Commissioner acknowledges the shortcomings of hearings not conducted in accordance with any rules of evidence or procedure by noting that "[h]er opinions are by their nature conditional on the facts and information presented to her by the government entity and the data subject."\textsuperscript{218}

D. Deference to Opinions

As stated earlier, the deference a court will give an agency decision depends primarily upon the type of decision rendered. For each type of opinion, the court considers several factors to determine whether increased or decreased deference should be given the agency determination.

1. Interpretive Opinions

The interpretation of a statute is reserved for the judiciary under the Minnesota Constitution.\textsuperscript{219} Minnesota courts have consistently recognized the power to interpret law as a judicial function.\textsuperscript{220} Accordingly, the courts will not defer to the legal interpretations by other branches of government. If an agency

\begin{itemize}
  \item \textsuperscript{215} See Op. Comm'r Dep't Admin. 95-028, at 1-3 (1995) (using correspondence to provide response by a party to the issues raised); Op. Comm'r Dep't Admin. 94-004, at 1 (1994) (determining the facts of the dispute from letters submitted by the parties); Op. Comm'r Dep't Admin. 93-003, at 2 (1993) (basing the opinion on information obtained by a faxed letter).
  \item \textsuperscript{216} MINN. STAT. § 13.072, subd. 1 (1994 & Supp. 1995).
  \item \textsuperscript{217} See generally Richard McMillan, Jr. & Todd D. Peterson, The Permissible Scope Of Hearings, Discovery, And Additional Fact-Finding During Judicial Review Of Informal Agency Action, 1982 DUKE L. J. 333 (discussing the limitations of agency records and the court's treatment of these records on review).
  \item \textsuperscript{218} Op. Comm'r Dep't Admin. 93-007, at 2 (1993).
  \item \textsuperscript{219} MINN. CONST. art. III, § 1.
  \item \textsuperscript{220} See, e.g., Frost-Benco Elec. Ass'n v. Minnesota Pub. Util. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984) (stating that the court is not bound by the decision of the MPUC and need not defer to "agency expertise"); Crookston Cattle Co. v. Minnesota Dep't of Nat'l Resources, 300 N.W.2d 769, 777 (Minn. 1980) (stating that an agency decision is reversed only when it reflects an error of law). Some opinions rendered by the Commissioner acknowledge that issues of legislative interpretation present issues for the courts to decide. Op. Comm'r Dep't Admin. 94-001 (1994) (acknowledging that the definition of "person" is for the courts to decide).
\end{itemize}
decision "is based on legal rather than factual considerations, the reviewing court is not bound by the decision of the agency and need not defer to agency expertise." 221

\[ \text{2. Adjudicative Opinions} \]

In general, a court will adopt an administrative agency's findings in a contested or quasi-judicial matter unless the decision "reflects an error of law, is arbitrary and capricious, or is unsupported by substantial evidence." 222

\[ \text{a. Defe} \text{rence to Legal Conclusions} \]

In an adjudicatory hearing, reviewing courts do not give deference to an agency's interpretation of the law. With some limited exceptions, interpretation of statutes is a judicial function. A court may give weight to a statutory construction of an ambiguous statute by the agency charged with implementing the statute. 223 Courts may also give deference to an agency's interpretation of its own ambiguous regulation as long as the interpretation is reasonable. 224 The deference a court will give an agency's findings in a contested matter depends to a large extent on the indicia of reliability of the findings. 225 The Commissioner of Administration noted that "to the extent that a court finds that the Commissioner's opinion rests on incomplete or incorrect facts, the court will obviously be free to find its own facts." 226

The limited hearing and process to request an adjudicative

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222. Cable Communications Bd. v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 668 (Minn. 1984); In re Kokesch, 411 N.W.2d 559, 562 (Minn. Ct. App. 1987).

223. See Cable Communications Bd., 356 N.W.2d at 667 (stating that if an agency interpretation merely restates existing policy or is consistent with the regulation, it implies the court has upheld the agency action).

224. See St. Otto's Home v. Department of Human Servs., 437 N.W.2d 35, 40 (Minn. 1989) (reviewing an agency's determination of common terms and finding the decision reasonable); Krumm v. R.A. Nadeau Co., 276 N.W.2d 641, 644 (Minn. 1979) (stating that when the meaning of a statute is doubtful, courts should give great weight to a construction placed upon it by the department charged with its administration).

225. See, e.g., St. Otto's Home, 437 N.W.2d at 39-40; Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 827 (Minn. 1977) (stating courts will review agency decisions to see if findings are unsupported by substantial evidence and whether conclusions are arbitrary or capricious).

determination obviously limit the Commissioner's ability to find facts accurately. In addition, judicial review requires sufficient findings to assure that they are supported in the record.\textsuperscript{227}

\textit{b. Deference to Agency Charged with Implementing Statute or to Agency's Expertise}

If a statute's meaning is unclear, courts have appropriately given great weight to an agency's statutory construction when it is charged with implementing the statute.\textsuperscript{228} It is not clear that this exception applies to the Commissioner's opinions. The MGDPA charges each agency and political subdivision it governs to be responsible for implementing policies and procedures for access to its data consistent with its rules.\textsuperscript{229} The MGDPA also provides for each government entity to compile a list of government data maintained in its files, with the appropriate classification assigned for each type of data.\textsuperscript{230} The MGDPA assigns to agencies and local officials the responsibility of determining matters such as when a civil action is pending,\textsuperscript{231} when a criminal investigation is active,\textsuperscript{232} the actual costs for copies of data,\textsuperscript{233} whether a child's parent can have access to information about his or her child over the child's objection,\textsuperscript{234} when criminal investigative data should be released to the victim of the crime,\textsuperscript{235} and when the names of victims and witnesses can be withheld from the public,\textsuperscript{236} among other things. A Commissioner's opinion concerning employee disciplinary data recognizes that determining which data in a personnel file "constitute[s]
the reasons for imposing a disciplinary action" is not knowable by the commissioner.\textsuperscript{237} Accordingly, the data documenting the basis for the action "can best be made by those persons . . . who made the decisions to discipline these employees."\textsuperscript{238}

