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# Government Data Practices Law Survey

Legislative Commission on Data Practices  
December 22, 2014

House Research Department

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# Agenda

- Minnesota Government Data Practices Act
- Federal Freedom of Information Act (FOIA)
- State Data Practices/Open Records Laws
  - State Commissions & Offices
  - State Ombudsman
  - Role of the Attorney General
  - Fees and Fee Waivers
  - Timeliness
  - Other Public Records Issues



# MINNESOTA GOVERNMENT DATA PRACTICES ACT OVERVIEW

Minnesota Statutes, Chapter 13



# Minnesota Government Data Practices Act

- Enacted in 1979
- All government data is presumed public, unless explicitly classified otherwise (statute or temporary classification)
  - Applies to data maintained by state agencies, statewide systems, and political subdivisions



# Minnesota Government Data Practices Act

## Classifications of Data that are Not Public

Data Classification	Data subject?	Accessible to data subject?	Accessible to authorized government employees?	Statutory reference
Private	An individual, natural person	Yes	Yes	13.01, subd. 12
Confidential	An individual, natural person	No	Yes	13.01, subd. 3
Nonpublic	An entity (not a natural person)	Yes	Yes	13.01, subd. 9
Protected Nonpublic	An entity (not a natural person)	No	Yes	13.01, subd. 13



# Minnesota Government Data Practices Act

- Requests for access to data
  - Must be made to the government entity that holds the data
  - Requestor is not required to provide identification or a purpose for seeking access to public data
  - Request can be to “inspect” data, or to receive copies of data



# Minnesota Government Data Practices Act

## Fees and Timeliness

Type of Request	Data subject charged fees?	General public charged fees?	Response time required?
Inspection	No	No	Reasonable time (general public)  Immediately, or within 10 days (data subject)
Copies	Actual cost of making and certifying copies	\$0.25/page (up to 100 pages, black and white)  Actual cost (more than 100 pages)	Reasonable time (general public)  Immediately, or within 10 days (data subject)



# Minnesota Government Data Practices Act

- Other request/fee issues
  - Government entity may charge additional reasonable fee for data with commercial value
    - Sufficient documentation to explain fee may be required
  - Government entity may limit a data subject's access to private data to once in a six-month period





# Minnesota Government Data Practices Act

## State Oversight of Data Practices Laws

- Commissioner of Administration
  - Advisory opinions
    - 965 issued since 1993
      - 19 (2014); 15 (2013); 19 (2012); 19 (2011)
      - High: 96 opinions issued in 2001
  - Temporary classifications
    - 182 approved since 1977
    - 30 approved, 1991-present
      - One current classification: Automated License Plate Readers (expires August 1, 2015)
  - Information Policy Analysis Division (IPAD)



# Minnesota Government Data Practices Act

## Remedies and Enforcement

- Office of Administrative Hearings
  - Authorized to hear complaints and issue orders for compliance with the law (since 2010)
  - 17 cases heard and resolved (FY 2011-FY 2014)
- Other Remedies and Enforcement
  - Civil action for damages
    - Exemplary damages for willful violation (\$1,000 - \$15,000)
    - Attorney's fees if government entity fails to follow advisory opinion
  - Criminal Penalties
  - Suspension without pay or dismissal of public employee for willful violation



# Minnesota Government Data Practices Act

## Other Relevant Minnesota Laws

- Official Records Act
  - Minn. Stat. § 15.17
- Records Retention
  - Minn. Stat. §§ 138.161-138.25
- Data Practices Administrative Rules
  - Minn. Rules Chapter 1205
- Various topic-specific laws governing data
  - Health Records Act (Minn. Stat. § § 141.291-141.298)
  - Business Screening Services (Minn. Stat. § 332.70)



# FEDERAL FREEDOM OF INFORMATION ACT (FOIA) OVERVIEW

5 U.S.C. § 552



# Freedom of Information Act (FOIA) Overview

- Enacted by Congress in 1966
- Statutory right of access to information in federal executive branch agencies.
- Intent: Ensure informed citizenry and prevent secret law.
- Presumes records are disclosable unless “exempt” (see following slide) or “excluded” (applies to certain law enforcement records).



