

# Accessing Government:

## How difficult is it?

AN ANALYSIS OF  
OPEN GOVERNMENT LAWS  
IN THE MIDWEST



Excerpted Portions: Minnesota

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## ABOUT THE CITIZEN ADVOCACY CENTER

The Citizen Advocacy Center (Center) is an award-winning, non-profit, non-partisan community legal organization based in the suburbs of Chicago. Founded in 1994, the Center's mission is to build democracy for the 21st century by strengthening the public's capacities, resources and institutions for self-governance.

Community lawyers at the Center help citizens and community groups address self-identified issues of public concern through providing resources and training in how to use civic tools, the law, community organizing, coalition building, and the media to affect government decision-making.

The Center's work has a regional and statewide impact due to our focus on identifying systemic reforms that increase government accountability, accessibility, and transparency as well as citizen participation in government affairs. Additionally, the Center monitors government agencies for abuse of power and anti-democratic policies, and, only when necessary, engages in president setting federal and state litigation to hold government agencies accountable for abuse of power.

## ABOUT THE MIDWEST DEMOCRACY NETWORK

The Citizen Advocacy Center is a member of the Midwest Democracy Network, an alliance of Midwest state-based civic and public interest organizations, academic institutions, and policy and legal experts.

Members of the Midwest Democracy Network share a commitment to fundamental democratic values and principles, especially those that speak to honesty, fairness, transparency, accountability, citizen participation, competition, respect for constitutional rights and the rule of law, and the public's need for reliable information. They believe that such principles must be continuously reinforced and zealously protected against those who see politics as a means to promote narrow interests rather than the common good.

Toward these ends, members seek to reduce the influence of money in politics; keep courts fair and impartial; promote open and transparent government; create fair processes for drawing congressional and legislative districts; guarantee the integrity of our election systems; promote ethical government and lobbying practices; and democratize the media.

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Ms. Pastika was part of the team of community lawyers recognized regionally for "Most Innovative Advocacy" and has been a guest speaker at the John F. Kennedy School of Politics at Harvard University. Ms. Pastika was also nationally recognized by the Washington D.C. non-profit OMB Watch, as one of only three young people inducted into the first "Public Interest Rising Star Hall of Fame" for leading a new generation in pursuit of social justice. Ms. Pastika graduated from Marquette University in 1992 and Creighton University School of Law in 1997. She is a member of the California, Nebraska and Illinois Bar.

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## ANALYSIS OF OPEN GOVERNMENT LAWS

# Executive Summary

“A popular government without proper information or the means of acquiring it is but a prologue to a farce or a tragedy—or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own governors, must arm themselves with the power which knowledge gives.”

—James Madison, Letter to W. T. Barry, 1822

Strong open government laws that mandate transparency in conducting the people’s business are essential components of a healthy democracy. The ideals of a government that is of the people, by the people, and for the people require that the public have, to the fullest extent possible, the capacity to access the governmental decision-making process and documents that are created and maintained with public tax dollars.

Broad access to government ensures the public’s capacity to play a role in the democratic process and provides a mechanism by which the public can knowledgeably discuss issues of public concern, make informed judgments as to the actions of public officials, and monitor government to ensure that it is acting in the public interest.

Both the federal government and all individual states have open government laws. These laws uphold the ideals of transparency in government and mandate liberal access to government documents and government meetings. By providing public access to government meetings and robust access to information regarding government affairs, open government statutes are cornerstone laws that ensure and protect the free flow of information from government to the people.

However, state open government laws have statutorily weak features that must be reformed. Moreover, the implementation of state open government laws suffers from inconsistent governmental responses, despite strong public policy statements which are supposed to provide a framework to interpret statutory provisions. While public bodies have the legal burden to ensure compliance with open government laws, more often than not compliance rests on the shoulders of the public.

Our democracy is weakened when government can circumvent transparency based on ineffective oversight mechanisms, a lack of penalties or implementation of penalties, a lack of training that leads to inadvertent violations, excessive fees that make information inaccessible, ineffective policies that fail to address the integration of technology in the businesses of governing, or few resources available to provide assistance to people when government is resistant to permitting proper access or disclosure. These are just a few of the barriers that impede public participation.

A healthy democracy requires that open government barriers be identified, dismantled, and replaced with effective statutory language and institutional protocols that ensure citizen participation and government operation in the light of day.

To address systemic barriers that chill public participation and access to government, the Citizen Advocacy Center (Center) conducted a systemic overview of open government laws in the states of Michigan, Ohio, Illinois, Wisconsin, and Minnesota with the goals of evaluating the provisions and implementation of the statutes.

In executing this project, the Center reviewed the relevant statutes and more than 1,000 legal cases, attorney general opinions, and professional publications to produce a comprehensive study of each state's respective strengths and weaknesses. The study serves as a valuable resource for policy makers, good government organizations, the media, and citizens who regularly use open government laws.

Specifically, the Center analyzed how the public in each state is entitled to participate in the democratic process and to what extent policy goals of mandating transparency and accessibility to government operations are achieved.

With regard to the Freedom of Information Act (FOIA) statutes, the Center focused on issues such as:

- Response time to requests;
- Appeal time and procedures;
- Fees and costs associated with requests;
- Fines and penalties for lack of responsiveness by a government body;
- The frequency with which available fines and penalties have been implemented;
- The extent of exempt information from public records requests;
- The presence of government resources to act as an ombudsman; and
- Provisions that mandate access and disclosure of public records created via the Internet.

With regard to the Open Meetings Act (OMA) statutes, the Center reviewed:

- Public notice and agenda requirements;
- Provisions to address the use of the Internet and other forms of electronic communications to conduct meetings;
- Fines and penalties;
- The frequency with which available fines and penalties are implemented; and
- The extent to which a public body can close public meetings.



During the course of completing the Midwest Open Government Project, four major themes surfaced.

The first is that all of the surveyed Midwestern states suffer from a lack of enforcement implementation. In every state surveyed except Illinois, public information laws have some kind of fine or penalty provision to deter non-compliance. While fine and penalty schemes are available, a review of case law indicates that they are rarely enforced in the states where present.

With respect to open government laws, every state statute includes a variety of enforcement and penalty provisions, some of which include criminal charges and removal from office. Despite strong provisions, few states implement their statutory provisions to hold public bodies accountable. The lack of implementation of enforcement provisions has a detrimental ripple effect: public bodies are less likely to be responsive to requests for public information and more likely to inappropriately utilize exemption provisions. In addition, government bodies are less likely to hold open government meetings.