The Commissioner of Administration has some oversight duties in implementing the MGDPA. The Commissioner is charged with promulgating rules of general applicability.\textsuperscript{239} In addition, the Commissioner may require copies of compilations of data from other governmental bodies,\textsuperscript{240} may approve a new or different use or dissemination of data "as necessary to carry out a function assigned by law"\textsuperscript{241} and may issue a temporary classification of data.\textsuperscript{242} In these instances, the Commissioner is relying on the expertise of the governmental entity asking for a new use, dissemination, or classification of government data, not on the Department of Administration's own expertise in categorizing and classifying data. In determining the appropriate weight to be given a statutory construction by the Commissioner of Administration, the Department of Administration's limited involvement here should be considered. The department plays only a small role in categorizing and classifying the data collected, created, received, maintained, and disseminated by the hundreds of governmental entities governed by the MGDPA. The courts may give deference to agency decisions when the agency is acting within its area of expertise. Deference to agency expertise has its genesis in the historical deference accorded to the administrative expertise of individual state agencies, which were created to deal with particular problems falling within their province and which consequently have experience with those specialized areas that are not ordinarily duplicated within the judicial system. Such a policy of deference need

\textsuperscript{237} See Op. Comm'r Dep't Admin. 94-051, at 6 (1994).
\textsuperscript{238} See id.
\textsuperscript{239} See MINN. STAT. § 13.07 (1994).
\textsuperscript{240} See MINN. STAT. § 13.05, subd. 1 (1994).
\textsuperscript{241} See MINN. STAT. § 13.05, subd. 4(c) (1994).
\textsuperscript{242} An application for a new classification of data must be based upon the fact that other state agencies or political subdivisions treat similar data as either private or confidential, or because there is a compelling need to protect the public interest or the health, safety, or well-being of the data subject. See MINN. STAT. § 13.06, subd. 2 (1994).
not be applied, however, when the area of regulation . . . is specifically within the court's particularized experience and expertise.\(^{243}\)

Deference to an opinion by the Commissioner of Administration is problematic because the Commissioner's professed area of expertise is "to offer consistent interpretation of the statute."\(^{244}\) Statutory interpretation is not only duplicated within the judicial system, it is the province of the courts.\(^{245}\) A court, in reviewing a question of law, need not defer to an agency's expertise in an adjudicative matter.\(^{246}\)

Courts have deferred to agency expertise in adoptions,\(^ {247}\) in determining if workers are employees,\(^ {248}\) and in handling consumer complaints.\(^ {249}\) It is doubtful that the Commissioner of Administration's professed expertise in statutory construction would be accorded the same type of deference because of the Minnesota constitutional requirement that courts exercise judicial authority and because of the court's expertise in questions of law.

c. Deference to Interpretation of Ambiguous Regulation

Courts have also shown deference to an agency's interpretation of its own ambiguous regulation, if the agency interpre-

\(^{243}\) Hennepin County Court Employees Group v. Public Employment Relations Bd., 274 N.W.2d 492, 494 (Minn. 1979).

\(^{244}\) Op. Comm'r Dep't Admin. 95-004, at 3 (1995).

\(^{245}\) International Ass'n of Firefighters v. City of Plymouth, 513 N.W.2d 831, 833 (Minn. Ct. App. 1994) (finding the court not bound by "agency determinations concerning questions of law such as statutory interpretation.").

\(^{246}\) See, e.g., Minnesota Teamsters Pub. & Law Enforcement Employee's Union v. County of McLeod, 509 N.W.2d 554, 556 (Minn. Ct. App. 1993) (holding that "statutory construction is a question of law, subject to de novo review.").

\(^{247}\) In re S.T. & N.T., 497 N.W.2d 625, 629 (Minn. Ct. App. 1993) (according deference to Commissioner's expertise in matters of adoption while district court retains an independent interest where child is a ward of the state because of parental termination).

\(^{248}\) See In re Kokesch, 411 N.W.2d 559, 562 (Minn. Ct. App. 1987) (finding that court should affirm Commissioner's decision unless there exists an error of law or the decision is arbitrary, capricious, or unsupported by the evidence).

\(^{249}\) In re Sentry Ins. Payback Program Filing, 447 N.W.2d 454, 458 (Minn. Ct. App. 1989) (recognizing "the Commissioner's and the Department's experience [in] handling consumer inquiries and complaints and in evaluating forms relating to automobile insurance.").
tation is reasonable.\textsuperscript{250} Very few Commissioner's opinions have mentioned the Administrative Rules, Minnesota Rules chapter 1205.\textsuperscript{251} The Administrative Rules apply only to data on individuals, and in general do not expand the scope of the MGDPA.\textsuperscript{252} To the extent a Commissioner's opinion is based on the Rules and is a reasonable one, a court may give deference to the opinion.

3. Analysis of Selected Opinions

The number of requests for interpretive advisory opinions by a governmental entity is relatively small.\textsuperscript{253} As stated above, the actual authority delegated to the Commissioner to issue advisory opinions is consistent with the authority, which may be properly delegated under the Minnesota Constitution and implemented without formal rulemaking under MAPA, provided the opinion sought concerns a long-standing agency interpretation of an ambiguous rule, and the agency interpretation is a reasonable one, or corresponds with the plain meaning of the law or rule.\textsuperscript{254} The Commissioner's opinions that have been issued in response to requests for interpretive opinions frequently offer new interpretations of an ambiguous law or extend beyond the plain meaning of an unambiguous law.

The Commissioner's opinions on trade secret information, for example, illustrate a new interpretation of an unambiguous law.\textsuperscript{255} In the first opinion issued on this topic,\textsuperscript{256} the Com-

