House Judiciary Finance and Civil Law Committee
February 13, 2025

Written Testimony In Support of HF 20
Matt Ehling, Board Member
Minnesotans for Open Government
(*Formerly Minnesota Coalition on Government Information - MNCOGI*)

Dear Committee members,

I write today on behalf of Minnesotans for Open Government, a non-partisan, nonprofit organization whose all-volunteer board I sit on.

I am pleased to hear that the committee will be discussing HF 20, a bill authored by Reps. Niska, Scott, and others, pertaining to the classification of data maintained by the Office of the Attorney General ("OAG").

Our board endorses HF 20 for the following reasons:

1) HF 20 would address a data access problem stemming from the actions of the OAG, and cemented by the Minnesota Supreme Court's majority opinion in the *Energy Policy Advocates v. Ellison* case;

2) HF 20 would return Minn. Stat. § 13.65 to its prior effect — returning OAG data that had been presumptively public for over forty years to its previous "public" classification.

At the February 13th committee hearing, Don Gemberling* from our board will be testifying on behalf of our organization. For several decades, Mr. Gemberling helped to shepherd the creation and implementation of the Data Practices Act (MGDPA), including processing the original temporary classification of data that resulted in the OAG's current data statute - Minn. Stat. § 13.65.

We thank the committee for the opportunity to submit comments on this bill, and we hope that the hearing will result in bi-partisan support for HF 20, so that the public's former, broad access to data maintained by the OAG will be restored.

*Mr. Gemberling is the former director of IPAD, the predecessor to the Minnesota Department of Administration's current Data Practices Office. On October 4, 2023, Mr. Gemberling was inducted into the National Freedom of Information Coalition's State Open Government Hall of Fame.

Background:
Energy Policy Advocates v. Ellison case creates data access problem

The data access problem that HF 20 aims to address stems from a data practices dispute between the OAG and a data requester, which resulted in a 2022 Minnesota Supreme Court decision (*Energy Policy Advocates v. Ellison*) regarding the scope of § 13.65.

In *Energy Policy Advocates v. Ellison (EPA)*, a non-profit organization sought data from the OAG related to that office's use of privately-funded attorneys to pursue certain climate change-related legal matters. The OAG refused to produce certain requested data, and litigation ensued.

During the litigation, the OAG asserted that its section of the MGDPA — Section 13.65 — should be read so that the phrase "private data" that occurs there refers not only to *individuals*, but also to data *not on individuals* like non-profits, corporations, and — importantly — the government itself. Adopting this reading effectively expands the OAG's statute, allowing the existing term "private" to be read much more broadly than just classifying data on "individuals" — and thereby eliminating public access to large categories of OAG data, such as inactive "investigative data" (*see* § 13.65 subd. 1(d)).

Since the inception of the MGDPA, the defined term "private data on individuals" has always — and only — referenced a "not public" classification for "individuals." (When the MGDPA seeks to classify non-individual data, it uses the terms "nonpublic" or "protected nonpublic" instead of "private" or "confidential" — which are solely reserved for individuals). By expanding the term "private" to create an entirely new classification for both *individuals* and *non-individuals*, the internal logic of the statute is disrupted.

Section 13.65 was enacted in 1981, shortly after the passage of the MGDPA. It was based on a temporary classification of data approved by the Commissioner of Administration, whose original 1977 memo makes clear that only *data on individuals** was being classified, rather than any broader set of OAG data.

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*See attached portion of the joint MNCOGI-Public Record Media amicus brief in the *EPA* case for further details. In 1977, Don Gemberling was an employee of the Department of Administration, and was responsible for negotiation the language of the temporary classification pertaining to the OAG (which eventually became § 13.65).

This construction of § 13.65 was affirmed by the Commissioner of Administration in 1994 — in Data Practices Advisory Opinion 94-047 — where the Commissioner opined that correspondence maintained by the OAG that involved representatives of corporations, non-profits, and government entities had to be produced to a data requester, and could not be withheld by the OAG as "private data."*

Problems Caused by *EPA* decision

In terms of the immediate, practical effect of the *EPA* case, the OAG has already asserted that it will withhold certain data that used to be classified as public — including data related to inactive investigations.

Inactive investigative data is largely public in many important contexts throughout the MGDPA — including in the criminal investigative context (§ 13.82) and the general civil investigative context (§ 13.39). Permitting the public to see the end results of government investigations allows individual citizens (as well as the press) to examine key governmental actions, and to determine whether they were properly handled or not.

In the OAG's section of the MGDPA, certain investigative data "that is not currently active" (*see* § 13.65 subd. 1(d)) is classified as "private data on individuals." Applying the conventional MGPDA definition, that would mean that only "data on individuals" contained within a mixed set of data "on individuals" and data "not on individuals" held by the OAG would be "private" and subject to withholding, while other data would be "public" by default.

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*The OAG took for granted that this kind of correspondence would be "public" in Data Practices Advisory Opinion 03-034. In the facts behind that opinion, a data requester sought "electronic and paper communications" between members of several Attorney General Task Forces. In corresponding about the request, the Attorney General's Chief Deputy wrote to the Commissioner of Administration that the OAG did not dispute that the requested information would constitute public data, and one such letter was produced to the requester. (Note that Opinion 03-034 was not primarily about data classification, but about whether certain requested data existed, as well as the statutory requirements to make and preserve official records under § 15.17.)

Now, as the OAG has made clear since the *EPA* decision, it will withhold *all* inactive investigative data from public release, pursuant to the Minnesota Supreme Court's ruling in the *EPA* case:

> "Please note further that *inactive* investigative data are also classified as not public with this Office pursuant to Minn. Stat. § 13.65, subd. 1(d). *See also Energy Policy Advocates v. Ellison*, 980 N.W.2d 146, 158 (Minn. 2022)."
>
> - (*See* attached copy of page from OAG response to data request of Matt Ehling, pertaining to Feeding Our Future civil investigative data.)

The OAG's decision to withhold *all* of its inactive investigative data will mean that data underlying numerous high-profile OAG investigations — including the ongoing Feeding Our Future investigations, as well as multiple other inquiries — will be subject to withholding once those cases are closed. This sets the OAG apart from many other government entities (whose closed investigative data is largely accessible), and will pose a major problem for gauging the quality of the work of the state's top law enforcement office.

For over four decades, the OAG has co-existed with the language of § 13.65. Even when the OAG has been in the midst of multi-million dollar civil litigation (such as the tobacco cases litigated by former AG Humphrey) the legislature has not modified the OAG's statute to add new data classifications. Now, however, that outcome has been effected without any input from the legislature at all.

Accordingly, MNCOGI urges the legislature to remedy this problem by passing HF 20, which would return § 13.65 to its prior function.

As always, MNCOGI looks at this issue through a nonpartisan lens, and urges the legislature to view this (and all data access issues) as matters of maintaining the public's "right to know" — the most fundamental kind of infrastructure in a representative democracy.

Sincerely,

Matt Ehling
Board member,
Minnesotans for Open Government

Guide to Exhibits

EXHIBIT A (Pgs 6-9)
Relevant portion of MNCOGI-Public Record Media amicus brief in *Energy Policy Advocates v. Ellison* (Minn. 2022)

The brief details the circumstances under which the OAG applied for a temporary classification of data, and the Commissioner of Administration approved a classification that only permitted certain data on *individuals* to be withheld by the OAG. (NOTE that the Commissioner has routinely held that persons acting on behalf of corporations, non-profits, and government entities are not "individuals" as defined by the MGDPA. *See*, for example, opinions 10-023, 18-013.)

EXHIBIT B (Pgs 10-13)
Data Practices Advisory Opinion 94-047

In opinion 94-047 the Commissioner of Administration opined that the OAG may only withhold portions of correspondence "that do not evidence final public actions" under § 13.65 subd. 1(b) in circumstances where the correspondence contains data on individuals. The rest of of the correspondence (pertaining to representatives of corporations, nonprofits, and government entities) had to be released as public data.