The second theme is that no state surveyed has a statutorily created entity with enforcement powers specifically dedicated to ensuring compliance with sunshine laws. It is laudable that every state examined had either state resources or non-profit organizations available to the media, public officials, and the general public to navigate respective open government statutes, provide training, and advocate for more transparency, accountability, and accessibility of government. Despite these resources and considering the systemic lack of enforcement among open government laws in general, a statutorily created office with enforcement powers would substantially increase the likelihood that governmental bodies will comply with open government laws.

The third theme is the lack of mandated training for public officials and public employees on appropriate utilization of open government statutes. Ohio was the only state surveyed that requires every elected official, or a designee, to receive three hours of training regarding use of that state's open records law during every term in office. Mandatory training for those who fall under the purview of open records and open meetings laws is essential to promoting open government. Required training increases the capacity of public officials and employees to comply with the law and offers a degree of accountability.

The fourth theme is that participatory opportunities for the public during open meetings are absent. The preamble of each state's open meetings statute identifies broad goals as ensuring transparency in the government decisionmaking process and guaranteeing that the public has access to full and complete information regarding the affairs of government.

Beyond having the capacity to access government information and observe how government operates, a healthy democracy requires an engaged public that has the opportunity to publicly comment on issues that public officials intend to take action on. Michigan is the only state surveyed that requires public bodies to provide an opportunity for the public to speak at public meetings, within appropriate restrictions. This is a tremendously important element that is conspicuously absent in other states.

In addition to the major themes identified above, the Midwest Open Government Project brought to light interesting aspects of each state's open government laws. For example:

- Ohio's OMA has outstanding provisions within the statute and remarkable fines and penalties for non-compliance, however, the statute does not apply to home rule units of government per the Ohio Constitution;
- In Illinois, the notice and minutes provisions of the OMA are the most stringent of the five statutes, but its FOIA was the only state surveyed that fails to have any kind of penalties or fines for violations. In addition, Illinois's statute has the longest list of exemptions by far, making the statute perplexing;
- With respect to Michigan, while its OMA mandates public comment opportunity at public meetings and its FOIA covers private entities that receive more than half of its funding from a government agency, the Governor's office, Lieutenant Governor's office and legislature are exempt from the statute. In addition, Michigan has the most stringent requirements regarding the imposition of fees for searching and compiling public records and the shortest statute of limitations for a lawsuit to be filed under OMA when issues of expenditures are at stake;

- Wisconsin, while considered to have fairly strong open government laws, is devoid of an administrative appeals process for when requests are denied and lacks a firm statutory deadline by which public bodies must respond to requests for records. The lack of a firm deadline results in unjustified delays in accessing government information; and
- Minnesota places a high priority on protecting the privacy of a requestor of public records, as well as an individual who may be the subject of a request. The high sensitivity to protecting individual privacy coupled with many regulations, leads to tremendously complex and confusing open records laws. The multi-tiered system regarding the production of government documents renders the statutes virtually unusable to general public. Moreover, public bodies in Minnesota are not required by law to provide public notice of meetings, agendas detailing what action public bodies will take at such meetings, or that any minutes beyond the recording of votes be taken.

As the Center completed its broad overview of each state's statutory provisions, we completed comparative analyses highlighting positive and negative anomalies that influenced our eventual reform recommendations for each state. In addition to the individual state policy reports that provide an overview of each state's open government laws and the identification of specific strengths and weaknesses, the Center drafted ten model statutes that are tailored to each state that good government advocates can use to begin the conversation about how to advance specific reforms.

Additionally, the Center has produced citizen guides that translate dense legalese into an easily understandable format for the public. The combination of the policy reports, model legislation, and citizen guides results in a comprehensive open government tool box that can be effectively deployed to advance systemic democratic protocols. The Midwest Open Government Project is a substantial endeavor embarked on by the Center that has produced significant results to help strengthen democracy and build the capacity of the public to participate and affect government decision-making.

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Minnesota's two open government laws have significant protections built into the statutes, including extremely strong penalty provisions to deter and punish violations. However, with regard to the Open Meetings Law (OML), notable omissions undermine its overall efficacy and the convoluted statutory scheme of the public records law makes it excessively complicated.

In 1979, the Minnesota General Assembly enacted the Minnesota Government Data Practices Act (MGDPA), which is Minnesota's public records law. MGDPA refers to public information as government data and is atypical among other Midwestern states' freedom of information-type laws due to its complicated approach to public records.

Within certain limitations, MGDPA allows anyone to inspect and obtain copies of all government data, *i.e.*, public records, prepared, possessed, used by, or in the control of any government entity, *i.e.*, public office. However, MGDPA is lengthy, tremendously detailed, and provides differentiated levels of access to government data based on different circumstances. For example, individuals who are the subject of government data requests have special rights and administrative procedures to protect their personal information from public disclosure.

The Minnesota OML, originally enacted in 1957, generally requires that meetings of governmental bodies be open to the public. The Minnesota Supreme Court has articulated the following three critical purposes of OML:

- To prohibit actions taken at a secret meeting where it is impossible for the public to become fully informed about a board's decisions or to detect improper influences;

- To assure the public's right to be informed; and
- To afford the public an opportunity to present its views to the public body. *St. Cloud Newspapers, Inc. v. District 742 Community Schools*, 332 N.W.2d 1, 4 (Minn. 1983).

The OML promotes public participation in local government and gives citizens the right to observe government meetings, except in limited circumstances which are designed to protect the public interest or personal privacy concerns.

The MGDPA and OML have numerous strengths, described more fully below, but the most impressive aspect of Minnesota's open government laws is the range of penalties available for violations. Minnesota's public records law provides substantial civil and criminal penalties for violations. Additionally, the MGDPA was recently amended to increase monetary penalties to allow potential exemplary damages of \$1,000 to \$15,000 for willful violations.

While the OML lacks criminal penalties, the available civil fines for OML violations are remarkably high, permitting a \$300 fine for a single occurrence and reasonable costs, disbursements, and attorneys' fees of up to \$13,000 in OML litigation. Severe penalties for open government violations operate as a deterrent. In addition, Minnesota has established a state office dedicated exclusively to educating both the public and elected officials on the state's open government laws, namely Minnesota's Information Policy Analysis Division.

While the goal of the Minnesota's public records law is to balance openness in government with privacy interests of citizens who are subject to government data requests, reform is needed to improve the MGDPA's overly complicated scheme. Further, the significant penalties established by the MGDPA and OML statutes need to be imposed on public bodies that violate the law. Penalties have to be imposed to have a meaningful effect and force public bodies to take open government laws seriously.