\begin{footnotesize}
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\item See, e.g., \textit{In re Q Petroleum}, 498 N.W.2d 772, 777 (Minn. Ct. App. 1998).
\item Fewer than 20 of the Commissioner's first 185 opinions may be classified as interpretive opinions issued to governmental entities. For purposes of this article, a request for an advisory opinion is a request for an interpretive opinion only if the opinion is requested by the governmental entity or entity contracting with the governmental entity. Requests for opinions by government employees concerning disputes between them and their public employers over data privacy practices are not included in this category.
\item See supra section IV.B.
\item Minnesota Statutes § 13.37, subdivision 1(b) defines trade secret information as follows: government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual
\end{enumerate}
\end{footnotesize}
missioner determined that the statute should be interpreted narrowly, and based her opinion on that narrow interpretation. The Commissioner first noted that the definition of trade secret information in the MGDPA is "drawn from the definition of trade secret" in Minnesota Statutes section 325C.01, subdivision 5, the Uniform Trade Secrets Act. Instead of looking to the Uniform Trade Secrets Act and Minnesota cases interpreting it, the Commissioner turned to a 1990 decision from the United States Court of Appeals, Tenth Circuit that interpreted the Federal Freedom of Information Act exemption for trade secrets. This determination exceeded the Commissioner's express authority to issue opinions under chapter 13 or other Minnesota statutes governing government data practices and does not account for the very different structures and classification schemes of applicable Minnesota and federal laws. The MGDPA classifies each piece of information based on why it was gathered and who can see it, whereas the federal Freedom of Information Act sets up a standard of open access to all govern-

or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

See Op. Comm'r Dep't Admin. 94-037 (1994) (limiting the scope of the term "government data" as applied to trade secret information); Op. Comm'r Dep't Admin. 94-045 (1994) (allowing access to a government contractor's profit and loss statements despite a contract clause purporting to keep the information confidential); Op. Comm'r Dep't Admin. 94-047 (1994) (allowing access to government contract despite confidentiality clause provided the information does not constitute trade secret information under Minnesota Statutes § 18.37, subdivision 1(b) (1994)); Op. Comm'r Dep't Admin. 95-017 (1995) (finding that government contractor's economic forecasts and general production description had no independent economic value for the purpose of Minnesota Statute § 18.37, subdivisions 1(b) and 3 (1994); Op. Comm'r Dep't Admin. 95-040 (1995) (finding that classification of data is not dependent on the method by which the government entity attains the data); Op. Comm'r Dep't Admin. 95-018 (1995) (ruling that the information to be protected must be generated from a non-government entity); Op. Comm'r Dep't Admin. 95-019 (1995) (noting that the Commissioner must have the information sought to determine its status).

257. Id. at 2-4.
258. Id. at 2.
259. Id.
260. MINN. STAT. § 13.072, subd. 1(a) (1994). Under the federal Freedom of Information Act, the exemptions to the Act are broadly worded. See 5 U.S.C. § 552(b)(4) (1988) (defining as protected, "trade secrets and commercial or financial information obtained from a person and privileged or confidential.").
ment records unless the record falls within one of the specified exemptions.\textsuperscript{261} The exemptions are broadly drawn. Federal law dictates that the exemptions be narrowly construed to further the policy of openness expressed in the FOIA.\textsuperscript{262} Although the MGDPA also provides that government data is public unless otherwise classified, the Act attempts to classify all government data and unlike the federal FOIA leaves no discretion to interpret the classifications. Imposing a narrow construction on the definition of trade secret exceeded the authority of the Commissioner of Administration to issue interpretive opinions of Minnesota law.\textsuperscript{263} In addition, the interpretation was neither consistent with the plain language of the statute, nor the long-standing interpretation of an ambiguous law by the Department of Administration. This construction in essence ignored the word "including" in the definition of trade secret.

Continuing with her opinion, the Commissioner does cite applicable Minnesota law to define the requirement that a person must make reasonable efforts to keep the information secret to claim trade secret protection.\textsuperscript{264} The Commissioner speculated that a person could obtain some of the information included in the capital expenditure reports, apparently without any basis in the record before the Commissioner.\textsuperscript{265} That some of the information could be readily obtained is an example of a factual finding for which there is no basis in the record, entitling it to no deference.

In Opinion 95-017, the Commissioner of Administration again determined that certain financial data submitted to the City of Moorhead was not trade secret information because of the Commissioner's speculation that information about "recycling trends, an analysis of demand for molded pulp egg cartons, competitive assessment, process equipment availability, freight cost competitiveness, and marketing strategy" is readily ascertainable through proper means by people who are interested.\textsuperscript{266} These opinions appear to exceed the Commissioner's authority to interpret the MGDPA for purposes of issuing advisory

\textsuperscript{262} See generally FRANKLIN & BOUCHARD, supra note 20, at 12-14.
\textsuperscript{263} See supra note 259 and accompanying text.
\textsuperscript{264} Op. Comm'r Dep't Admin. 94-037, at 4 (1994).
\textsuperscript{265} Id.
\textsuperscript{266} Op. Comm'r Dep't Admin. 95-017, at 5 (1995).
opinions. Opinions interpreting the trade secret provision go beyond the plain meaning of a law that is not facially ambiguous. In addition, the Commissioner is in essence finding facts in a situation where only an interpretive opinion was requested.267

Other Commissioner's opinions also illustrate interpretations of the MGDPA that extend beyond the plain meaning of the statute. In Opinion 95-004, the Commissioner of Administration was asked to issue an opinion on the proper classification of booking photographs, sometimes known as mugshots.268 The Commissioner of Administration had issued an earlier opinion about mugshots that arose out of a controversy between a newspaper and a county sheriff's office.269 The Commissioner's earlier opinion was that booking photos were not classified under Minnesota Statutes section 13.82 (law enforcement data) and therefore were public data because they were not classified.270 The Dakota County Attorney pointed out that booking photos were gathered at the time an inmate is booked at the jail, and are used for identification purposes, thereby fitting within the definition of corrections and detention data found in Minnesota Statutes section 13.85,271 not law enforcement data, Minnesota Statutes section 13.82.272 The Commissioner of Administration rejected this classification based on the Commissioner's characterization of the intent of the Legislature in authorizing the advisory opinions.273 The Commissioner stated the legislative intent was to "assure consistency of application of Chapter 13 through the employment of the expertise of the Department of Administration to offer consistent interpretation

267. One problem is that the MGDPA does not address proprietary financial information submitted to a governmental entity. If one reads the definition of trade secret to give effect to all of its provisions, the definition will cover some financial information, but this interpretation is not comprehensive. The 1996 Minnesota Legislature classified Two Harbors Development Authority data in Act of April 11, 1996, ch. 440, 1996 Minn. Laws 874, §§ 14, 15, to be effective August 1, 1996.
270. Id. at 2.
271. Minnesota Statutes § 13.85, subdivision 1 (1994) states as follows:
Definition. As used in this section, "corrections and detention data" means data on individuals created, collected, used or maintained because of their lawful confinement or detainment in state reformatories, prisons and correctional facilities, municipal or county jails, lockups, work houses, work farms and all other correctional and detention facilities.
273. Id. at 3.
of the statute." The Commissioner concluded that if some governmental entities were to rely on the statutory classification while others relied on the earlier Commissioner’s opinion, there would be no consistency in the interpretation of booking photos; therefore mugshots are properly classified as public. In this opinion, the Commissioner of Administration appears to be engaged in legislative-type rulemaking by establishing a new law of general applicability, without following the procedures for formal rulemaking. The opinion also fails as an interpretive rule because it does not correspond with the plain meaning of the statute and is not a long-standing agency interpretation.