EXHIBIT C (Pg 14)
Relevant portions of correspondence between Matt Ehling and the OAG, dated December 15, 2022 and January 23, 2023

Correspondence pertaining to a data practices request filed by Matt Ehling after *Energy Policy Advocates v. Ellison* decision. A portion of data discussed in the request included civil investigative data pertaining to Feeding Our Future. The OAG's response indicated that, per the court's opinion, *all* OAG inactive investigative data would be withheld as "not public."

EXHIBIT D (Pgs 15-38)
Energy Policy Advocates v. Ellison (Minn. 2022) concurrence and dissent

Dissent by Justice Thissen pertaining to § 13.65 describes logic of majority opinion as "somewhat Orwellian" in its re-writing of the statutory definition of "private data on individuals" to arrive at the results sought by the OAG.

EXHIBIT A

B. DPA history and structure confirm OAG may not hide data on policy matters involving no data-on-individuals.

Because the DPA's plain text and its application here are "free from all ambiguity," the Court may end its analysis of §13.65, subdivision 1 there. Minn. Stat. §645.16. Alternatively, any possible ambiguity is settled by "contemporaneous legislative history"; the "occasion and necessity" for §13.65; and the "circumstances under which" the legislature passed §13.65. *Id.* §§645.16(1), (2), (7). All of these sources confirm that §13.65, subdivision 1 does not allow OAG to withhold policy-related OAG data that entirely lacks an individual (natural person) subject.

During the 1970s, the legislature began enacting the laws that now comprise the DPA. The legislature started in 1975 with a data-privacy statute. *See* Act of June 5, 1975, ch. 401, 1975 Minn. Laws 1174, 1174–76. The statute's "primary emphasis" was to address the particular "effect of governmental data gathering and utilization on individuals who were the subject of information maintained by governmental agencies."[26]

The data-privacy statute ultimately "la[id] the cornerstone" for the DPA's "most unique feature": its "data classification system" (as noted above).[27] The statute achieved this "by defining the terms 'private data on individuals', 'confidential data on individuals' and 'public data on individuals'" (i.e., the terms on which this case turns).[28]

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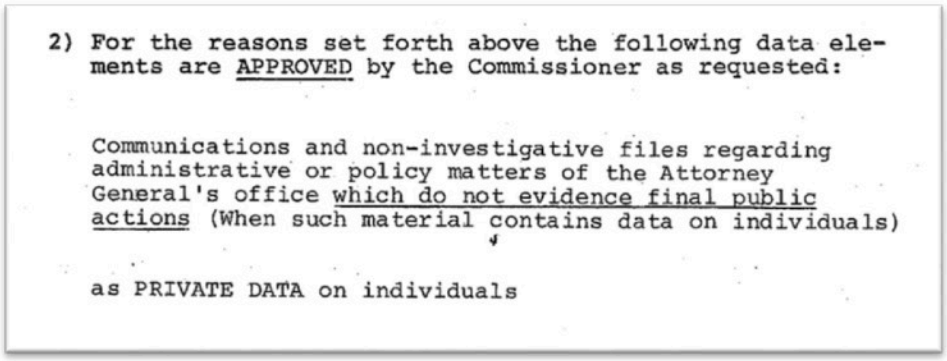
[26] Donald Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, in GOV'T LIAB. 241, 243 (Minn. CLE ed., 1981).

[27] *Id.* at 250.

[28] *Id.* (some punctuation added for clarity).

The next year, the legislature authorized state agencies to "apply to the [C]ommissioner [of Administration] for permission to classify data … on an emergency basis until a proposed statute can be acted upon by the legislature." Act of April 13, 1976, ch. 283, 1976 Minn. Laws 1063, 1065. The modern DPA affords the same procedure (with certain added limits) in the form of "temporary classification[s]." Minn. Stat. §13.06.

In 1977, OAG sought emergency classification of "communications and noninvestigative files regarding administrative or policy matters of the [State] Attorney General's office which do not evidence final public actions."[29] The Commissioner granted OAG's application, but made clear in his grant of approval that the classification was limited to "PRIVATE DATA on individuals" and applied only **"[w]hen … material contained data on individuals"**—a condition that OAG accepted.[30]



2) For the reasons set forth above the following data elements are APPROVED by the Commissioner as requested:

Communications and non-investigative files regarding administrative or policy matters of the Attorney General's office which do not evidence final public actions (When such material contains data on individuals)

as PRIVATE DATA on individuals

Commissioner Grant of OAG Emergency Application

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29 Memorandum from Richard Brubacher, Minn. Comm'r of Admin., to Byron Starns, Minn. Chief Deputy AG, on Minn. OAG Request for Emergency Classification of Data on Individuals as Non-Public Under §15.1642, at 1, 4 (Dec. 30, 1977), https://bit.ly/3nWDGbq.

30 *Id.* at 4.

Four years later, in 1981, the legislature enacted the present text of §13.65 as part of an omnibus bill classifying a variety of government data. *See* Act of May 29, 1981, ch. 311, §35, 1981 Minn. Laws 1427, 1440–41. The bill applied the classification of "private" to OAG "[c]ommunications and non-investigative files regarding administrative or policy matters which do not evidence final public actions." *Id.* The legislature thus adopted the same text that the Commissioner of Administration approved in 1977—text that the Commissioner made clear applied to OAG data only to the extent "such material contained data on individuals."[31]

The 1981 data-classification bill's other data-classification sections reflect the legislature's careful, precise use of DPA data classifications to establish when a given DPA statutory provision governed both data-on-individuals and data-not-on-individuals. One significant example is data identifying stolen property, which the legislature declared was "either private or nonpublic depending on the content of the specific data." *See* 1981 Minn. Laws at 1433 (codifying then Minn. Stat. §15.1695, subd. 1(c)). Another example is certain real-estate sales data, which the legislature provided was "private … or nonpublic depending on the content of the specific data." *Id.* at 1438 (codifying §15.784, subd. 1).

By contrast, for OAG data, the legislature used classifications that govern solely data-on-individuals: "private" and "confidential." *Id.* at 1440–41. The legislature did the same for licensing data and health data. *Id.* at 1437–39 (codifying §15.781, subds. 2 & 3; §15.785, subds. 1 & 2). But

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31 Brubacher Memorandum, *supra* note 29, at 1, 4.

when a data category called for restrictions on data-on-individuals and data-not-on-individuals, the legislature used separate subdivisions, as evinced by the "confidential" and "nonpublic" subdivisions for housing agency data. *Id.* at 1439 (codifying §15.786, subds. 2 & 4).

In sum: the history and circumstances of §13.65, subdivision 1's enactment confirm that this provision governs only data-on-individuals. That is how OAG first obtained the benefit of a specific classification for policy-related OAG data: by agreeing that this classification applied only "[w]hen … material contained data on individuals."[32] And that is how the legislature structured the classification in 1981: as one about "private" data alone, rather than as one reaching "private or nonpublic data."

C. Adopting OAG's view of §13.65 would harm the DPA.

To the extent that §13.65 remains ambiguous even after legislative history and structure have been examined, the Court may weigh "the consequences of … particular interpretation[s]." Minn. Stat. §645.16(6). This consideration then counsels rejection of any §13.65 interpretation that would harm the DPA overall, for "the legislature intends the entire statute to be effective and certain." Minn. Stat. §645.17(2).

OAG's reading of §13.65 risks such overall harm in three ways:

First, OAG's reading of §13.65 strikes at "the heart" of the DPA: its general presumption that government data are public. *Demers*, 468 N.W.2d at 73. This presumption has been part of the DPA since 1979,

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[32] Brubacher Memorandum, *supra* note 29, at 1, 4.

EXHIBIT B

View entire list

Search List

Advisory Opinion 94-047

October 28, 1994; Minnesota Attorney General

October 28, 1994 | Trade secret

This is an opinion of the Commissioner of Administration issued pursuant to section 13.072 of Minnesota Statutes, Chapter 13 - the Minnesota Government Data Practices Act. It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

For purposes of simplification, the information presented by the citizen who requested this opinion and the response from the government entity with which the citizen disagrees is presented in summary form. Copies of the complete submissions are on file at the offices of PIPA and are available for public access.