The following provides an analysis of the strengths and weaknesses of the Minnesota MGDPA and OML and a summary of the main components of the laws. Copies of model versions of both statutes as well as citizen guides are available by contacting the Citizen Advocacy Center.



## ANALYSIS OF MINNESOTA'S

# Government Data Practices Act

## STRENGTHS

### *of Minnesota's Government Data Practices Act and Public Records Laws and Regulations*

The MGDPA and the additional state laws that impact the disclosure of public records are lengthy and complicated. However, these laws also establish a flexible standard for differentiated levels of access to data for different circumstances. The different levels of access to government data allows for Minnesota's laws to balance the public's right to information, individuals' right to privacy, and the government's need to function responsibly. Furthermore, the MGDPA is strengthened by the legal guidance provided by the state Legislature in its regulations that interpret the MGDPA, set forth in the Minnesota Administrative Rules, Chapter 1205.

The MGDPA establishes a presumption that government data is public and accessible for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that declares certain data to not be public. Minn. Stat. § 13.01(3). In general, Minnesota courts have held that when specifically authorized by statute, disclosure of otherwise nonpublic data becomes permissible under MGDPA.

Individuals who are the subject of government data requests under MGDPA may take advantage of an administrative appeals process to protest disclosure of personal information and have the right to be informed of requests that include personal information.

Minnesota Administrative Rules, Section 1205.1600 sets forth the procedures by which an individual can appeal the release of government information that includes individual information based on a challenge to the accuracy and/or completeness of data about him or her. In order for an individual to attempt to circumvent disclosure of information, he or she must file a data challenge with the Responsible Authority.<sup>1</sup> Furthermore, the Responsible Authority must have failed to protect all of the data identified in the data challenge.

The administrative appeal option within MGDPA offers an opportunity to resolve disputes without costly litigation between a government entity responding to a public information disclosure request and an individual whose personal information is part of the request. In addition, public bodies must disclose to an individual when personal information is released. They must also disclose when there has been a security breach that results in a person obtaining government data without statutory authority or informed consent of an individual subject to a request. The disclosures by the public body must be made in the most expedient time possible.

Another significant strength of the MGDPA is its access to the courts for government data violations and robust enforcement of criminal and civil and penalty provisions. Any aggrieved person may enforce the MGDPA by filing a lawsuit seeking to compel compliance with the statute or obtain an injunction.

A plaintiff may be awarded compensation for the costs of the lawsuit and reasonable attorneys' fees. If a court issues an order to compel compliance by a public body, it may impose civil penalties up to \$1,000 payable to the state general fund and assess \$1,000 to \$15,000 for willful violations as exemplary damages.<sup>2</sup>

In addition, any person who willfully violates the MGDPA is guilty of a misdemeanor. A willful violation by any public employee constitutes just cause for suspension without pay or dismissal.

As with the concern for protecting the privacy of one who may be the subject of a public records request, the MGDPA explicitly protects individuals' anonymity in making public records requests. The law specifically states that a requestor need not identify himself or herself. In addition, no explanation for why public data is being requested is necessary, except for the sole purpose of facilitating data access.

<sup>1</sup> Under the regulations that interpret MGDPA, a "Responsible Authority" is the individual in a state agency, or statewide system, who is responsible for the entity's data by law or by the Commissioner of Administration. In a political subdivision, the Responsible Authority is the individual designated to be responsible for data by the local governing body.

<sup>2</sup> The 2008 Omnibus Data Practices Bill (Minnesota Session Laws 2008, Chapter 315) revised MGDPA to substantially increase penalties for MGDPA violations. Effective August 1, 2008, the maximum fine a court can assess if it finds a government entity did not comply with MGDPA more than tripled from \$300 to \$1,000 and the increase in the minimum award for exemplary damages for a willful violation rose from the range of \$100 to \$10,000 to \$1,000 to \$15,000.



Provisions that protect requestors' privacy rights eradicate the possibility of a government entity refusing to disclose information for fear of how the information is going to be used. It is also an incentive for those who are concerned about government retaliation to continue to use the MGDPA.

Minnesota has demonstrated an impressive commitment to the state's open government laws by establishing a state office dedicated exclusively to educating both the public and elected officials on the state's open government laws. Minnesota's Information Policy Analysis Division (IPAD) in the Minnesota Department of Administration is responsible for the following:

- Providing technical assistance and consultation
- Working with individuals, organizations, government entities, and the Legislature in drafting, proposing, and tracking legislation; assisting the Commissioner of Administration in performing duties under the open government laws
- Preparing explanatory publications to assist government entities in performing their duties and to assist individuals in actualizing their rights
- Preparing model forms, policies, and procedures to assist in compliance
- Consulting on complex legal, technical, and policy issues
- Consulting with the information technology community to ensure that information systems are developed that comply with data practices laws.

Although IPAD is not a statutorily created office and does not have the power to sanction government bodies that violate MGDPA, it is actively involved in advancing MGDPA compliance. IPAD provides free training seminars to instruct citizens and governments on their rights and obligations under open government laws. In addition, IPAD's comprehensive website contains significant open government resources.

Finally, the Minnesota Coalition of Government Information (Coalition) fills a crucial role in advancing state open government laws by providing comprehensive guidance on MGDPA and other public records laws.

The Coalition is a nonprofit organization committed to the promotion of public access to government information and transparency of government operations. It advances its goals by maintaining a website with numerous resources per-

taining to public records, posting a blog for discussion of issues about access to government information and operating a speaker's bureau to provide public presentations on access to government information.

In addition, the Coalition sponsors presentations by subject matter experts, promotes and supports open government research and collaborates with other organizations to enhance participation in the affairs of government, particularly with regard to public access to government information. The Coalition's website contains guides to open government laws, the public records statutes, legislative summaries, and links to various websites with additional resources. The Coalition is an invaluable resource for individuals and government entities seeking a better understanding of the often-bewildering public records laws in Minnesota.

## WEAKNESSES

### *of Minnesota's Government Data Practices Act and Public Records Laws and Regulations*

#### **MGDPA and related public records laws are extraordinarily complicated and inherently confusing.**

Unlike most states, which have one public records statute, Minnesota has dozens of data practices laws. In addition, there are numerous state regulations that serve the purpose of interpreting the various laws. The purpose of the various open records laws is to establish differentiated levels of access to government data for different people.