4. Opinions on Charges for Copies

The Commissioner also has issued a number of opinions concerning the rates charged for inspection and copies of government data. Governmental entities are authorized to charge fees for copies of government data. One section in the MGDPA authorizes a responsible authority to charge for the "actual costs of searching for and retrieving government data, including the cost of employee time, and for making, certifying, compiling, and electronically transmitting the copies of the data or the data." Another section of the MGDPA authorizes the responsible authority to "require the requesting person to pay the actual costs of making, certifying, and compiling the copies" of private or public data about the requester. The administrative rules also have provisions for determining the fee for copies.

274. Id.
275. Id.
276. The Minnesota Legislature added a specific classification for booking photos in the Act of June 1, 1995. 1995 Minn. Laws 259. Booking photos are now classified as public data under the statute. Id. at § 23, subd. 17(b). However, a law enforcement agency may withhold booking photographs if the agency determines that access will adversely affect an active investigation. Id.
278. See MINN. STAT. § 13.03, subd. 3 (1994).
279. See MINN. STAT. § 13.04, subd. 3 (1994).
280. MINN. R. 1205.0300 (1995); MINN. R. 1205.0400 (1995). The fee for copies of public data on individuals is determined by Minnesota Rule 1205.0300 (1995), and provides as follows:

Subp. 4. Determining fee for copies. The responsible authority may charge
The Commissioner issued an early adjudicative opinion about many disputes between a Mr. Valentino and the Ramsey County Sheriff concerning Mr. Valentino's access to data in the sheriff's office.\textsuperscript{281} The dispute included a question about whether the cost assessed by the Ramsey County Sheriff's Office for copies of its files was excessive.\textsuperscript{282} In responding to this issue, the Commissioner noted a difference between the two statutory sections authorizing recovery of costs for copies.\textsuperscript{283} Despite the government's representation that the charges were the standard fee and "fairly compensate the County for all the activities authorized by statute,"\textsuperscript{284} the Commissioner concluded that the charges were excessive.\textsuperscript{285} The conclusion was based on the Commissioner's own experience that "the time necessary to prepare this file for copying would mean removing any staples or clips and carrying it to a copying machine."\textsuperscript{286} The Commissioner did not consider Minnesota Rule 1205.0300, which allows an agency to be guided by the schedule of standard copying charges, but cited nothing other than what was apparently the Commissioner's personal experience in making copies a reasonable fee for providing copies of public data.

In determining the amount of the reasonable fee, the responsible authority shall be guided by the following:

- A. the cost of materials, including paper, used to provide the copies;
- B. the cost of the labor required to prepare the copies;
- C. any schedule of standard copying charges as established by the agency in its normal course of operations;
- D. any special costs necessary to produce such copies from machine based record keeping systems, including but not limited to computers and microfilm systems; and
- E. mailing costs.

*Id.* The fee for copies of private data is determined by Minnesota Rule 1205.0400 (1995) and provides as follows:

Subp. 5. Fees. The responsible authority shall not charge the data subject any fee in those instances where the data subject only desires to view private data. The responsible authority may charge the data subject a reasonable fee for providing copies of private data.

In determining the amount of the reasonable fee, the responsible authority shall be guided by the criteria set out in part 1205.0800 concerning access to public data.

\textsuperscript{281} See Op. Comm'r Dep't Admin. 94-028, at 1 (1994).
\textsuperscript{282} *Id.* at 5.
\textsuperscript{283} *Id.* at 6.
\textsuperscript{284} *Id.* at 3.
\textsuperscript{285} *Id.* at 10.
\textsuperscript{286} *Id.* at 7.
to reach this conclusion.\textsuperscript{287} There is no requirement that the adjudicatory hearings by the Commissioner be conducted under formal rules of evidence, but a decision based on factors totally outside the record removes any basis for deferring to the findings of the opinion.\textsuperscript{288}

In Opinion 94-040, the Commissioner also addressed disputed copy fees. Here, the Commissioner determined that "actual costs of making, certifying and compiling the copies" did not include costs of maintaining and repairing a copy machine or paying an employee's time.\textsuperscript{289} This conclusion follows from the Commissioner's statement that these costs "seem[] to go beyond what the legislature had in mind when it authorized the City to recover the actual costs of making, certifying and compiling the copies."\textsuperscript{290} Although the decision of the Commissioner restates the statutory requirement that the requester pay only the actual costs, the discussion indicates that the Commissioner believes the term "actual cost" may be subject to limitations not in the statute.\textsuperscript{291}

In Opinion 94-059, the Commissioner applied a statutory interpretation of the term "actual costs."\textsuperscript{292} The City of Rosemount was involved in a dispute over access to data, including copying charges.\textsuperscript{293} The City included costs for copy machines and maintenance as part of the actual cost of supplying data.\textsuperscript{294} The Commissioner interpreted the statute as excluding costs of copy machines and maintenance "unless the machine and maintenance costs are directly attributable to the costs of providing the public with copies of public data."\textsuperscript{295} This interpretation seems consistent with the plain meaning of the statute, but the Commissioner presumed that "Rosemount must operate and maintain copy machines for its internal

\textsuperscript{287} This is generally not the type of expertise that requires special training, education and, therefore, deference. Nor does it appear to be the type of fact of which a court may take judicial notice. \textit{Cf.} MINN. R. EVID. 201.


\textsuperscript{289} Op. Comm'r Dep't Admin. 94-040, at 7 (1994).

\textsuperscript{290} \textit{Id.}

\textsuperscript{291} \textit{Id.}

\textsuperscript{292} Op. Comm'r Dep't Admin. 94-059, at 3 (1994).