On October 7, 1994, PIPA received a letter from Mr. Archie Anderson, a resident of Coon Rapids, Minnesota. In this letter Mr. Anderson described attempts by him to gain access to certain data that he believes are maintained by the Office of the Attorney General, hereinafter Attorney General. Mr. Anderson asked that the Commissioner issue an opinion concerning the Attorney General's duty to provide him with access to the data he had requested. Mr. Anderson provided copies of his correspondence with the Attorney General, including his letters of request.

In his letter requesting data, dated August 6, 1994, Mr. Anderson asked that he be provided with the following data:

Item 1.

A copy of any contract with the person who wrote a preliminary report entitled Growing Children and Passive Smoke: A Dangerous Menu , hereinafter referred to as the report ;

Item 2.

A copy of the final report;

Item 3.

Copies of all correspondence relating to the report and the final report;

Item 4.

Criteria for financing the project to develop the report;

Item 5.

Amount of public money used to produce the report: and

Item 6.

The amount of 501C money used to produce the report.

In a letter dated August 25, 1994, the Attorney General responded to Mr. Anderson. In summary, the response was: data requested either did not exist; were not public; would, in the case of the final report, be provided when available; or, in the case of amount of public money spent to produce the report were not known.

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After making a second request to the Attorney General, in which he challenged the Attorney General's position that some of the data were not public, Mr. Anderson sent his letter requesting an opinion to the Commissioner.

In response to his request, PIPA, on behalf of the Commissioner, wrote to Hubert H. Humphrey III, the responsible authority for the Office of the Attorney General. The purposes of this letter, dated October 10, 1994, were to inform Attorney General Humphrey of Mr. Anderson's request, to provide a copy of the request to him, to ask him to provide information or support for the Attorney General's position and to inform him of the date by which the Commissioner was required to issue this opinion.

On October 21, 1994, PIPA received a letter from Mr. D. Douglas Blanke, Director of Consumer Policy, who indicated he was responding on behalf of the Attorney General. As to each item of data, as described above, Mr. Blanke provided the following responses:

Item 1:

The Attorney General did not enter into a contract with anyone to write this report therefore there are no data to provide to Mr. Anderson.

Item 2:

The final copy of the report has not been produced. When a final copy is completed, it will be provided to Mr. Anderson.

Item 3:

The Attorney General has determined that the correspondence requested are classified as private data pursuant to Minnesota Statutes Section 13.65, subd. 1 (b). Mr. Blanke indicated that there may be additional sections of Minnesota Statutes that classify the correspondence data as not public including the trade secret provision at Minnesota Statutes Section 13.37 and the elected officials correspondence section at Minnesota Statutes Section 13.33.

Item 4:

The Attorney General does not understand what data Mr. Anderson is requesting.

Item 5:

There are no existing data that document the total amount spent on the project but the Attorney General has calculated that out-of-pocket expenses for travel, lodging and production of the preliminary report total $6701.00.

Item 6:

As there was no contribution of funds to produce the report by nonprofit organizations that are exempt from federal income tax under section 501(c)(3) of the federal Internal Revenue Code, there are no data that describe the amount of 501(c)(3) money used to produce the report.

Mr. Blanke supplemented this summary of responses with detailed explanations of the Attorney General's position.

Discussion:

The Attorney General states very clearly that there are no data being maintained by the Attorney General that correspond to the data requested by Mr. Anderson in items 1, 2 and 6. Item 2, the copy of the final report, will be provided to Mr. Anderson when it is produced. It appears that the data requested by Mr. Anderson, described above as items 1, 2 and 6 do not exist and therefore there are no public government data available to him under the Minnesota Government Data Practices Act, and hereinafter Act or Chapter 13.

As to item 4, the criteria used to finance this project, the Attorney General takes the position that it does not understand Mr. Anderson's request. The Attorney General indicates that it may be able to respond if Mr. Anderson's request can be clarified. It appears that Mr. Anderson is asking the Attorney General if he can gain access to any data that will explain why the Attorney General decided to become part of the project that worked to produce this report and that required the expenditure of public funds. This appears to be a reasonable reading of Mr. Anderson's request in item 4. Whether that is a correct reading of Mr. Anderson's request, if there are data responsive to his request and the classification of those data can be clarified in further discussions between Mr. Anderson and the Attorney General.

As to item 5, the amount of public money used to produce the report, the Attorney General takes the position that Chapter 13 does not require it to produce data that do not currently exist. However in the interest of being helpful, the Attorney General calculated the amount of out-of-pocket expenses that went toward the production of the report and provided a figure of $6701.00. The Attorney General indicated that the state also paid the salaries and benefits of staff who worked on the project and other miscellaneous expenses but the Attorney General does not have data on the amount of those expenditures.

It is the Commissioner's understanding that the Attorney General uses a time sheet system for tracking the time spent by employees of the Attorney General on various projects and work for various clients. If the project to produce this report was a project against which Attorney General staff charged time on those time sheets, then data that account for that time and the amount of public funds that corresponded to that time would be data that exist and that should be available to Mr. Anderson. Data that account for an employee's work time are public data pursuant to Minnesota Statutes Section 13.43, subdivision 2.

Lastly, as to item 3, copies of all correspondence that relate to the report and the production of the final report, the Attorney General's response to Mr. Anderson was that correspondence data are classified as private by Minnesota Statutes Section 13.65, subd. 1(b). In its response to the Commissioner, the Attorney General indicated, in addition to being classified as not public by Section 13.65 of the Act, the correspondence data may also be classified as not public by other provisions of the Act.

Minnesota Statutes Section 13.65, subdivision 1 (b), classifies the following as private data on individuals: communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions. The Attorney General's position is that any correspondence it received about the production of this report was a communication about a policy project and that all correspondence are classified as private under Section 13.65. To the extent that the correspondence received by the Attorney General are data on individuals, Section 13.65 does classify correspondence concerning this report as private data on individuals.

However, the Attorney General's response indicates that some portion of this correspondence came from corporations. Generally, correspondence from a corporation, from non-profit organizations or from another government agency are not data on individuals. (See the definition of individual and data on individuals in Section 13.02, subdivisions 8 and 5 of the Act.) Section 13.65, subdivision 1(b), does not state that communications that are received by the Attorney General that are data not on individuals are classified as anything other than public and, absent a specific classification for the data, the presumption of Minnesota Statutes Section 13.03, subdivision 1, operates to make communications received from corporations and other entities that are not individuals, public data.

In its response the Attorney General mentioned that the correspondence relating to this report might also be classified as not public by Section 13.33 of the Act. However this section, which classifies correspondence between individuals and elected officials as private, presents a similar problem. Correspondence from corporations and other entities that are not individuals, depending on the content of the correspondence, are generally not data on individuals and therefore cannot be classified as private data by Section 13.33.

Lastly, the Attorney General indicates that some of the data provided by corporations in correspondence may be trade secret information under Section 13.37 of the Act. The Attorney General also indicates that some corporations provided data only on the understanding that the data would be kept in confidence. Entities subject to Chapter 13 are not authorized to make promises of confidentiality unless the data that are the subject of the promise of confidentiality are actually classified by statute or federal law as not public. (See Minnesota Statutes Section 13.03, subdivision 1.) It may very well be that some of the data provided by corporations to the Attorney General, that relate to this report, are trade secret information as defined in Section 13.37, subdivision 1(b). It is not likely, however, that all of the correspondence concerning this report sent by corporations to the Attorney General can meet the rigorous definition of a trade secret specified in Section 13.37, subdivision 1 (b). To the extent that the data provided do fulfill the definition, they are properly classified as nonpublic under Section 13.37, subdivision 2.