The overall composition of laws that govern disclosure of public information is tremendously complex in nature and is virtually impossible for the average citizen to decipher. While IPAD is a public resource to help navigate the complexity of the statutes, more resources, or a simplification of the law is needed.

Notably, the Attorney General's website is void of resources to assist individuals or government entities to understand the MGDPA. The site includes only a link to the MGDPA statute. While the state Legislature created the Minnesota Government Information Access Council for the purpose of improving public access to government information through the use of information technology, enacting legislation was repealed and the entity disbanded.

REFORM: Simplification of the statutes dealing with public access to government data is necessary in order to make public information accessible and usable to the public.

**Uncertainty regarding which government agency, if any, is the appropriate entity to respond to requests undermines transparency and accountability.**

Minnesota's convoluted public records law makes it difficult to determine which government agency may be the appropriate "Responsible Authority" to respond to a request under the MGDPA, or against whom to file a legal claim to enforce disclosure. Worse yet, individuals seeking to enforce the law may find that there is no proper authority to sue.

The ill-defined MGDPA inadvertently strips legal remedies from requestors. For example, in an unpublished decision, a district court denied a party's access to government data because it found that the respondent was not a Responsible Authority under MGDPA. *Feeban v. St. Mary's Point*, No. CX-02-1780, 2003 WL 21321691 (Minn. App. Jun. 10, 2003). As the record demonstrated in *Feeban*, there technically was no Responsible Authority appointed at the time the request was denied for a particular government entity. The court ruled that an outside party had been fulfilling the role of dispensing data. Since the plaintiff could not sue a non-responsible authority, there was no avenue available to redress MGDPA claim.

This glaring oversight could have been remedied if the plaintiff had been allowed to sue the government entity itself for failing to appoint a Responsible Authority, however MGDPA provides for no such recourse.

A similar problem emerges when a government employee gains access to government data while outside of his or her scope of employment. In such a case, neither the government nor the employee may be held responsible under the law for a violation of MGDPA. The government entity cannot be sued because the employee was acting outside of the scope of employment, and the employee cannot be sued because he or she is not a Responsible Authority under MGDPA.

REFORM: Require government entities to appoint a clear Responsible Authority for public information requests.

### Requests for electronic records often lead to delays and confusion.

An additional weakness in MGDPA is that Responsible Authorities are often unable to comply with requests for electronic data. Government data is public regardless of format, so how information is stored should not affect its accessibility. However, reports indicate that agencies in Minnesota are starting to encounter problems responding to requests for large databases. Since many data programs were not designed with attention to MGDPA's disclosure requirements, or with broad accessibility as a goal, responses by government agencies are inconsistent.

For example, an agency may have to separate information from databases containing both public and non-public data pursuant to a request. However, separating data may involve complicated programming which might slow access. Time delays and confusion abound with respect to mass electronic data requests.

REFORM: Gradually increase technological capacity of government agencies subject to MGDPA to sort electronic records.

### Allowing a Responsible Authority to recover attorneys' fees lessens MGDPA's effectiveness.

Another substantial weakness of MGDPA is its aggressive approach of permitting a Responsible Authority to recover attorneys' fees from a plaintiff in MGDPA litigation. The statute explicitly states that an individual seeking to enforce the MGDPA may be ordered to pay an award to the Responsible Authority. Attorneys' fees may be awarded by the court if it determines that an action brought is frivolous and without merit.

The Minnesota state Legislature’s decision to allow Responsible Authorities to assess attorneys’ fees and costs against plaintiffs creates a disincentive for individuals to bring legal action for MGDPA violations. Although courts have rarely awarded Responsible Authorities fees and costs under the law, there is a substantial chilling effect since members of the public do not have the requisite legal training to assess what constitutes a frivolous lawsuit.

REFORM: Remove provisions that allow a Responsible Authority to recover attorneys’ fees.

#### **Vague provisions within MGDPA circumvent transparency and accountability.**

The efficacy of the MGDPA is further undermined by the ambiguous nature of definitions and related requirements. For example, what constitutes “eligible parties” subject to the MGDPA is not well-established. Municipal corporations are typically outside of the MGDPA’s reach while third-party contractors are subject to coverage. Unlike government entities, third-party contractors may not have fully-established public records.

The law should clarify to what extent a contractor is expected to be directly responsible for providing public information and how it will protect nonpublic data. Minnesota courts usually require contractors to directly respond to requests for information rather than mandating sponsoring government entity to respond. As such, contractors need clarification as to which company documents are not considered government data. The MGDPA fails to provide clarity and guidance regarding this matter.

REFORM: Clarify within the MGDPA what constitutes an “eligible party”, its responsibilities, and what information is subject to disclosure.

## SUMMARY OF THE LAW

### *of Minnesota's Government Data Practices Act and Public Records Laws and Regulations*

The following section provides a summary of the main components of MGDPA and the state's various public records laws. This summary provides an overview of the nuts and bolts of MGDPA, including what records are covered, how to appeal a denial of records requests and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in MGDPA litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

This section first addresses the regulations that detail how to administer the procedures covered under MGDPA that pertain to data on individuals. The next section addresses MGDPA's standard procedures for government data.

## INDIVIDUAL DATA

### Who is Covered Under the Law?

The Minnesota Department of Administration Data Practices regulations detail how to administer the procedures covered under MGDPA, but only as they pertain to data on individuals. The regulations do *not* cover data on businesses or other entities that are not individuals (*i.e.*, nonpublic and protected nonpublic data). The regulations define to what extent information is made available to the public, while keeping other information confidential for the sake of efficient government operations.

This set of regulations only applies to data on individuals or to summary data. Coverage only extends to government entities or nonprofits in a contract with a state agency. Contractors' data generated independently of a state contract (such as personnel data) is exempt.

### Who Can Access Data?

Public data may be seen by anyone, regardless of the nature of the person's interest in the data. Private data may be seen by the subject of the data, individuals with express written consent from the subject of the data, individuals within a recordkeeping entity whose work assignments reasonably require access and/or agencies authorized by statute or federal law.

Private data on minors may be seen by parents of the subject, unless there is a state law or court order to the contrary. Notably, parents can be denied access at the minor's request or by the Responsible Authority's statutory authority.

### Fees for Public Records

Cost of labor and materials and mailing costs may be charged for standard public records requests. Special costs may be charged if copying involves a machine-based system (*e.g.*, microfilm). A government entity may establish a schedule of costs.