\textsuperscript{293} \textit{Id.} at 1.

\textsuperscript{294} \textit{Id.}

\textsuperscript{295} \textit{Id.} at 3.
operations." Based on this determination, the Commissioner found that the City had not shown its costs were the actual costs. This presumption by the Commissioner is again outside the record and undermines any factual determination.

In Opinion 95-024, the Commissioner issued an adjudicatory opinion in which the Commissioner determined that a resolution of the Minneapolis Fire Department Relief Association was in violation of the MGDPA because it established the same fee for copies of both public and private data. Distinguishing between the fees authorized by Minnesota Statutes section 13.03 and those authorized by Minnesota Statutes section 13.04 requires the Commissioner to read "actual costs" in two different ways. This runs counter to the promulgated rules that establish one set of criteria for determining costs under the MGDPA and imposes an ambiguity where none exists.

5. Limiting Judicial Deference to Commissioner's Opinions

These opinions illustrate several reasons to limit the deference a court should give the Commissioner's opinions. These opinions are based on statutory interpretation, a province reserved for the judiciary. The Commissioner's interpretations of terms, which might be considered ambiguous, are inconsistent with long-standing agency regulations. Factual determinations are made without any basis in the record before the Commissioner. Finally, the Commissioner is issuing opinions in areas of law beyond the scope of the authority granted under Minnesota

296. Id.
298. Id.
Statutes section 13.072. Where the Commissioner's opinions are inconsistent with the MGDPA and her authority to issue written opinions, these opinions create confusion instead of solving disputes.

The Commissioner's authority is limited to opinions regarding a person's rights as a subject of data or the right to have access to government data. Yet a reading of the Commissioner's opinions shows that the Commissioner interprets this delegation of power to include: violations of the MGDPA, the offensiveness of photographs maintained by law enforcement agencies, the destruction of data collected without a Tennessen Warning, and the extent of the attorney-client privilege. The Commissioner also offers interpretation of the requirements of the Vulnerable Adult Act, the Uniform Trade Secrets Act, and the Minneapolis Civilian Police Review Authority Rules. The Commissioner has issued many opinions determining that the rates charged by governmental agencies for copies of government data are unreasonable.

Other states have also instituted administrative proceedings to resolve disputes over access to government data. Some examples will be discussed in the next section.

V. DISPUTES OVER ACCESS TO DATA IN OTHER STATES

Almost all states provide for administrative appeal and
civil judicial review of agency determinations on the release of governmental records. Many other states require review of agency decisions by the state’s attorney general. Minnesota, like most states, does not require exhaustion of administrative remedies before an action may be filed in a court.


A. Administrative Hearings

Connecticut, New York, and Utah have established procedures for administrative review of agency decisions by an agency other than the agency that has the records, in addition to possible review of decisions through court actions. The Uniform Information Practices Code also addresses this issue. The administrative review bodies established in Connecticut, New York, and Utah and in the Uniform Code provide an interesting comparison to Minnesota’s scheme. These administrative review bodies allow for centralized decision-making, which should enhance consistency and incorporate procedural safeguards enhancing reliability of factual conclusions. The decisions of at least one such administrative body are made available in the form of printed reports. Summaries of these procedures follow.

1. Connecticut

The Connecticut Legislature established a Freedom of Information Commission (Commission) to hear appeals from agency decisions denying the right to inspect or copy government data, as well as disputes about administration of the public meeting law and the state’s privacy act. The Commission is composed of five members, appointed by the governor “with the advice and consent of either House or the general assembly.” Commissioners serve four-year, staggered terms. No more than three members can be from the same political party. Three members constitute a quorum.

The Commission adopted regulations under the Connecticut

316. See N.Y. PUB. OFF. LAW § 89.1 (McKinney 1988).
318. See supra note 5; see also HAW. REV. STAT. § 92F-15.5 (1996).
Administrative Procedure Act which established procedures for appeals from agency decisions. The Commission has the authority to conduct contested case hearings and issue advisory opinions. The contested case hearings may be held before a hearing officer who hears testimony under oath and has the power to issue subpoenas if approved by the Commission. The statute and regulations include many procedural safeguards and opportunities for the parties to explain their positions. The regulations also set forth in detail the procedures the Commission should employ to protect the confidential nature of disputed records.

The Commission was charged with making findings based on the record before it and may only take administrative notice of "judicially cognizable facts." Proceedings before the Commission contain many of the due process safeguards of a judicial proceeding. Although Connecticut courts defer to the fact-finding of the Commission, they do not defer to the Commission on questions of law.

2. New York

New York has a Committee on Open Government (Committee), which issues advisory opinions on issues related to the state’s Freedom of Information Law (FOIL), Open Meetings Law, and Personal Privacy Protection Law. The Committee’s staff issues “informal” opinions to any member of the public, and

327. CONN. AGENCIES REGS. § 1-21j-11 (1996); see also CONN. GEN. STAT. ANN. § 4-183 (1988 & Supp. 1995) (describing procedures for appeals from agency decisions as described in Uniform Administrative Procedure Act and as incorporated by Connecticut Agencies Regulations section 1-21j-11 (1996)).
329. Id.
332. CONN. AGENCIES REGS. § 1-21j-55(d) (1996).
335. N.Y. PUB. OFF. LAW § 89.1(a) (1988).
formal written opinions if requested by a Committee member.\textsuperscript{337} Eleven members serve on the Committee, which functions within the New York Department of State.\textsuperscript{338} The Committee has no authority to issue binding opinions. Moreover, in its report to the Governor, the Committee states that the advisory opinions are "intended to be educational and persuasive, and it is our hope that they serve to resolve issues and avoid the need to litigate."\textsuperscript{339} The Committee is not given specific authority to resolve disputes. The FOIL is silent as to whether courts should defer to the committee's factual findings or legal conclusions. The Committee is notified of any appeal of a denial of access to records and is informed of all determinations of those agency appeals.\textsuperscript{340}

The Committee appears to function as an intervener in disputes between agencies and people requesting access to government information. Significantly, under New York law, a party must exhaust administrative remedies,\textsuperscript{341} including the administrative appeal within the agency, before he or she may bring an action in court. Any judicial review of an agency decision under the FOIL is done in accordance with Article 78, Civil Practice Law and Rules, which is an action resembling a petition for a writ of mandamus, prohibition, or certiorari to review.\textsuperscript{342}