The Attorney General pointed out that there may be additional statutes that classify data in the correspondence files relating to this project as not public. However, there was no specific mention of what sections those may be, so it is impossible for the Commissioner to determine whether they may affect the public's right to gain access to the correspondence data.

Opinion:

Based on the correspondence in this matter, my opinion on the issue raised by Mr. Anderson is as follows:

The Attorney General does not have a duty to provide the data described in items 1, 2 and 6 above because those items of data do not currently exist. Because of the problems of the Attorney General in understanding the nature of Mr. Anderson's request, as described in item 4 above, I have no opinion as to whether the Attorney General has a duty to disclose those data. The Attorney General and Mr. Anderson should continue their dialogue to clarify if any data that relate to the criteria actually exist and, if so, how those data are classified. If the Attorney General maintains time sheet data that clarify the amount of staff time and the cost associated therewith spent on this project, the Attorney General has a duty to disclose those public data to Mr. Anderson. Lastly, to the extent that corporations and other non-individuals have corresponded with the Attorney General about the preparation of this report, the data in that correspondence appear to be public data and, unless it can be established that the data in that correspondence constitute a trade secret, as defined in Minnesota Statutes Section 13.37, the Attorney General has a duty to disclose that correspondence to Mr. Anderson.

Signed:

Debra Rae Anderson
Commissioner

Dated: October 28, 1994

EXHIBIT C

Matt Ehling

Public Record Media
PO Box 8205
St. Paul, MN 55108

December 15, 2022

Michael McSherry
Data Practices Compliance Official
Office of the Minnesota Attorney General
445 Minnesota Street
Suite 1400
St. Paul, MN 55101-2131

RE: Data Practices Act request follow-up

Via electronic mail only

Dear Mr. McSherry,

Thank you for your response to my Data Practices Act request of October 15, 2022 (the "Request"). I have reviewed the 149 pages of responsive data produced by your agency, as well as the accompanying three-page response letter you sent with it.

As of this writing, I consider this Request to be closed. Given your reference to certain data being "not public" by virtue of the operation of Minn. Stat. § 13.39 (the "civil investigation" provision of Chapter 13), I will file a new request for that data once circumstances have converted such data to "inactive investigative data." Per Minn. Stat. § 13.39 subd. 3, much of the inactive civil investigative data will be "public" at that time.

As stated in this Office's prior response:

> Note that under chapter 309, which governs charitable registration in Minnesota, organizations are automatically barred from soliciting in Minnesota the moment they fail to comply with registration deadlines without further AGO action. The AGO determines whether the paperwork and filing fee is complete and notifies charities of potential noncompliance, *but makes no "determination" as to the merits or accuracy of registration filing contents for the purposes of completing its registration.*

(Emphasis added.)

To the extent your request was intended to obtain data internal to the AGO regarding the initial registration process, the AGO notes that such data are classified as not public pursuant to Minn. Stat. § 13.65, subd. 1(b), which applies to "communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions." And as explained in previous correspondence, data such as active investigative data, attorney work product, and privileged correspondence are subject to other statutory classifications rendering such data inaccessible under the MGDPA. *See* Minn. Stat. §§ 13.39, subd. 2(a), .393. Please note further that *inactive* investigative data are also classified as not public with this Office pursuant to Minn. Stat. § 13.65, subd. 1(d). *See also Energy Policy Advocates v. Ellison*, 980 N.W.2d 146, 158 (Minn. 2022).

Again, thank you for contacting the AGO.

Sincerely,

Michael McSherry

Michael McSherry
Assistant Attorney General
Data Practices Compliance Official
datapractices@ag.state.mn.us

EXHIBIT D

CONCURRENCE & DISSENT

THISSEN, Justice (concurring in part and dissenting in part).

This appeal concerns a request for data that respondent Energy Policy Advocates submitted to appellant, the Attorney General of Minnesota, pursuant to the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01–.90 (2020) (the Act). I agree with the court that we should recognize the common-interest doctrine. I also agree that the attorney-client privilege extends to internal communications among lawyers within public law agencies like the Attorney General's office when those communications relate to legal advice. However, I conclude that the categories of data identified in section 13.65, subdivision 1, may be withheld from the public only when the data pertains to individuals. Put quite simply: I find it hard to understand how data can be "private data on individuals" when it is not data on individuals. Why would the Legislature have used the word "individuals" if it meant for section 13.65 to cover data that was not on individuals? Only a lawyer could take delight in pondering that question and reaching the result the court reaches today; other Minnesotans will be scratching their heads. Accordingly, I dissent from the court's decision on that issue.

A.

The Act presumes that all government data is public unless otherwise classified by "statute, . . . temporary classification . . . , or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential." Minn. Stat. § 13.03, subd. 1. Section 13.65 of the Act exempts from disclosure certain data retained

by the Attorney General of Minnesota. At issue in this appeal is subdivision 1 of that section, which reads as follows:

> Subdivision 1. **Private data**. The following data created, collected and maintained by the Office of the Attorney General are *private data on individuals*:
>
> (a) the record, including but not limited to, the transcript and exhibits of all disciplinary proceedings held by a state agency, board or commission, except in those instances where there is a public hearing;
>
> (b) communications and noninvestigative files regarding administrative or policy matters which do not evidence final public actions;
>
> (c) consumer complaint data, other than those data classified as confidential, including consumers' complaints against businesses and follow-up investigative materials;
>
> (d) investigative data, obtained in anticipation of, or in connection with litigation or an administrative proceeding where the investigation is not currently active; and
>
> (e) data collected by the Consumer Division of the Attorney General's Office in its administration of the home protection hot line including: the name, address, and phone number of the consumer; the name and address of the mortgage company; the total amount of the mortgage; the amount of money needed to bring the delinquent mortgage current; the consumer's place of employment; the consumer's total family income; and the history of attempts made by the consumer to renegotiate a delinquent mortgage.

Minn. Stat. § 13.65, subd. 1 (emphasis added).

The Attorney General relied on this provision to deny a request by Energy Policy Advocates for access to data that does not pertain to individuals. The Attorney General claims that subdivision 1 defines all data that falls under one of its five prongs as "private data on individuals" whether or not the data actually pertains to "individuals." The court

accepts the Attorney General's interpretation. I disagree because the position of the Attorney General and the court contradicts the plain language of the Act.

Because we read statutes "as a whole to harmonize and give effect to all [their] parts," I start with a review of the comprehensive categorization scheme set forth in the Act. *See Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 177 (Minn. 2020) (citation omitted) (internal quotation marks omitted). The Act broadly divides government data into two categories: data on individuals and data not on individuals. *See* Minn. Stat. § 13.02, subds. 4–5. "Data on individuals" is a specific term that refers to data in which any natural person can be identified. *Id.*, subds. 5, 8. By comparison, if government data does not pertain to a natural person, it is "[d]ata *not on individuals*." *Id.* subds. 4, 8 (emphasis added); *see KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 789 (Minn. 2011) (asserting that "*all* government data falls into one of two main categories based on the type of information included in the data: (1) data on individuals, or government data in which any individual . . . can be identified . . . [or] (2) data not on individuals, which is *all other* government data" (emphasis added) (internal quotation marks omitted) (citing Minn. Stat. § 13.02, subds. 4, 5)).

The Act further divides "data on individuals" and "data not on individuals" into three subcategories each. Those subcategories impose graduated, parallel levels of accessibility. Each category pertaining to "data not on individuals" corresponds to a category for "data on individuals" that has the same level of access. Specifically, the Act divides "data on individuals"—in descending order of accessibility—into three categories of access: (1) public data on individuals, which is accessible to the public without

limitation; (2) private data on individuals, which is not accessible to the public but is accessible to the individual subject of the data; and (3) confidential data on individuals, which is neither accessible to the public nor to the individual subject of the data. Minn. Stat. § 13.02, subds. 3, 12, 15.