For summary data, reasonable costs of preparation, copying and mailing can be charged. The government entity can reduce the costs charged to the requestor if the summary data being prepared is also of value to the entity.

### Appeals Process

As described more fully below in “Administrative Appeal,” under the MGDPA, an individual can appeal a Responsible Authority’s adverse decision to the Commissioner of Administration. The appeal must be made within 60 days of the Responsible Authority’s decision if the Responsible Authority informed the individual of his or her right to appeal in writing, otherwise the deadline is 180 days.

The notice must contain contact information for the appellant, the name of the Responsible Authority and entity, a description of the nature of the dispute and the data, and a description of the desired outcome. The Responsible Authority’s entity must reimburse the Department of Administration for any costs of appeal.

## GOVERNMENT DATA

### Who is Covered Under the Law?

The MGDPA governs the data practices of all government entities and government contractors in Minnesota, except for the judicial branch. It creates a presumption that all data is open to the public unless otherwise specified.

There are four types of classified data specified, and rules for defining how each data type changes classification or becomes public. This statute also explains the duties of the Commissioner and other Responsible Authorities for managing access to records and explains the rights of the public to access data, appeal denials, and be informed of breaches of security to their private data.

MGDPA does not address public records as “records;” it addresses such records as “data,” specifically, “government data,” which it defines as data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use.

Government entities include state agencies, record-keeping systems, political subdivisions, corporations or non-profits under contract, state university system and school districts, and any officer, board, or authority appointed for an agency or ordinance or any level of local government (counties, districts, charter cities, towns, etc.).

### Types of Data

**Data On Individuals:** Data on individuals are defined as government data in which any individual is or can be identified as the subject of that data, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data is not accessed by the name or other identifying data of any individual.

There are several classifications of data on individuals:

- *Public.* Public data is government data that may or may not identify an individual but is available to any member of the public for any reason, *e.g.*, names and salaries of agency employees.
- *Summary Data:* Summary data are statistical records and reports derived from data on individuals in which individuals are not identified and from which neither their identities nor any other characteristics that could uniquely identify individuals are ascertainable. Summary data are usually statistics compiled by the government agency about its programs or recipients. This data is public data unless classified as not-public by another statute, federal law or temporary classification.
- *Private.* This is data about individuals which can be disclosed only to the subject of the data or to government entities and employees whose work assignments reasonably require access to the data. For example, welfare system data about individuals is generally private, *e.g.*, names of persons who are receiving welfare benefits.
- *Confidential:* This is data about individuals that even the individuals themselves cannot be told, *e.g.*, information from an investigation regarding adoption records. Note that even if the confidential data itself cannot be disclosed to individuals, individuals do retain the right to know whether an agency is maintaining confidential data about them.

**Data Not On Individuals:** Data not on individuals are government data about non-individuals, such as organizations including partnerships, corporations, associations, etc.

- *Public.* This is data about non-individuals, such as businesses, which can be disclosed to anyone for any purpose, *e.g.*, names of vendors who have contracts with a government entity.



- *Private*: This is data about non-individuals which can be disclosed only to the subject of the data or to government entities and employees whose work assignments reasonably require access to the data, *e.g.*, certain financial information about businesses.
- *Protected Non-Public*: This is data about non-individuals, which is available only to government entities with a legal right to know it. For instance, a corporation being investigated for fraud would not have a right to the information being collected during the investigation.

### Relevant Government Entities

“Commissioner” means the commissioner of the Department of Administration. A “Responsible Authority” is the individual in a state agency or statewide system who is made responsible for the entity’s data by law or by the Commissioner of Administration; in a political subdivision, he or she is the individual designated to be responsible for data by the local governing body. For the purposes of MGDPA, it is typically the Responsible Authority who is the relevant entity.

### Form of Records

The data must be in a format and condition that is “easily accessible for convenient use.” Photographic, photostatic, and microfilm formats are automatically considered “accessible” and “convenient” regardless of size. An individual may request data that requires a customized search. If the requestor seeks a copy of the data, he or she may be charged for the costs of “searching for and retrieving” that data.

### Special Provisions Regarding Electronic Mail

Electronic mail records are considered a public record, subject to the coverage of MGDPA.

### Fees for Public Records

- *Inspection*: The government cannot charge a fee for inspecting data, except when providing for remote access that enhances the data or access at the person’s request.
- *Copying*: If 100 or fewer black-and-white pages are requested, then the fee will be no more than 25 cents per page and no actual costs may be charged. Otherwise, the fee may cover the actual costs of searching for, compiling, or electronically transmitting the data (including employee time under certain conditions, as discussed more fully below).
- *Staff Costs*: Actual costs may be charged in the discretion of the Responsible Authority if the request entails more than 100 pages of copies and the staff is required to retrieve documents, use certain materials (paper, copier ink, staples, diskettes, video or audio cassettes,

etc.), write or modify a computer program to format data, incur mailing costs, or incur vehicle costs directly involved in transporting data to the appropriate facility when necessary to provide copies.

- *Development Costs:* If the requested data has commercial value and is a “substantial and discrete portion” of work developed with significant public funds, then the copy fee can reflect actual development costs for the information. (The government must give a justification of such costs upon request).
- *Private Data:* In the case of copies of private data, a Responsible Authority’s ability to recover costs is very limited, including only actual reproduction costs associated only with making, certifying, compiling, and electronically transmitting or mailing the data.

MGDPA does not provide for fee waivers.

### Public Records Open to Disclosure

Regardless of physical form, all information collected, created, received, maintained, or disseminated by the government. All government data are presumed public for inspection and copying unless there is federal law, state law, or temporary classification (see Minnesota Statutes, Section 13.06) making it not public.

### Public Records Exempt From Disclosure

The following types of data are exempt from disclosure under MGDPA:

- *Private Data:* Data on individuals only accessible by individual (data becomes public only with subject’s consent or whichever is later—30 years after creation of data or 10 years after subject’s death); educational data; and welfare data. Example: court data for psychological evaluations.
- *Confidential Data:* Data on individuals only accessible by the government (data becomes public on whichever is later—30 years after creation of data or 10 years after subject’s death). Example: criminal investigation data.
- *Nonpublic Data:* Data on a business or other entity that is only accessible by the subject of the data (data becomes public only with subject’s consent or 10 years after creation/receipt of data, unless the government determines it against public interest). Example: inactive criminal investigation data.
- *Protected Nonpublic Data:* Data on a business or other entity that is only accessible by the government data becomes public ten years after creation/receipt of data (unless the government determines it against public interest). Example: criminal investigative data.