3. \textit{Utah}

Utah recently passed a new Government Records Access and Management Act.\textsuperscript{343} The Legislature established a Records Committee\textsuperscript{344} to hear appeals from determinations about access to government data.\textsuperscript{345} In addition, a party may appeal an agency determination concerning access to information to the

\begin{itemize}
\item \textsuperscript{337} N.Y. PUB. OFF. LAW § 89.1(b) (1988).
\item \textsuperscript{338} N.Y. PUB. OFF. LAW § 89.1(a) (1988).
\item \textsuperscript{339} State of N.Y., Department of State, Committee on Open Government, 1995 Report to the Governor and the Legislature from the Committee on Open Government, Dec. 1995, at 6.
\item \textsuperscript{340} N.Y. PUB. OFF. LAW § 89.4(a)(1988).
\item \textsuperscript{342} N.Y. PUB. OFF. LAW § 89.5 (1988).
\item \textsuperscript{344} UTAH CODE ANN. § 63-2-501(1)(1995).
\item \textsuperscript{345} UTAH CODE ANN. § 63-2-502(1)(c)(1995).
\end{itemize}
Chief Administrative Officer of the governmental entity.\textsuperscript{346} Records Committee determinations may also be appealed to District Court.\textsuperscript{347} The Records Committee holds a hearing in which parties may testify, present evidence, and comment on issues.\textsuperscript{348} The Committee reviews the agency decision \textit{de novo} and may conduct an in-camera review of the disputed government information.\textsuperscript{349} No discovery is allowed, but the Committee may issue subpoenas if further evidence is necessary.\textsuperscript{350} In a judicial appeal, the court is also directed to conduct a \textit{de novo} review of the record, but may allow evidence to be presented to the Records Committee if the dispute was heard there.\textsuperscript{351} Again, in-camera inspection of records is allowed.\textsuperscript{352} In making their determinations concerning the release of records, the Legislature directs the courts to weigh the private and public interests at stake.\textsuperscript{353}

4. \textit{Uniform Information Practices Code}

The Uniform Information Practices Code contains an optional article establishing the Office of Information Practices.\textsuperscript{354} The Office of Information Practices is authorized to issue advisory guidelines, opinions, or other information concerning a person's rights and the functions and responsibilities of agencies. It may even conduct inquiries regarding compliance by an agency and recommend disciplinary action to appropriate officers of an agency.\textsuperscript{355} The Office of Information Practices is also authorized to bring an action against another agency to enforce the provisions of the code.\textsuperscript{356} Such an enforcement action is limited to declaratory, injunctive or similar relief.\textsuperscript{357}

\begin{itemize}
\item \textsuperscript{346} \textsc{Utah Code Ann.} § 63-2-401(1)(a) (1995).
\item \textsuperscript{347} \textsc{Utah Code Ann.} § 63-2-404(1)(a) (1995).
\item \textsuperscript{348} \textsc{Utah Code Ann.} § 63-2-403(2)(d) (1995).
\item \textsuperscript{349} \textsc{Utah Code Ann.} § 63-2-408(9)(a)-(10)(b) (1995).
\item \textsuperscript{350} \textsc{Utah Code Ann.} § 63-2-403(10)(a) (1995).
\item \textsuperscript{351} \textsc{Utah Code Ann.} § 63-2-403(10)(b) (1995).
\item \textsuperscript{352} \textsc{Utah Code Ann.} § 63-2-404(6) (1995).
\item \textsuperscript{353} \textsc{Utah Code Ann.} § 63-2-403(11)(b) (1995).
\item \textsuperscript{354} \textsc{Unif. Information Practices Code,} § 4, 13 U.L.A. 315 (1986).
\item \textsuperscript{355} \textit{Id.} at § 4-102.
\item \textsuperscript{356} \textit{Id.}
\item \textsuperscript{357} \textit{Id.} at § 2-104.
\end{itemize}
5. Comparison to Minnesota’s Commissioner’s Opinions

The models for dispute resolution in Connecticut, New York, Utah, and in the Uniform Act illustrate administrative hearing procedures that range from a formal hearing to informal, “educational” advisory opinions. All allow judicial review of agency action.

Consistent with general principles of administrative law, under these statutes courts may defer to the factual findings of an agency if the hearing conducted by the agency has indicia of procedural safeguards, such as an opportunity for the parties to present their testimony under oath and be subject to cross-examination. The advisory opinions authorized by the MGDPA, as implemented by the Minnesota Department of Administration, allow the parties limited process. No testimony is taken, documents including those in dispute may not be submitted for examination, and there is no requirement that the legal determination be rendered by a person learned in the law. Despite these limitations in the process, Minnesota’s statute authorizing advisory opinions by the Commissioner directs courts to give deference to the determinations.

The principles that guide a court in determining the level of deference to give an administrative decision in other areas of law should also apply in evaluating the level of deference that the Commissioner’s opinions should be given. The level of a court’s deference to an agency’s findings of fact depends on the type of record made before the agency, and whether the findings are supported in the record. Deference to an agency’s expertise is appropriate in areas where courts do not have the needed expertise. Deference to a legal interpretation is appropriate when the agency’s interpretation conforms with the plain meaning of the statute or represents a long-standing interpretation of an ambiguous agency rule. Minnesota’s Commissioner’s advisory opinions, unlike the decisions rendered by the commissions in Connecticut and Utah, do not contain a fact-finding process that supports deference to the facts.

361. See id.
362. See supra notes 186-245 and accompanying text.
Likewise, Minnesota’s Commissioner’s opinions, in most cases, do not warrant deference to the legal conclusions contained in them, because they are not rendered by a court or even by the attorney general or other person with legal training and experience.\textsuperscript{363} The Commissioner’s legal conclusions are entitled to deference insofar as they do not stray from the plain meaning of the law, or possibly to the extent they represent the Department of Administration’s long-standing interpretation of the administrative rules governing the MGDPA.\textsuperscript{364}

Administrative proceedings in jurisdictions where classifications of data and restrictions on access are less rigid than those in Minnesota can be very helpful. Where exceptions to a presumption of open access are worded broadly, an agency determination of fact concerning, for example, when the release of information would cause “undue embarrassment” has merit.\textsuperscript{365} The usefulness of administrative fact-finding in disputes under the MGDPA is less apparent.