Similarly, "data not on individuals" falls into three categories of access: (1) public data not on individuals, which is accessible to the public without limitation; (2) nonpublic data, which is not accessible to the public but is accessible to the subject of the data, if any; and (3) protected nonpublic data, which is neither accessible to the public nor the subject of the data. *Id.*, subds. 9, 13, 14. These definitions apply throughout the entire Act. *Id.*, subd. 1 ("As used in this chapter, the terms defined in this section have the meanings given them."); *see also State v. Morgan*, 968 N.W.2d 25, 30 (Minn. 2021) ("If a word is defined in a statute, that definition controls.").[1] The following chart illustrates the classification plan under the Act:

[1] Authoritative scholarship on the Act emphasizes the importance of the Act's classification system (including the categories for data "not on individuals"), noting that "every government datum *must* fit" into "one and only one" of the "six discrete data classifications," and asserting that "the linchpin of the [Act] is the mechanism for classifying government data." Donald Gemberling & Gary Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From "A" to "Z"*, 8 Wm. Mitchell L. Rev. 573, 580, 595–96 (1982) (emphasis added).

CATEGORIES OF ACCESS	DATA ON INDIVIDUALS	DATA NOT ON INDIVIDUALS
1–Public without Limitation	"Public Data on Individuals"	"Public Data Not on Individuals"
2–Not Public except accessible to subject of information	"Private Data on Individuals"	"Nonpublic Data"
3–Not Accessible to Anyone	"Confidential Data on Individuals"	"Protected Nonpublic Data"

Accordingly, if the government wants to overcome the presumption under the Act that all data is public and make data that does not identify a natural person not public, it must classify the data as either nonpublic data or protected nonpublic data.

It is also important to observe at the outset that there is nothing strained or unreasonable about reading the words in section 13.65, subdivision 1—"[t]he following data created, collected and maintained by the Office of the Attorney General are private data on individuals"—in a way that limits what data is made private to data related to individuals. The language of section 13.65, subdivision 1, easily can be read to say that, as long as the data that falls within the categories listed in section 13.65, subdivision 1, are on individuals, the data is not public.

Notwithstanding the Act's clear distinctions explained above and the express inclusion in section 13.65, subdivision 1, of the words "data on *individuals*," the Attorney General first argues that it can keep secret the data not on individuals that Energy Policy seeks because under the general definition of "private data on individuals" in section 13.02, subdivision 12, private data on individuals does not have to relate to individuals. The Attorney General grounds its textual argument in the fact that the definition of "private

data on individuals" in section 13.02, subdivision 12, refers only to "data" and does not specify in the definition that it is data "on individuals." This argument makes no sense and the plain language of the statute does not leave room for it. I cannot imagine that the Attorney General would ever argue in a case where the Attorney General is not affected that the definition of "private data on individuals" set forth in section 13.02, subdivision 12, is not limited to data on individuals simply because the definition does not expressly repeat the words "on individuals." The court properly does not rely on this textual argument about the meaning of section 13.02, subdivision 12, but a few further words about it are in order.

The definition of private data on individuals starts out (unsurprisingly) by saying that it covers "[p]rivate data on individuals." Minn. Stat. § 13.02, subd. 12. Plainly, the Legislature is referring to data on individuals. Later in the definition, the statute clearly states that there must be an "individual" who is the subject of the data: "Private data on individuals are data made by statute or federal law applicable to the data: (a) not public; *and* (b) accessible to the *individual subject* of those data." Minn. Stat. § 13.02, subd. 12 (emphasis added) (internal quotation marks omitted). The language states that private data on individuals is data that has as its subject an individual. Data that does not pertain to and identify an individual as its subject is not private data on individuals under the section 13.02, subdivision 12, definition.[2] *See State v. Irby*, 967 N.W.2d 389, 395 (Minn. 2021) (noting that "and" is generally conjunctive).

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[2] By comparison, the Act defines the corresponding access category for data "not on individuals"—"[n]onpublic data"—as "data *not on individuals* made by statute or federal

Section 13.03, subdivision 1, reaffirms that conclusion. The subdivision states that "[a]ll government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified . . . as nonpublic or protected nonpublic, or *with respect to data on individuals*, as private or confidential." Minn. Stat. § 13.03, subd. 1 (emphasis added). This language confirms that the classifications "private" and "confidential" data relate to data on individuals.[3]

The Attorney General does not contest any of these textual responses to his reading of section 13.02, subdivision 12, and so I will linger no further on this argument. Accordingly, I now turn to the Attorney General's other argument: that section 13.65 creates a special second, alternative definition of "private data on individuals" that applies only to the Attorney General. In other words, the Attorney General argues that "private data on individuals" means: (1) "data made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data"; or (2) for data held by the Attorney General, the categories of data listed in section 13.65 regardless of

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law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, *if any*, of the data." Minn. Stat. § 13.02, subd. 9. In stating that "nonpublic data" is accessible to the subject "*if any*," the Act explicitly considers the possibility that there *is not a subject of nonpublic data*. In defining "private data on individuals," the Act conspicuously omits the qualifier "if any." *Id.*, subd. 12. When the Legislature includes modifying language "in one part of a statute, but omits it in another, we regard that omission as intentional." *Gen. Mills, Inc. v. Comm'r of Revenue*, 931 N.W.2d 791, 800 (Minn. 2019). The natural inference is that, while "nonpublic data" may lack an identifiable subject, "private data on individuals" may not.

[3] Indeed, the Act often uses "private" as shorthand for "private data on individuals." *See, e.g.*, Minn. Stat. § 13.51, subd. 2 (providing that income property assessment data collected from individuals is "private").

whether any individual is or can be identified as the subject of that data. This is the position that the court adopts.

This reading of the Act—that there is a special, somewhat Orwellian, Attorney General definition of "private data on individuals" that is not limited to data "on individuals"— is not a reasonable textual interpretation of the Act (let alone the *only* reasonable interpretation of the Act, *see* Part B, *infra*). Certainly, the Legislature nowhere explicitly stated that it was creating a second, alternative definition of "private data on individuals" that applies only to the Attorney General. Rather, the Legislature expressly stated that "[a]s used in [the Act], the terms defined in [section 13.02, which includes the definition of private data on individuals,] have the meanings given them." Minn. Stat. § 13.02, subd. 1. In light of that express statutory command, I would expect the Legislature to speak much more explicitly if it intended to create in section 13.65 an additional or alternative definition for the defined term "private data on individuals" to cover data that do not relate to individuals.

Further, had the Legislature intended that all the categories of data set forth in section 13.65, subdivision 1, were to be nonpublic but accessible to the subject of the information regardless of whether the subject of the information is an individual,[4] creating

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[4] The Attorney General's alternative definition argument raises another problematic interpretive and operational question. "Private data on individuals" is not public but it is accessible to the "individual subject of [the] data." Minn. Stat. § 13.02, subd. 12. But section 13.65 also shows a clear intent that the subject of the data should have access to the categories of data set forth in section 13.65, subdivision 1, because in subdivision 2 of section 13.65, the Legislature made other types of data "confidential" and so *not* accessible to the individual subject of the data. Minn. Stat. § 13.65, subd. 2; *see* 13.02, subd. 3. Presumably the Attorney General would also argue that subdivision 2 allows it to keep

an alternative definition of "private data on individuals"—which otherwise applies only to data on individuals—seems a very odd and indirect path to take. Again, why only use the phrase "private data on individuals" if what is meant is data on individuals *and* data not on individuals, especially when the category "nonpublic data" provides precisely the same protection for data not on individuals? *See Buzzell v. Walz*, 974 N.W.2d 256, 265 (Minn. 2022) (rejecting a statutory interpretation argument on the basis that, had the Legislature intended a particular meaning, it would have chosen a more direct textual path); *Jepsen as Tr. for Dean v. County of Pope*, 966 N.W.2d 472, 486 (Minn. 2021) (same).

There is another reason that the Attorney General's and the court's interpretation is unreasonable. Again, we look to the entire law when interpreting statutory language. *Save Lake Calhoun*, 943 N.W.2d at 177. Accordingly, it is appropriate to return to the fundamental classification rule under the Act, which is the mechanism under the Act that shifts data from a presumptively public to a different status as not public.