### Changes in Classification of Non-Public Data

Changes in classification must take place by statute, by judicial or administrative rules of procedure, by physical transfer to the state archives or when the classified data is released to the public (because it is 10 years after subject's death, or 10 years after creation of data for business entities). The classification *at the time of the request* applies to the request. If non-public data is transferred between government entities, the classification stays the same for both entities. Note that a Responsible Authority can apply to the Commissioner of an agency for temporary classification of public data into non-public data until the legislature enacts a statute under a complicated set of procedures.

### Breach of Security of Individuals' Data

When there is a reasonable belief that a person has obtained government data without statutory authority or informed consent of the data subject, the person must have the intent to use the data for governmental purposes. The state agency must give notice when a breach occurs and disclosure must be made in the most expedient time possible, without unreasonable delay. If more than 1,000 individuals are affected, the agency must notify all consumer reporting agencies without unreasonable delay.

Types of Notice: Written notice by first-class mail; electronic notice to each individual; substitute notice if breach affects 500,000 plus people or notice would cost over \$250,000 (substitute notice requires e-mail notice to all individuals affected, conspicuous posting on website, and notification to major media outlets).

### Administrative Appeal for Individuals Who Are the Subject of Government Data

MGDPA contains an administrative appeals process for individuals who are the subject of government data, have made a data challenge with a government entity and that entity has not corrected all of the data identified in the data challenge. The state's administrative rules interpreting MGDPA establish the right to administratively appeal the Responsible Authority's determination on a person's challenge to the accuracy and/or completeness of data about that person. See Minnesota Administrative Rules, Section 1205.1600.

An individual may appeal an adverse determination of a Responsible Authority to the Commissioner of Administration. A notice of an appeal must be submitted to the Commissioner within a reasonable time of the determination made by the Responsible Authority, generally 180 days, unless the Responsible Authority has provided the individual with a written statement which informs the individual of the right to appeal the determination to the Commissioner within 60 days.

The appeal must be in writing and addressed to the Commissioner and include: the name, address, and phone number, if any, of the appealing party; the name of the Responsible Authority and the entity which he or she represents; a description of the nature of the dispute, including a description of the data; and a description of the desired result of the appeal. Upon written request of the data subject stating justifiable reasons, the appeal may be processed under the name of a pseudonym.

If the Commissioner determines that the appeal meets all of the requirements in the law, the appeal will be accepted. Informal resolution or mediation may be proposed by the Responsible Authority. If the dispute cannot be resolved informally, the Commissioner will in most instances order a hearing by an administrative law judge in the state Office of Administrative Hearings. The administrative law judge will hear the case and issue a recommendation to the Commissioner. The Commissioner will review the recommendation and issue an order about whether the data is accurate and/or complete. Both the appealing party and the Responsible Authority have the right to appeal the Commissioner of Administration’s order to the Minnesota Court of Appeals.

The Department of Administration shall be reimbursed for all costs associated with the contested case proceeding by the entity whose Responsible Authority has been the impetus for the individual’s appeal to the commissioner.

**Deadline for Production of Public Records**

MGDPA requests data must be complied with in an “appropriate and prompt manner” as “soon after that time [of the request] as possible.”

**What Must be Included in Denial Letter?**

The requestor has a right to be informed in writing by the Responsible Authority of the specific law or classification that justifies the denial.

**Appeal to Commissioner of Administration**

Note: the following two appeal categories apply to individuals denied access to government data *not* pertaining to themselves. Described earlier is the administrative remedy for challenging the Responsible Authority’s determination on a person’s challenge to the accuracy and/or completeness of data about that person.

An individual denied access to data by the Responsible Authority’s decision or the Responsible Authority itself may ask the Commissioner of Administration to issue an opinion with respect to the nature of the data sought. Such opinions are not binding on a public agency, but must be given deference by a court in a proceeding regarding the data. There is no time limit for requesting an opinion from the Commissioner of Administration.

If the Commissioner decides not to issue an opinion, he or she will provide a notice of that decision within 5 days of the receipt of the request. If the Commissioner issues an opinion, it must occur within 20 days of receipt of the request, however, the commissioner may “for good cause” extend this deadline for one additional 30-day period.

## Appeal to State Court

A person denied access to government records pursuant to an MGDPA request may bring a lawsuit in the district court of the county where the records are kept or in any county for state agencies. The Responsible Authority may be sued, in addition to the particular agency. In an action seeking compliance with MGDPA, the statute states that “the matter shall be heard as soon as possible.” No statute of limitations is set forth in MGDPA for initiating a state court lawsuit.

## Penalties for Violation

*Criminal Penalties:* Any person who willfully violates MGDPA is guilty of a misdemeanor. Willful violation of MGDPA by any public employee constitutes just cause for suspension without pay or dismissal of the public employee.

*Civil Remedies:* Any aggrieved person may enforce MGDPA by bringing a lawsuit seeking to compel compliance or obtain an injunction. An action to compel compliance must be heard “as soon as possible.” A person who wins a lawsuit alleging losses as a result of violation of MGDPA may be awarded compensation for the loss and for costs of the lawsuit and reasonable attorneys’ fees.

*Penalties:* If a court has to issue an order to compel compliance, then it may impose civil penalties up to \$1,000 payable to the state general fund (the court decides on the penalty based on to what extent the defendant complied with Minnesota Statutes, Chapter 13). Exemplary damages between \$1,000 to \$15,000 may be awarded for willful violations.

*Burden of Proof:* A subject must show that he or she suffered damages (which may include emotional distress). Damages must be a result of the violation.

*Exemption from Civil or Criminal Liability:* A person or government agency is immune from civil and criminal liability for releasing data that are not public, if the data are released pursuant to a court order.

*Responsible Authority:* If the court determines that an action brought under MGDPA is frivolous and without merit and a basis in fact, it may award reasonable costs and attorneys’ fees to the Responsible Authority.

## Availability of Attorneys’ Fees for MGDPA Litigation

For an action for damages under MGDPA, a successful party may recover costs and reasonable attorneys’ fees from the Responsible Authority. A prevailing plaintiff must be awarded attorneys’ fees if there was a prior written opinion from the Commissioner directly relating to the cause of action, to which the Responsible Authority did not conform.

### Whether Attorneys' Fees Are Usually Granted

Attorneys' fees are usually not granted under MGDPA. Some of the obstacles include the following: proving that a party is "aggrieved"; showing but-for causation between the violation and the harm; and, proving that there was any damage other than the wrong of the access itself. *Pro se* litigants may not recover attorneys' fees.