\textbf{B. Judicial Review}

Because under the MGDPA questions about access to government data will turn on questions of law in almost all cases, a remedy allowing prompt judicial review of a government agency’s determination about a request for access to government data is in many ways a more appropriate remedy than an administrative fact-finding hearing. The MGDPA contains remedies of judicial review of agency denial of access,\textsuperscript{366} injunction and an “action to compel compliance” that “should be heard as soon as possible.”\textsuperscript{367} Although not specifically designated as such, this action closely resembles an action for a writ of mandamus, and can reasonably be analyzed as a writ of mandamus.\textsuperscript{368} The petition for writ of mandamus is not a

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\item \textsuperscript{363} See, e.g., Independent Sch. Dist. No. 581, Edgerton v. Mattheis, 275 Minn. 383, 386, 147 N.W.2d 374, 377 (1966).
\item \textsuperscript{364} Id.
\item \textsuperscript{365} N.Y. PUB. OFF. LAW § 87.2(b)(1988).
\item \textsuperscript{366} See MINN. STAT. § 13.03, subd. 8 (1994).
\item \textsuperscript{367} See MINN. STAT. § 13.08 (1994).
\item \textsuperscript{368} See Hunt v. Hoffman, 125 Minn. 249, 253-54, 146 N.W. 733, 734 (1914). The Minnesota Supreme Court in \textit{Hunt} was asked to exercise original jurisdiction concerning a dispute about the counting of ballots by a canvassing board. \textit{Id.} The court noted that it had original jurisdiction to issue writs of mandamus and concluded that “[t]he proceeding authorized by the statute quoted is not designated mandamus,
\end{itemize}
\end{footnotesize}
perfect fit with the action to compel compliance. These differences will be discussed below.

To obtain a writ of mandamus in Minnesota a petitioner must ordinarily show (1) the failure of an official duty clearly imposed by law, (2) a public wrong specifically injurious to the petitioner, and (3) no other adequate specific legal remedy. In the MGDPA, the Legislature has specified that an action to compel compliance is available without a specific finding that the petitioner has no adequate remedy at law and thus satisfied the threshold requirement that petitioners have no adequate legal remedy by legislative declaration. The Legislature has, in essence, declared that the right to access to government data is such that any legal remedy is per se inadequate. The Legislature's direction that actions to compel compliance be heard as soon as possible also helps establish the equitable nature of the remedy.

Nineteen other states have provided for review of disputes over access to government data "at the earliest practicable date," "without delay," or with a similar directive that the hearings be expedited. Twelve states even specified times for scheduling
petitions, responses, hearings, or decisions. Ordinarily, such
specificity in dictating procedure would run afoul of the Minnesota Constitution's explicit separation of powers. Minnesota law recognizes that while the Legislature has the authority to establish substantive rights of litigants, the Minnesota Supreme Court has the power "to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, including the probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant."\(^{375}\)

The use of a petition for a writ of mandamus to compel compliance with the MGDPA avoids encroachment into the court’s province by giving the general directive that the hearing should commence as early as possible. More importantly, the Minnesota Supreme Court has exempted proceedings under Minnesota Statutes chapter 586 from their procedural rules.\(^{376}\)

The law governing procedure for obtaining a writ of mandamus is a matter of statutory law only. The law allows the parties and the court to proceed to a determination on the question of whether a petitioner is entitled to either an alternative writ or a peremptory writ depending on whether the respondent would have any valid excuse for nonperformance.\(^{377}\) If respondent has a valid excuse for nonperformance, the court issues an alternative writ and allows the respondent to answer on the day the writ is returned.\(^{378}\) If there is no valid excuse for nonperformance, a preemptive writ

order of notice on the complaint shall be returnable no later than 10 days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties."); N.H. REV. STAT. ANN. § 91-A:7 (1990) (declaring that if any justice finds time to be of the essence, then there is authority to issue an ex parte order); TENN. CODE ANN. § 10-7-505(b) (1992) (stating that "the generally applicable periods of filing such [a] response shall not apply in the interest of expeditious hearings."); UTAH CODE ANN. § 68-2-404.(2)-(3) (1995) (setting out timelines and deadlines for filing a petition for judicial review and requirements for the contents of a petition including a directive that all additional pleadings and proceedings be governed by Utah Rules of Civil Procedure); VA. CODE ANN. § 2.1-346 (Michie 1995) (providing that petitions for mandamus or injunction shall be heard within seven days); WASH. REV. CODE ANN. § 42.17.340(1)-(2). (West Supp. 1996) (explaining that court may order agency to show cause why it has disallowed inspection or copying of public records).

375. See sources cited supra note 373.
376. MINN. R. CIV. P. 81.01(a), App. A.
377. MINN. STAT. §§ 586.03-.04 (1994).
378. MINN. STAT. § 586.06 (1994).
may be issued.\textsuperscript{379} Even in the case of an alternative writ, this remedy affords the parties involved in a dispute concerning access to government data a timely judicial determination about whether the person seeking access to government data is entitled to the access.

Using a petition for a writ of mandamus rather than the Commissioner's advisory opinions gives a party seeking access to government data several advantages. First, Minnesota Statutes chapter 586 allows for judicial interpretation of the statute rather than an administrative interpretation,\textsuperscript{380} making the decision more trustworthy and giving it more legal integrity. Second, a peremptory writ may be issued in a matter of hours rather than the thirty to fifty days allowed for Commissioner of Administration opinions.\textsuperscript{381} Third, in cases of alternative writs, if the governmental entity can show cause why the data should not be released to the person requesting it, the court is in a position to hold a trial or other proceedings as necessary to establish facts that are in dispute.\textsuperscript{382} The Commissioner of Administration does not take testimony under oath and may or may not review relevant documents.\textsuperscript{383}