Section 13.03, subdivision 1, states that all government data "shall be public" unless it is classified as nonpublic or protected nonpublic (when the data is not on individuals) or "with respect to data on individuals," private or confidential. Even if the court is correct that the phrase "private data on individuals" includes all types of information held by the

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secret data not on individuals even though the definition of confidential data set forth in section 13.02, subdivision 3, applies only to data on individuals. Therefore, the Attorney General's position creates a conflict: does a nonindividual subject of the data get access to the data? Section 13.65, subdivision 1, and section 13.02, subdivision 12, would say the answer is "No," but section 13.65, subdivision 2, would suggest the answer is "Yes." This wrinkle, which is caused by the Attorney General's interpretation of the statute and does not exist under my interpretation of the statute, is another reason we should not adopt the Attorney General's interpretation.

Attorney General and listed in section 13.65 regardless of whether any individual is or can be identified as the subject of that data, that data would *still be* public under the plain terms of section 13.03.

Section 13.03 only makes "private" data (data that falls into the private data on individuals bucket however defined) not public when it is "with respect to data on individuals." Minn. Stat. § 13.03, subd. 1. In other words, if data is "private" but not "with respect to individuals," it remains public under the express terms of section 13.03, subdivision 1. To make the categories of data in section 13.65, subdivision 1, not public to the extent that the data does *not* relate to individuals, section 13.03 (as well as the Act's comprehensive categorization scheme) would require that the data be classified as "nonpublic" or "protected nonpublic."

In short, the Attorney General's alternative definition argument simply does not work within the plain language of the operational provision of the Act. Even if the special alternative Attorney General definition of "private data on individuals" were adopted (that for the categories of data listed in section 13.65, subdivision 1, both data on individuals and data not on individuals are "private data on individuals"), it ultimately does not matter. The alternative route proffered by the Attorney General ends up at the same destination as the main route set forth in the Act: under section 13.03, subdivision 1, the only "private" data that is not public is data that identifies an individual as its subject. Relying on its special Attorney General definition of "private data on individuals," the Attorney General

wants to keep secret "private"[5] data that is not "with respect to individuals." The Attorney General's interpretation of the statute is inconsistent with, and does not work with, the text of section 13.03, subdivision 1.

The court's reliance on *Westrom v. Minnesota Department of Labor & Industry*, 686 N.W.2d 27 (Minn. 2004), is inapposite. In *Westrom*, the court determined that orders issued by the Department of Labor and Industry imposing penalties on an employer for failure to secure workers' compensation insurance and objections to those orders filed by the employer were civil investigative data made nonpublic by section 13.39, subdivision 2. 686 N.W. 2d at 34–36. Section 13.39 specified that civil investigative data was either protected nonpublic data or confidential data on individuals. Minn. Stat. § 13.39, subd. 2(a). (As an aside, in contrast to section 13.65, the Legislature specifically referred to the classifications for both individuals and not individuals when it wanted to make data not public for both individuals and not individuals; the Legislature clearly knows how to specifically make data not on individuals nonpublic when it wishes to.)

As part of the normal process by which the Department of Labor and Industry investigates compliance with workers' compensation law and imposes a civil penalty for failure to secure workers' compensation insurance, the Department sent the orders to the Westroms, and the Westroms themselves filed the objections. 686 N.W.2d at 30. Accordingly, the Westroms had access to the specific subspecies of civil investigative data at issue in the case, albeit for reasons wholly unrelated to the Act. *Id.*

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[5] Again, "private" as used in section 13.03, subdivision 1, refers to the category "private data on individuals."

The Department of Labor and Industry seized on this anomaly—that the Westroms had access to the data—to defend its broad release of the orders and objections to the media. Pointing out that the Legislature uses "confidential data on individuals" and "protected nonpublic data" when it wants data to be (1) not public and (2) not accessible to the individual or not individual subjects of the data, Minn. Stat. § 13.02, subds. 3, 13, the Department argued that because the orders and objections were necessarily accessible to the subjects of the data, they were inconsistent with the definitions of "protected nonpublic" and "confidential" data, each of which is definitionally *unavailable* to their subjects. Accordingly, because the orders and objections did not fall under the relevant definitions exempting investigative data from disclosure, the Department argued that the data also must necessarily be accessible to the public. Thus, the Department contended that its decision to release the information to the media was proper.

We rejected that bootstrap argument. We concluded that, in requiring that "confidential data on individuals" and "protected nonpublic data" be inaccessible to the subject, section 13.02 conflicted irreconcilably with the use of those terms in section 13.39, which included orders and objections inherently accessible to the "subject" of the data. 686 N.W.2d at 36. We resolved that *irreconcilable* conflict by applying the specific provision in section 13.39, which kept civil investigative data (including orders and objections) not public despite the fact that the general definitions in section 13.02 prohibited the subjects' access to the data. 686 N.W.2d at 36. Thus, we held that the Westroms' access to the orders and objections for reasons unrelated the Act did not justify the Department of Labor and Industry's broad release of the orders and objections to the media. *Id.*

This case presents a different question. We have not yet reached the point where we can determine whether any conflict (let alone an *irreconcilable* one) exists between the section 13.02, subdivision 12, definition of "private data on individuals" and section 13.65. The conflict the court posits as an analogy to *Westrom* is between the "general" section 13.02, subdivision 12, which defines "private data on individuals" as being about individuals, and the "specific" section 13.65, which *according to the court* includes within the meaning of "private data on individuals," data that is not about individuals. The court's interpretation creates the conflict. If my interpretation of section 13.65, subdivision 1 (that only data on individuals is private) is accepted, there is no conflict. Further, the court's attempt to fall back on the Attorney General's argument that section 13.02, subdivision 12, is not limited to data on individuals to avoid the conflict is misplaced. As I discussed earlier in the dissent, the Attorney General's argument that section 13.02, subdivision 12, does not limit the definition of "private data on individuals" to data on individuals makes absolutely no textual sense and the court does not even try to defend it.

The court's other *Westrom* argument—that my interpretation somehow creates a conflict because not all of the Attorney General data listed in section 13.65, subdivision 1, are exclusively or necessarily about individuals—begs the question; it is tautological. Indeed, the court admits that its argument assumes that its interpretation of the statute is correct, even though the whole purpose of the exercise is to determine whether its interpretation of the statute is correct. The fact that the data listed in section 13.65, subdivision 1(b) and (d), *could be* about both individuals and not individuals does not mean that it *must be* about both individuals and not individuals (particularly when the statute

expressly refers to data on individuals). It certainly does not expressly state that; indeed, that is precisely the question that we are trying to answer in this case.

Accordingly, a conflict between section 13.02, subdivision 12, and section 13.65 exists *only* if one first accepts the court's conclusion that the plain language of section 13.65 creates a second, alternative Attorney General-specific definition of "private data on individuals." But that is the question that we are trying to answer with the tool of statutory interpretation (here, the canon that the specific prevails over the general). The court is not justified in relying on a purported conflict between *its* contested interpretation of section 13.65 and the plain language of section 13.02, subdivision 12, to support the correctness of *its* interpretation of section 13.65 as an original matter. That is putting the cart far in front of the horse.[6] Indeed, the fact that the court's interpretation (unlike mine) *creates* such a conflict supports the conclusion that my interpretation is the better one.