### Main Areas of Litigation and Typical Outcomes Regarding Public Records Exempt From Disclosure

Courts have addressed what constitutes active investigative data under MGDPA, typically holding that ongoing investigative data collected in anticipation of a lawsuit is confidential. However, the courts have found that once the investigation is inactive, it becomes public. Further, even if derived from data available to the public, investigative reports generated can still be confidential, and if investigative data is turned over to the court, it must rely on court rules for protection, not MGDPA.

In most cases, the issue turns on whether an investigation is still pending, whether the data was actively collected or passively received, and whether the data was collected in the course of regular business or if it was collected specifically to prepare for litigation.

Whether educational data is disclosable under MGDPA has also been litigated regularly, with courts typically holding that drug use data is classified as "educational data," which is private, and cannot be disclosed to anyone without the student's permission.

Courts have further held that law enforcement data maintained separately and only used for law enforcement purposes is not educational data, even if it is kept at a school. In this line of cases, courts have determined that the main difference between educational data and law enforcement data is that educational data remains private while law enforcement data is confidential and will become public once an investigation is over.

### General Areas Litigated Most Commonly and Typical Outcomes

Courts addressing scope of liability issues have found that there is no obligation to produce documents that are not proven to exist, no liability for public employees who violate the law outside of the scope of their employment, no liability for data that was not "collected" but passively received from a non-government entity, and no improper disclosure when data is already available in public court files (*e.g.*, from previous litigation).

### Ranking in 2007 National Study of 50 States' Freedom of Information Laws

In 2007, the nonpartisan, nonprofit organizations Better Government Association and National Freedom of Information Coalition conducted a 50-state study of FOIA responsiveness.

Three of the criteria—Response Time, Attorneys' Fees & Costs and Sanctions—were worth four points each.

Two of the criteria—Appeals and Expedited Process—were assigned a value of two points each.

Response Time, Attorneys' Fees & Costs and Sanctions were assigned a higher value because of their greater importance. These criteria determine how fast a requestor gets an initial answer, thus starting the process for an appeal if denied, and provide the necessary deterrent element to give public records laws meaning and vitality.

Appeals and Expedited Process, although important, were determined to be less critical in promoting open government access and thus assigned only a two-point value.

The following sets forth Minnesota's rankings in this study, which may be found at [www.bettergov.org/policy\\_foia\\_2008.html](http://www.bettergov.org/policy_foia_2008.html).

For response time (analyzing response times, the process of appealing records denials and expediency, and the means to give a case priority on a court's docket in front of other matters because of time concerns); **1 of 4**.

For appeals (analyzing choice, cost and time); **0.5 of 2**.

For expedited review (if a petitioner's appeal, in a court of law, would be expedited to the front of the docket so that it is heard immediately); **1 of 2**.

For fees and costs ((1) whether the court is required to award attorneys' fees and court costs to the prevailing requestor; and (2) what sanctions, if any, the agency may be subject to for failing to comply with the law); **2 of 4**.

For sanctions (whether there was a provision in the statute that levied penalties against an agency found by a court to be in violation of the statute); **4 of 4**.

Percentage (compared to other 49 states); **53 of 100**.

**GRADE: F**



## CASE IN POINT

**Governor Tim Pawlenty** has developed a questionable record in filing and preserving records. Pawlenty's administration has cited a 40-year-old Minnesota Supreme Court decision to justify retaining only records of final decisions. E-mails and paperwork that cast light on how decisions are made are not included. Under that policy, for example, many of the e-mail exchanges regarding the Interstate 35W bridge collapse could have been destroyed if they had not been ordered preserved by the attorney general in anticipation of lawsuits.

While the public can always file a Data Practices Act request to the Governor's office for documents that it's still holding, that would not help someone trying to recover e-mails and other documents that the staff decided were never official records and destroyed.

"Our staff retains e-mails while they are useful and then they are deleted," wrote Pawlenty director of operations Paula Brown in an e-mail to the Star Tribune. When the Star Tribune sought e-mails and other correspondence from Pawlenty Chief of Staff Matt Kramer and Deputy Chief of Staff Bob Schroeder since August 1, 2007, the documents made available were largely limited to correspondence of the last two months. No correspondence about key legislative issues or budget negotiations was included, even though both Kramer and Schroeder played key roles in the talks.

Pawlenty's administration has taken a more limited view on what records to keep than former Minnesota Governors. Pawlenty has also called for the state public records law to be rewritten to provide that most of the personal information in government files, like driver license data, be confidential.

The entire story can be found at: [www.startribune.com/politics/state/23659144.html?page=1&c=y](http://www.startribune.com/politics/state/23659144.html?page=1&c=y)

## ANALYSIS OF MINNESOTA'S

# Open Meetings Law

## STRENGTHS

### *of Minnesota's Open Meetings Law*

The Minnesota OML benefits from a strong presumption of coverage, which generally requires that meetings of governmental bodies be open to the public. The Minnesota Supreme Court has articulated three critical purposes of OML:

- (1) To prohibit actions taken at a secret meeting where it is impossible for the interested public to become fully informed about a public board's decisions or to detect improper influences;
- (2) To assure the public's right to be informed; and
- (3) to afford the public an opportunity to present its views to the public body. *Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002) (citing *St. Cloud Newspapers, Inc. v. District 742 Community Schools*, 332 N.W.2d 1, 4 (Minn. 1983)).

In addition, while the term “public body” is not defined in the OML, the Minnesota Supreme Court has stated that “[i]n common understanding, ‘public body’ is possibly the broadest expression for the category of governmental entities that perform functions for the public benefit.” *Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004).

The OML also benefits from a tiered system for determining when to close public meetings. The statute mandates closed sessions for a limited range of subjects while permitting a public body to exercise discretion as to whether to close a meeting for other matters. The existence of different standards is an indication by the legislature that most public business can be discussed in the open.

This is especially significant in several instances. For example, employment matters are usually subject to mandatory closed sessions. However, there is no specific provision of the OML that would allow the public body itself, or a quorum, to close a meeting to interview a perspective employee.

In addition, the OML does not contain a mandatory exception for matters involving pending and imminent litigation. A government entity has the choice to close a session addressing a matter permitted by the attorney-client privilege, but it is not required to do so. Moreover, meetings where labor negotiations and certain property transactions are discussed may also, potentially, be open based on the government's discretion.