# FOIA Exemptions

(Chapter 8 of the FOIA Manual)

1. Classified Material
2. Internal Personnel Rules
3. Records Required to be Withheld by Another Statute
4. Confidential Commercial or Financial Information
5. Inter- or Intra-Agency Records
6. Personal Privacy
7. Records or Information Compiled for Law Enforcement Purposes
8. Records Relating to Supervision of Financial Institutions
9. Geological or Geophysical Information



# Freedom of Information Act (FOIA) Q&A

Question	Answer
Who may make a request?	“Any person” (except fugitives & foreign gov)
What is a proper request?	(1) in writing, (2) reasonably describes records requested (3) complies with agency regulations
How must the agency acknowledge the request?	Must provide tracking number and update status; 20 days to respond
Expedited Processing?	For “compelling need”; 10 days
Fee Waivers?	Yes, discretionary if (1) “contributing significantly to public understanding” and (2) noncommercial
Right of Appeal?	May appeal denial to (1) agency administrator and/or (2) seek judicial review



## FOIA Fees Table

Type of Requester	Agency Search	Individual Review	Duplication Costs
Commercial	\$	\$	\$
Education/ Science	Free	Free	\$*
News Media	Free	Free	\$*
All Others	\$**	Free	\$*

\* First 100 pages free.

\*\* First 2 hours of search free.





# STATE OPEN RECORDS LAWS OVERVIEW



## State Open Records Laws

1. State Commissions & Offices
2. State Ombudsman
3. Role of the Attorney General
4. Fees and Fee Waivers
5. Timeliness
6. Other Public Records Issues



# 1. State Commissions and Offices: Overview

- At least **13 States** have commissions or offices to specifically to manage and adjudicate public records issues
- **Powers:** All commissions can issue advisory opinions, some have the power to order an agency to release records, set fines, report noncompliant agencies, and mediate disputes.
- **Simultaneous Suit in Court?** 2 states require filing a complaint first with the commission before filing a suit in court, 7 allow both actions to be done at the same time.





# 1. State Commissions and Offices: Connecticut

- **Connecticut Freedom of Information Commission**
  - Organized under Office of Governmental Accountability
  - 9 member commission (5 appointed by governor, w/ legislative approval; 4 appointed by legislative leaders)
- Hears complaints from persons who have been denied access to the records or meetings of public agencies in Connecticut.
- If the agency has violated the FOI Act, the Commission can order the disclosure of public records, null and void a decision reached during a public meeting, or impose other appropriate relief.
- <http://www.ct.gov/foi/>



# 1. State Commissions and Offices: Hawaii

- **Hawaii Office of Information Practices**
  - Organized under the Lieutenant Governor's Office.
- Office has jurisdiction to investigate agencies' actions.
- "Attorney of the day" service provides legal guidance to agencies and to the general public
- OIP issues formal and informal opinions, and facilitates an appeals process. Individuals also retain right to pursue action in court.
- <http://oip.hawaii.gov/>



# 1. State Commissions: Illinois

- **Illinois Public Access Counselor**
  - One position, appointed by Attorney General
- Mission to help individuals obtain public documents and access public meetings.
- Mediates disputes, and issues advisory and binding opinions related to records access
- <http://foia.ilattorneygeneral.net/>



# 1. State Commissions: Indiana

- **Indiana Public Access Counselor**
  - One position, appointed by governor
- Educates the public and answer inquiries from individuals and agencies about records.
- Issues advisory opinions and informal opinions in response to complaints.
- Plaintiffs must seek the opinion of the Public Access Counselor in order to collect attorneys' fees.
- <http://www.in.gov/pac/>



# 1. State Commissions: Iowa

- **Iowa Public Information Board**
  - 9 members appointed by governor (w/ senate confirmation)
  - Board membership includes media, local government; party balance required
- The board conducts trainings, issues binding and advisory opinions, and answers questions from agencies and the public.
- The board's jurisdiction includes both Iowa's Open Meetings law and Public Records Law.
- <https://www.ipib.iowa.gov/>





# 1. State Commissions and Offices: Massachusetts

- **Massachusetts Supervisor of Public Records**
  - Administrative official within Office of the Secretary of the Commonwealth
- Discretion to review cases and may refuse to accept an appeal under certain circumstances.
- Supervisor may report violations to the Attorney General or District Attorney.
- <http://www.sec.state.ma.us/pre/preidx.htm>

# 1. State Commissions and Offices: New Jersey

- **New Jersey Government Records Council**
  - 5 member council (3 appointed by governor + Commissioner of Education and Commissioner of Community Affairs)
- Issues advisory opinions on the accessibility of government records.
- Provides mediation and resolution of disputes related to access to government records.
- <http://www.state.nj.us/grc/>



# 1. State Commissions and Offices: New York

- **New York Committee on Open Government**
- Acts as an ombudsman and provides opinions, guidelines, and information regarding disclosure of public records.
- Advises and oversees Freedom of Information Law, Open Meetings Law, and Personal Privacy Protection Law
- Makes extensive recommendations to legislature on potential amendments to open records laws
- <http://www.dos.ny.gov/coog/>