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[6] This discussion raises a more general reservation that I have about the statutory interpretation methodology adopted by the court at several points in its analysis. The question before us is whether section 13.65, subdivision 1, only makes data on individuals private (my position) or makes data on both individuals and non-individuals private (the court's position). Accordingly, the only useful and ultimately meaningful statutory interpretation tools that the court (or I) can rely on to support our positions in this case are those that both point definitively in the direction of one meaning (for the court, data on individuals and not on individuals are made private by the statute) *and also* show that the alternative meaning (my position that only data on individuals is made private by the statute) is incorrect. If the same statutory interpretation tool that the court relies upon to show that its interpretation is reasonable would also show that the alternative interpretation is reasonable if one were to assume the alternative reading of the statute, then the tool tells us nothing helpful about which interpretation is correct. *See Johnston v. State*, 955 N.W.2d 908, 916 (Minn. 2021) (Thissen, J., dissenting) (rejecting the court's reliance on the principle that the court cannot add words to the statute to conclude one interpretation of a statute is unreasonable where the other interpretation of a statute also requires the addition of words to the statute). This requirement that, to be useful, a particular tool of statutory interpretation must both support the reasonableness of one interpretation and not support

The court also relies heavily on provisions in the Act where the Legislature used the construction "data on individuals" are "private data on individuals." And it is true that the Legislature could have used that same construction in section 13.65, subdivision 1—"The following data [on individuals] created, collected and maintained by the Office of the Attorney General are private data on individuals . . . ."—to accomplish the goal of making sure readers understood that the provision was limited to data on individuals. But the fact that the Legislature did not do so here is not decisive.

The Legislature has also repeatedly used the construction "private data on individuals *or nonpublic data*" when it wanted to make both data on individuals and data not on individuals not public but accessible to the subject of the data.[7] Of course, the Legislature did not do so here. In the face of that common construction, *the court's* interpretation of section 13.65 requires *the court* to add the words "or nonpublic data" to

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the reasonableness of an alternative interpretation (taking that alternative interpretation on its own terms) is a cousin to Karl Llewellyn's observations about the Newtonian principle that for each canon of construction there is an opposing canon. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-05 (1950). "Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means*, *out of the statutory language*." *Id.* at 401.

[7] *See, e.g.*, Minn. Stat. §§ 13.15, subd. 2, 13.201, 13.44, subd. 3(b), 13.591, subd. 1, 13.64, subd. 3(b), 13.82, subd. 7; *see also* Minn. Stat. § 13.39, subd.2 (using the construction "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").

the statute.[8] The court's reliance on the rule of construction that we decline to add words where the Legislature did not cuts both ways and does not advance the ball at all. If anything, the second construction—adding the words "or nonpublic data"—would have been a more straightforward way to express a legislative intent to cover both individuals and not individuals and more consistent with the overall classification scheme in the Act.[9]

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[8] The statutory (not legislative) history highlights the absence of such language. The original version of the Act covered only data on individuals; it made no provision for data not on individuals. *See* Minn. Stat. § 15.162 (2020); Act of June 5, 1975, ch. 401, 1975 Minn. Laws 1353; Act of April 11, 1974, ch. 479, 1974 Minn. Laws 1199. In 1980, the Legislature added categories for data not on individuals including nonpublic data. Act of April 23, 1980, ch. 603, §§ 1–7, 1980 Minn. Laws 1144, 1144–45. The Legislature added the Attorney General's provisions in section 13.65 in 1981 within a year of adding the category for nonpublic data. Act of May 29, 1981, ch. 311, § 35, 1981 Minn. Laws 1427, 1440–41. Of course, "[i]n enacting statutes, we presume that the legislature acts with full knowledge of existing law." *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005). Yet the statute enacted in 1981 referred only to the definition of private data on individuals and made no mention of nonpublic data. Act of May 29, 1981, ch. 611, § 35, 1981 Minn. Laws 1427, 1441. *See infra*, at C/D-18–20.

[9] Another alternative construction is the language we considered in *Cilek v. Office of the Minnesota Secretary of State*, 941 N.W.2d 411 (Minn. 2020). The provision at issue was part of Minnesota's election law, Minn. Stat. § 200.01 (2018). The court noted that Minn. Stat. § 13.607 (2018), expressly limited the application of the Act's "general regime when campaign and election data are at issue" and provided that certain sections of election law codified outside the Act may limit access to data even if the data were not classified as private, confidential, nonpublic or protected nonpublic. 941 N.W.2d at 415–16. The court concluded that Minn. Stat. § 201.091 limited access to registered voter lists and, accordingly, those lists were not public even though the lists were not classified as private, confidential, nonpublic or protected nonpublic. 941 N.W.2d at 415–16. Of course, in practical terms, that is what the Attorney General wants us to do with the data listed in section 13.65—in the absence of properly classifying the data to cover both individual data and data not on individuals under the general classification regime of the Act, an easy alternative would have been to generally restrict access to the data. The Legislature did not choose that easy and clear route.

The same is true if one views the competing interpretations through the lens of an opposite canon of construction—that each interpretation is unreasonable not because the interpretation impermissibly adds words to the statute, but rather because it renders other statutory language superfluous. *State v. Strobel*, 932 N.W.2d 303, 309 (Minn. 2019) (explaining that "[u]nder the State's interpretation, paragraph b would do no work"). Admittedly, the interpretation advanced by this dissent arguably makes redundant the occasional limiting proviso "on individuals" in other parts of the Act. But the court's view of the Act renders completely superfluous the access categories that apply to data "not on individuals." And in the end, my conclusion is that the magnitude of the surplusage caused by these two interpretations is not comparable. The court's interpretation works much greater distortion on the Act.

The bottom line is that the Legislature over time has used several different sentence structures to identify categories of not public data which identify an individual while including or excluding data which does not identify an individual. Against that backdrop, running an inventory of those various sentence structures is simply not helpful to the interpretive project. And because the implication of applying these canons of construction is at best indecisive, the general presumption in the Act that all data is public unless classified as not public favors an interpretation of section 13.65, subdivision 1, that leaves data not on individuals public.

My position that private data on individuals means that the data is not public only if it is data on individuals is not an application of the absurdity doctrine as the court posits. I do not argue that what the Legislature is doing is so illogical that we must step in and

correct its error despite the plain language of the statute. For that reason, the court's reliance on cases like *State v. Altepeter*, 946 N.W.2d 871 (Minn. 2020), *Harlow v. State, Department of Human Services*, 883 N.W.2d 561 (Minn. 2016), and *Schatz v. Interfaith Care Center*, 811 N.W.2d 643 (Minn. 2012) is beside the point. Rather, I am making a statutory interpretation argument that flows from the plain meaning of a text which expressly includes the word "individual." The court chooses not to engage with that textual argument.

The court also maintains that, by limiting "private data on individuals" to data "on individuals," I am reclassifying the data in section 13.65 as "public" even though the Act classifies that data as "not public." Like the court's *Westrom* argument, *see supra* C/D-11-13 and n.6, this argument makes sense only if one first presumes that the court is correct in its analysis of the statutory language; it is not an argument that makes the court's statutory interpretation correct. In other words, the court cannot argue that its interpretation is correct (and, more importantly, that an alternative interpretation is incorrect) based on an assumption that its interpretation is correct. My textual argument is that section 13.03 makes *all* data public and only excepts "private" data from that public presumption if it is "on individuals." Minn. Stat. § 13.03, subd. 1. Accordingly, if one accepts that position, it is definitionally impossible to reclassify data not pertaining to "individuals" from "private data on individuals" to "public data" because, as a threshold matter, "private data on individuals" *cannot include* data "not on individuals."

B.

Because I conclude that the Attorney General's reading of the statute creating a special definition of "private data on individuals" for the Attorney General is unreasonable, I need not turn to post-ambiguity canons of construction. But if the language were ambiguous, extra-textual considerations plainly repudiate the Attorney General's position.

For instance, the underlying purpose of the Act is to protect "the right of the public to know what the government is doing." *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 307 (Minn. 1990); *see also* Minn. Stat. § 645.16(4) (2020) (permitting this court, in the absence of clear language, to consider "the object to be attained" by the statute). Accordingly, "the general presumption that data are public informs our interpretation of every provision of the Data Practices Act." *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 347 n.2 (Minn. 2016); *see also Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991) ("*At the heart* of the [A]ct is the provision that all 'government data' shall be public unless otherwise classified by statute, by temporary classification under the MGDPA or by federal law." (emphasis added)). The Attorney General's position contravenes the Act's explicit goal of promoting public access to government data.