A writ of mandamus is not a perfect fit, however. The discussion of some of the disputes submitted to the Commissioner illustrates well that the official duty may not be clearly imposed by law. The same data may fall within several categories that dictate differing rights of access. Specific authority in the MGDPA to proceed by petition for writ of mandamus under Minnesota Statutes chapter 586 in an action to compel compli-

\begin{footnotes}
\item[379] MINN. STAT. § 586.04 (1994).
\item[380] Id.
\item[382] MINN. STAT. § 586.12 (1994).
\item[383] See MINN. R. 1205.1600, subp. 1 (referring to Rules of the Office of Administrative Hearings). Two obstacles exist to the use of a writ of mandamus to enforce rights under the MGDPA. The first is that Minnesota Statutes § 586.10 (1994) sets a maximum fine of $250 when the court determines that a public officer has neglected or refused to perform a duty without just cause. It is not clear if this provision would bar misdemeanor prosecution for a willful violation or the payment of exemplary damages, both of which are available under the MGDPA. Second, it is not clear to what extent the right to receive attorney's fees differs between the MGDPA and Minnesota Statutes chapter 586 governing writs of mandamus.
\end{footnotes}
ance without the specific showing that the duty is clear would eliminate this shortcoming. 384

The writ of mandamus also has other disadvantages when compared to the Commissioner's advisory opinions, such as its relatively high cost to the parties. Government entities, for example, pay $200 for each Commissioner opinion. 385 Other parties requesting opinions pay nothing. 386 The MGDPA also grants immunity from exemplary or compensatory damages or attorney's fees to any agency that "acts in conformity with a written opinion." 387 Removing the specter of damages, costs, and attorney's fees that could result from an erroneous but good faith attempt to properly categorize and classify government data is an incentive to resolve disputes. Another great benefit of Commissioner's advisory opinions is the consistency that can come from a centralized decision-making body. As illustrated in section III.C., the Commissioner's application of the MGDPA has not been uniform. The concept of a central decision-maker, however, allows for the removal of much uncertainty in the interpretation of the MGDPA.

VI. CONCLUSION

The MGDPA's complex and rigid structure has resulted in many disagreements over how government information should be classified and to whom it may be released. Minnesota's MGDPA contains solutions, which do not provide the citizens individually or collectively (as the government) with consistent, cost-efficient, and useful solutions to disputes about access to government data. The Commissioner's advisory opinions could provide uniform guidance in interpreting the statute throughout the state by offering consistent opinions about the classification of data, and providing access to those opinions. The Commis-

384. See MINN. STAT. § 586.01 (1994) (requiring that the duty be specifically found in the law).
385. MINN. STAT. § 13.072, subd. 3 (1994).
386. See MINN. STAT. § 13.072, subs. 1, 3 (1994) (making no reference to a fee by other individuals).
387. MINN. STAT. § 13.072, subd. 2 (1994). Costs to the parties may include attorney's fees. MINN. STAT. § 13.08, subd. 4 (1994). Parties may retain legal counsel for either type of proceeding. For instance, 28 of the first 50 requests for opinions from the Commissioner of Administration were from attorneys on behalf of their clients. In addition, the amount of attorney time would vary greatly depending upon the complexity of the issues.
sioner's advisory opinions, unfortunately, have been at times inconsistent in their approach to classification of data, have strayed into areas of interpretation not explicitly authorized by the MGDPA or other statutes, and have involved unnecessary and unsupported fact-finding. The Commissioner is not a judicial body or legal advisor with skills and expertise in interpreting a statute. In addition, the statute does not give the Commissioner the authority to issue opinions that have finality. Most importantly, although the Legislature delegated to the Commissioner of Administration the authority to issue written opinions about classification of data and rights of parties, the Commissioner is bound by the complex and rigid structure of the MGDPA.

The MGDPA also provides for judicial determination of the legal issues of proper classification and access of government data through what the MGDPA designates as an "action to compel compliance." This action, if administered as a petition for a writ of mandamus, provides a solution for disputes about access to government data. This approach has some advantages over the Commissioner's opinions because courts have the charge and expertise of interpreting statutes. A petition for a writ of mandamus may also be more timely than the Commissioner's opinions. The MGDPA also provides that a party disputing a denial of access may bring "an action in district court seeking release of the data." Presumably, this would require initiation of a lawsuit through service of a summons and

388. Although Minnesota Statutes § 13.072, subdivision 2 (1994) mandates that the Commissioner "arrange for public dissemination of opinions," the opinions are not generally available. Some opinions have been published in Finance & Commerce, a legal newspaper, but not on a predictable basis. Minnesota's Attorney General Opinions are published. Most states including Alaska, Kentucky, and Washington publish attorney general opinions on open records or freedom of information laws. Texas attorney general opinions are online at [REINSERT WWW ADDRESS].


390. While the Commissioner has stated that consistent interpretation is of paramount importance in issuing the opinions, the statute does not give the Commissioner authority to ignore sections of the MGDPA or change classifications of data. An agency may not decide the limits of its statutory power. Burlington Northern, Inc. v. Department of Pub. Serv., 308 Minn. 48, 49, 240 N.W.2d 554, 557 (1976).

391. See MINN. STAT. § 13.08, subd. 4 (1994).

392. See MINN. STAT. § 13.03, subd. 8 (1994).
Without a fundamental change in the structure of the MGDPA, however, the courts, the Commissioner, and the parties to any dispute will continue to be hemmed in by the MGDPA itself. Informal dispute resolution and compromise by the parties is not possible under the current dictates of the MGDPA. It costs citizens and government both time and resources when either the Minnesota Commissioner of Administration or the courts must be involved in each disagreement over category and classification of data.

Many different data access procedures in other states attempt to provide fast, inexpensive methods, that can result in decisions with integrity. A remedy that combines the centralized, inexpensive (to the parties) decision-making of the Commissioner’s opinions with the integrity and finality of judicial determinations could be fashioned. Many states rely on the attorney general to issue legal opinions on the open records or freedom of information statutes. Other states use a commission that consists of commissioners who are learned in the law and have the authority to hold fact-finding hearings, if necessary. In addition, if the determinations are of state-wide significance, they could be distributed in a uniform, reliable way, assuring their availability to parties with similar disputes. Finally, appellate review could be available in those cases where the commission’s decision is dispositive. Many other schemes combining state-wide consistency (and distribution) with the integrity and finality of judicial determinations at a reasonable cost to the parties may exist, and merit discussion at the Legislature.

393. See supra notes 309, 319 and accompanying text.