# 1. State Commissions and Offices: Pennsylvania

- **Pennsylvania Office of Open Records**
  - Administrative agency, established in 2009
  - Large agency: 12 staff, \$2 million+ annual budget
- Develops forms for use by individuals in making records requests
- Appeals officers conduct hearings and have the authority to issue final determinations regarding the openness or confidentiality of records
- <http://openrecords.state.pa.us>



# 1. State Commissions and Offices: Tennessee

- **Tennessee Office of Open Records Counsel**
  - Administrative office, established within Office of Comptroller of the Treasury
- Assists in obtaining public records from local government,
  - Includes guiding citizens to correct offices/officials and resolving disputes regarding access to public records.
- **Advisory Committee on Open Government** advises the legislature on proposed legislation regarding Tennessee's open meeting laws.
- <http://www.comptroller.tn.gov/openrecords/>



# 1. State Commissions: Utah

- **Utah State Records Committee**
  - 7-member committee, representing various interests
  - Government Records Ombudsman, appointed by state archivist
- Conducts hearings, reviews records, and orders disclosure
- The committee may assess fines, and forward a report of noncompliance to the governor, the Legislative Management Committee, or the Judicial Council.
- Anyone denied access after petitioning the State Records Committee may file action in a district court
- <http://archives.utah.gov/src/>



# 1. State Offices/Commissions: Comparisons

State	Powers	Simultaneous court action?	Organization	Staff	Budget
<b>Connecticut</b>	Order release of records; impose fines	Yes	Gov. / Office of Accountability	15 (+9 commiss. )	\$1,697,599
<b>Hawaii</b>	Order release of records	Yes	Lt. Gov.	8.5	\$539,757
<b>Illinois</b>	Advisory and binding opinions, informal and binding mediation	Yes	Attorney General	~1	N/A
<b>Indiana</b>	Advisory and informal opinions	Yes	Gov. (exec. order)	2	\$135,137
<b>Iowa</b>	Binding and advisory opinions.	Yes	Gov./state agency	3 (+9 commiss. )	\$350,000
<b>Massachusetts</b>	Order release of records; report agency	Yes	Sec. of State	7	N/A
<b>Minnesota</b>	Advisory opinions, Temporary classifications	Yes	Dept. of Administration	4.5	\$463,000
<b>New Jersey</b>	Order release of records; supervise mediation	Yes	Governor	6 (+5 commiss.)	\$612,000
<b>New York</b>	Advisory and informal opinions only	Yes	Gov. / Dept. of State	~5 (+11 commiss. .)	N/A
<b>Pennsylvania</b>	Appoints appeals officers; power to order records release	No	Governor	12	\$2,002,000
<b>Tennessee</b>	Advisory and informal opinions only	Yes	Compt. Of the Currency	~1 (+14 commiss.	N/A
<b>Utah</b>	Order release of records; impose fines; report agency	No	Gov. / Archives Dept.	~1 (+7 commiss. )	N/A



# 1. State Commissions: Appointed Commissions

State	No. of Members	Appointed by	Appointment composition	Term length	Responsibilities
<b>Connecticut</b>	9	Governor (5), Legislature (4)	No more than 5 members can be from the same political party	4 years (5), 2 years (4)	Hear disputes
<b>Iowa</b>	9	Governor	No more than 3 media and county representatives, politically balanced	4 year staggered terms	Hear disputes
<b>New Jersey</b>	5	Governor (3); Dept. of Ed (1); Dept. of Comm. Affairs (1)	Governor must appoint members from more than one political party	Length of governor's term	Hear disputes
<b>New York</b>	11	Governor (5), Legislature (2), Ex-officio (4)	Two must be representatives of the news media, one a local government official	Varies	Hear disputes
<b>Tennessee</b>	14	Governor	Specific members from state and local government, news media, citizen, citizen groups, education	4 years	Advise only
<b>Utah</b>	7	Governor	Specific members from state and local government, news media, citizen, private sector	4 years	Hear disputes





## 2. State Ombudsman: Overview

- At least **4 States** have general state ombudsman available to hear complaints about access to public records:
  - **Alaska:** Individuals may seek help of the state ombudsman if denied access to records but generally rely on their own resources. <http://ombud.alaska.gov/>
  - **Arizona:** Citizens may complain to the Office of the Ombudsman-Citizens Aide, which has investigative powers and the ability to make recommendations to agencies. <http://www.azoca.gov/>
  - **Iowa:** The Office of the Ombudsman has statutory authority to investigate citizens' complaints about government (including Open Records Law). <https://www.legis.iowa.gov/Ombudsman/>
  - **Utah:** Serves as a resource for government records officers who are responding to records requests. Upon request, the ombudsman can attempt to mediate disputes between requesters and responders. <http://archives.utah.gov/recordsmanagement/ombudsman.html>



### 3. Role of the Attorney General: Overview

- Most state open records laws do not prescribe a specific role for the Attorney General.
- At least **12 states** grant the Attorney General power to bring suit on behalf of citizens or on their own to enforce an open records act.
- At least **7 states** make the decision of the agency directly appealable to the Attorney General. The Attorney General then manages an appeals process, with decisions having the force of law in some cases.