There is an implication underlying the Attorney General's argument that allowing the Attorney General to keep data on individuals private but allowing the public to see data that does not specifically identify an individual makes no sense.[10] Ultimately, that concern

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[10] Notably, several categories of data listed in section 13.65, subdivision 1, will almost always, if not always, be individual data. *See* Minn. Stat. § 13.65, subd. 1(a) (records of disciplinary proceedings), 1(c) (consumer complaint data including consumers' complaints

implicates complicated policy decisions that are best left to the Legislature. *State v. Khalil*, 956 N.W.2d 627, 633 (Minn. 2021) (deferring to Legislature's balancing of competing policy interests because "legislators are the elected representatives of the people and . . . legislative bodies are institutionally better positioned than courts to sort out conflicting interests and information surrounding complex public policy issues"). And it is not immediately clear to me why it is not sensible in some circumstances to provide more protection to individuals than corporations, non-profits, other government entities or agencies, and other non-individuals. It strikes me that individuals may have qualitatively different reputational and privacy interests at stake than non-individual entities. Indeed, the Act is replete with examples where individuals are afforded greater protections than non-individuals. *See* Minn. Stat. §§ 13.03, subd. 8 (providing that data not on individuals becomes presumptively public after 10 years; no similar provision exists for data on individuals), 13.04 (setting forth rights specific to individuals but that do not apply to nonindividuals).

In addition, the Commissioner of Administration views "private data on individuals" in section 13.65 to pertain only to data "on individuals." The Commissioner is charged with primary responsibility for enforcing and administering the Act. *Westrom*, 686 N.W.2d at 31–32. In particular, the Commissioner is authorized to give a written opinion on any question relating to public access to government data or classification of data. Minn. Stat. § 13.072, subd. 1. Although not binding, the Commissioner's opinion

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against businesses and follow-up investigative materials), 1(e) (data collected by the Consumer Division while administering the home protection hot line).

that section 13.65, subdivision 1, pertains only to data "on individuals" "must be given deference by a court . . . in a proceeding involving the data." Minn. Stat. § 13.072, subd. 2; *see also* Minn. Stat. § 645.16(8) (permitting courts to consider "administrative interpretations of the statute" if the text is not clear).

In 1977, the Attorney General asked that the Commissioner classify as not public "communications and non-investigative files regarding administrative or policy matters of the Attorney General's office which do not evidence final public actions." Memorandum from Richard Brubacher, Minn. Comm'r of Admin., to Byron Starns, Minn. Chief Deputy Att'y Gen., on Request for Emergency Classification of Data on Individuals as Non-Public Under Minnesota Statutes 15.1642, at 1, 4 (Dec. 30, 1977). The Commissioner agreed to the emergency classification but clarified that the classification only applied "[w]hen such material contains *data on individuals*." *Id.* Thus, the final language of the temporary classification made private "communications and non-investigative files regarding administrative or policy matters of the Attorney General's office which do not evidence final public actions (when such material contains data on individuals)." *Id.* at 4.

The request from the Attorney General for the temporary classification came soon after the law was first enacted at a time when the Act was much less developed and detailed than it is today. The Attorney General made its request pursuant to a provision authorizing agencies to "apply to the [C]ommissioner [of Administration] for permission to classify data . . . *on individuals* as private or confidential . . . on an emergency basis until a proposed statute can be acted upon by the legislature." Act of June 2, 1977, ch. 375, § 6, 1977 Minn. Laws 825, 826–27 (codified as amended at Minn. Stat. § 15.1642, subd. 1 (1978))

(emphasis added). Indeed, as noted above, in 1977, the Act did not cover data not on individuals at all. Minn. Stat. §§ 15.162 (1976 & 1977 Supp.), .1641 (1976).

Importantly, the law in 1977 provided that the temporary classification would "expire on . . . July 31, 1978" (unless enacted into statute) and that no more temporary classifications would be granted after that date. Act of June 2, 1977, ch. 375, § 6, 1977 Minn. Laws 825, 828 (codified as amended at Minn. Stat. § 15.1642, subd. 5 (1978)). The Legislature later delayed the expiration date for existing temporary classifications until July 31, 1979. Act of April 5, 1978, ch. 790, § 5, 1978 Minn. Laws 1155, 1156 (codified as amended at Minn. Stat. § 15.1642, subd. 5 (1980)). The next year, the Legislature again extended the lifespan of existing temporary classifications, this time until July 31, 1980. Act of June 5, 1979, ch. 328, § 13, 1979 Minn. Laws 910, 916 (codified as amended at Minn. Stat. § 15.1642, subd. 5 (1980)). Finally, for a third time, the Legislature extended the lifespan of existing temporary classifications (including the twice-extended, still-operative Attorney General classification) until July 31, 1981. Act of April 23, 1980, ch. 603, § 10, 1980 Minn. Laws 1144, 1147 (codified as amended at § 15.1642, subd. 5 (1980)).

By that point, the Legislature directed the Commissioner to submit all existing temporary classifications (including the Attorney General temporary classification at issue here) to the Legislature "in bill form" for consideration. Minn. Stat. § 15.1642, subd. 5a (1980). The next year, a few months after the directive to the Commissioner, the Legislature codified the temporary classification governing Attorney General Data as part of an extensive bill codifying specific data privacy rules for many different agencies. Act

of May 29, 1981, ch. 311 § 35, 1981 Minn. Laws 1427, 1440 (codified as amended at Minn. Stat. § 15.789 (1982)). Accordingly, the language of the 1977 emergency classification that the Commissioner determined to relate solely to individuals is the direct predecessor of the provision that is now section 13.65, subdivision 1 (and specifically section 13.65, subdivision 1(b)). Act of May 29, 1981, ch. 311, § 35, 1981 Minn. Laws 1427, 1440–41 ("The following data created, collected and maintained by the office of the attorney general are classified as private, pursuant to section 15.162, subdivision 5(a) [defining private data on individuals]: . . . (b) Communications and non-investigative files regarding administrative or policy matters which do not evidence final public actions . . . ."). And as noted earlier, the Legislature used language that referred only to private data on individuals *even though* the Legislature had just one year earlier created categories of nonpublic data related to entities that were not individuals. *See, supra,* C/D-15 n.8 (describing statutory history showing that the Legislature retained the Commissioner of Administration's limitation that the data relate to individuals rather than adding a reference to nonpublic information as well); *cf. Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005) ("In enacting statutes, we presume that the legislature acts with full knowledge of existing law.").

In summary, section 13.072, subdivision 2, directs that we give deference to the Commissioner's understanding that the scope of the language (which the Attorney General at the time reviewed for legality) is limited to individuals, especially where (as here) the Attorney General has not issued an opinion specifically contradicting the Commissioner's opinion, *see* Minn. Stat. § 13.072, subd. 1(f) (providing that "[a] written, numbered, and

published opinion issued by the attorney general shall take precedence over an opinion issued by the commissioner under this section"), and the Legislature did not see fit to alter the limitation that the data relate to individuals. *See generally Minn. Power & Light Co. v. Pers. Prop. Tax, Taxing Dist., City of Fraser, Sch. Dist. No. 695*, 182 N.W.2d 685, 689 (Minn. 1970) (stating that an agency's interpretation of a statute is ordinarily "entitled to weight . . . if the interpretation construes an ambiguous statute . . . *particularly*, if the interpretation is longstanding" (emphasis added)).

In short, the Act makes abundantly clear that "private data on individuals" must pertain to individuals. The plain language of the Act, its categorization system, generally applicable provisions, and our canons of statutory construction tell us that any conclusion to the contrary is incorrect. Concluding that "private data *on individuals*," as that term appears in section 13.65, subdivision 1, need not pertain to individuals ignores the plain text adopted by, and the manifest intent of, the Legislature. I respectfully dissent.

GILDEA, Chief Justice (concurring in part and dissenting in part).

I join in the concurrence and dissent of Justice Thissen.

ANDERSON, Justice (concurring in part and dissenting in part).

I join in the concurrence and dissent of Justice Thissen.