### 3. Role of the Attorney General: Comparison

Role	State
<b>Power to bring suit on behalf of citizens or on own the enforce act</b>	Delaware, Georgia, Iowa, Kansas, Arkansas, Missouri, New Mexico, Oregon, Texas, Virginia, Wisconsin, Rhode Island
<b>Decision of agency appealable to Attorney General</b>	Kentucky, Massachusetts, Nebraska, North Dakota, Oregon, Washington, Wisconsin
<b>Attorney General defends agency in appeal</b>	New York (in specific appeal proceedings)
<b>Attorney General sets agency fees</b>	Texas



## 4. Fees and Fee Waivers: Overview

- At least **12 states** mandate waiving fees when the request is determined to be in the “public interest.”
  - **Alaska, Hawaii, Idaho, Illinois, Kansas, Michigan, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Carolina, and Texas** all have statutory requirements to waive fees when this test is met.
- “Public interest” determination is usually at agency discretion.
- **Oregon** provides an appeals process for fee waiver determinations.
- **Louisiana** may grant fee waivers for indigent persons.



## 4. Fees and Fee Waivers: Oklahoma

- **Oklahoma:**

“In **no case shall** a search fee be charged when the release of records is in the **public interest**, including, but not limited to, release to the news media, scholars, authors and taxpayers seeking to determine whether those entrusted with the affairs of the government are honestly, faithfully, and competently performing their duties as public servants.”

– 51 OKLA. STAT. § 24A



## 4. Fees and Fee Waivers: Texas

### Texas:

“A governmental body **shall** provide a copy of public information without charge or at a reduced charge if the governmental body determines that waiver or reduction of the charge is in the **public interest** because providing the copy of the information primarily benefits the general public.”

—TEX. GOV'T CODE ANN. § 552.267



## 4. Fees and Fee Waivers: Oregon (appeals)

- **Oregon:**

Public bodies may provide a fee waiver or reduction if disclosure “primarily benefits the general public.”

- OREGON REV. STAT. 192.440(5)

- **Appeal of Fee Waiver Denial**

- Individuals may appeal a decision to the Attorney General or district attorney.



## 4. Fees and Fee Waivers: Louisiana (indigent citizens)

- **Louisiana:**

“Copies of records may be furnished without charge or at a reduced charge to **indigent citizens** of this state or the persons whose use of such copies, as determined by the custodian, will be limited to a **public purpose**, including but not limited to use in a hearing before any governmental regulatory commission.”

– LA. REV. STAT. 44:32





## 5. Timeliness of Response

Time	State(s)
<b>1 Day</b>	Mississippi*
<b>3 Days</b>	Arkansas, Georgia, Kentucky, Louisiana, Missouri, Idaho, Kansas
<b>4 Days</b>	Connecticut, Nebraska
<b>5 Days</b>	Illinois, Michigan, Nevada, New York, Pennsylvania, Utah, Virginia, West Virginia
<b>7 Days</b>	Mississippi*, Tennessee, Vermont,
<b>10 Days</b>	California, Colorado, Massachusetts, New Hampshire, South Dakota
<b>15 Days</b>	Delaware, District of Columbia, New Mexico, South Carolina
<b>30 Days</b>	Maryland

\*Mississippi law requires response within 1 working day if a public body has not established record access procedures; if procedures are established a response is required within 7 working days.



## 6. Other Public Records Issues

- **Excessive requests for data**
  - At least 9 states address burdensome, frivolous, voluminous, or harassing requests in law
- **Information technology security audits**
  - At least 13 states have statutory requirements for conducting security audits and reviews (including Minnesota)
- **Security breaches**
  - 47 states have security breach notification laws (may or may not apply to government entities)
  - At least 31 states require destruction of personal identifying information in specified circumstances (private sector and public sector)



## Resources for Additional Information

- **National Conference of State Legislatures**
  - [www.ncsl.org](http://www.ncsl.org)
- **Information Policy Analysis Division** (Minnesota Dept. of Administration)
  - [www.ipad.state.mn.us](http://www.ipad.state.mn.us)
- **Reporters Committee for Freedom of the Press** (*"Open Government Guide"*)
  - [www.rcfp.org](http://www.rcfp.org)
- **U.S. Department of Justice, Office of Information Policy** (*"Guide to the Freedom of Information Act"*)
  - <http://www.justice.gov/oip>
- **National Association of Counties** (*"Open Records Laws: A State-by-State Report"*)
  - [www.naco.org](http://www.naco.org)



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