A significant strength of the OML is its stringent enforcement and penalty provisions. While only individuals can bring litigation to enforce the OML, the potential fines for OML violations are remarkably high. A person who intentionally violates the OML is subject to a civil penalty up to \$300 for a single occurrence, which cannot be paid by the public body. Minn. Stat. § 13D.06(1). In addition, an individual who intentionally violates the law in three or more legal actions involving the same governmental body forfeits the right to serve on that body for a time equal to the term the person was serving. Minn. Stat. § 13D.06(3)(a). Most significantly, the court may award reasonable costs, disbursements, and attorneys' fees of up to \$13,000 to any party in an OML action. Minn. Stat. § 13D.06(4)(a).

While courts rarely impose high costs and fees against a government entity defendant, the possibility of such an award provides a serious incentive to government bodies and their members to comply fully with the law. Moreover, there are no time limits to file a lawsuit in state court. This allows members of the public to bring an OML action when they learn of such a violation regardless of the length of time.

Coverage of the OML regarding public bodies is especially strong. Although "public body" is not explicitly defined, the Minnesota Supreme Court has stated that "[i]n common understanding, 'public body' is possibly the broadest expression for the category of governmental entities that perform functions for the public benefit." *Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004).

The list of groups and entities covered by the OML does not include nonprofit corporations created by a governmental entity, but the OML has explicitly extended coverage to nonprofit corporations under certain conditions. A 1986 Minnesota Attorney General opinion stated that the OML did not apply to nonprofit corporations created by political subdivisions. Minn. Op. Att’y Gen. 92a-30, (Jan. 29, 1986). In 1999 the Legislature established a taskforce to recommend legislation governing corporations created by political subdivisions. The resulting 2000 legislation addressed the issue of application, stating that the law applied and a nonprofit corporation created by a political subdivision cannot be exempted from it. See Minn. Stat. § 465.719(9). Statutorily mandated OML coverage of nonprofit corporations increases transparency and accountability in Minnesota.

As with enforcement of MGDPA, Minnesota’s Information Policy Analysis Division (IPAD)<sup>3</sup> provides technical assistance and resources to the public and governmental entities to ensure maximum compliance. The IPAD tracks OML issues and legislation and is proactively involved in advancing government accountability and transparency. Additionally, the Minnesota Coalition for Government Information plays an essential role in ensuring government compliance with OML. Their educational resources and trainings are geared to build the capacity of the public to effectively utilize OML to maximize public participation in the democratic process.

<sup>3</sup> [www.ipad.state.mn.us](http://www.ipad.state.mn.us)

## WEAKNESSES

### *of Minnesota's Open Meetings Law*

#### **Weak notice and vague meeting requirements circumvent transparency.**

The minimal agenda requirements for public meetings provide little notice to the public as to what public business is going to be discussed and what votes regarding public items shall take place. Agendas are not required to include proposed final actions, property transactions, or specific business items to be discussed. The OML however does require that if printed materials relating to an agenda item(s) are prepared by or at the direction of the governing body, and are distributed or available to public officials, one copy of these same materials must be available in the meeting room for inspection by the public. Minn. Stat. § 13D.01(6)(a).

The failure of the OML to require specific agendas severely undercuts government transparency and impedes the ability of concerned individuals and citizen groups to address issues of public concern.

Further, the OML does not specifically require that minutes of public meetings be taken. All that is required is a record of mere vote tallies for actions taken during a public meeting. The record must be kept in a journal that is open to the public during normal business hours. If a vote involves the appropriation of money, the roll call vote of each member must be recorded.

The OML's bare bones minutes requirement similarly impedes government transparency as documentation of policy discussions is not required. Paired with the scant agenda requirement, the OML fails to inform individuals of what to expect from meetings, or what has occurred at them in a meaningful manner.

REFORM: Require agenda notice provisions that reasonably inform the public of proposed meeting activity and mandate detailed minutes that provide the public with enough information to be reasonably apprised of substantive issues discussed.

**The tiered closed session provision, while a strength, also acts as a weakness.**

While Minnesota’s two-tiered system for closed meetings provides public bodies with some flexibility regarding entering closed sessions, but also mandates closed meetings for various subjects without exception. Government entities have no discretion to make meetings public in cases involving certain disciplinary hearings and educational data, health data, medical data, welfare data, or mental health data that are not public data, among other areas. In addition, public bodies have no incentive to avoid making final decisions in improperly closed meetings.

Except for labor regulation, the OML is silent on invalidating final actions taken at a closed session that was illegally closed. The Minnesota Supreme Court has addressed the issue and ruled that courts cannot void the decisions made at meetings that were improperly closed. *Sullivan v. Credit River Township*, 299 Minn. 170, 176-177, 217 N.W.2d 502, 507 (Minn. 1974). The lack of recourse to invalidate a decision made under illegal circumstances violates good open government principles and strips power from the public in Minnesota.

REFORM: Revise the OML to mandate the invalidation of a vote made during an improperly closed meeting.

**The recovery of attorneys’ fees from individuals who file OML lawsuits against public bodies has a chilling effect.**

As with MGDPA, if a court determines that a citizen’s OML suit is frivolous and without merit, the court may award to the public body court costs and reasonable attorneys’ fees to the public body. This provision has a severe chilling effect on the public and is inconsistent with the statute’s emphasis on accessibility. Even if courts rarely award public bodies fees and costs, the possibility of high legal costs is a disincentive to individuals holding public bodies accountable.

REFORM: Remove the defendant attorneys' fee provision from the statute.

**The OML is devoid of references to technology.**

Notably, the OML is silent regarding electronic communications and whether a series of electronic mail communications among several public officials at one time constitutes a meeting. To date, no court has directly addressed this issue. Considering the significant degree to which technology is impacting the business of governing, it is crucial for electronic communications to be explicitly covered in the statute. Further, the OML does not address whether meetings may be taped or filmed.

While the Attorney General has opined that an individual may tape a meeting as long as the taping does not have a significantly adverse effect on the order of the proceedings or impinge on constitutionally protected rights (Minn. Op. Atty.Gen., 63a-5, Dec. 4, 1972), the OML provides no statutory protection of the public's right to record meetings.

REFORM: Specifically prohibit electronic quorums and mandate the public's right to document public meetings.

## SUMMARY OF THE LAW

### *of Minnesota's Open Meetings Law*

The following section provides a summary of the main components of the Minnesota OML. This summary provides an overview of the nuts and bolts of the OML, including what types of meetings are covered by the law, the procedures for closed sessions, how to appeal a violation and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in OML litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

#### Who is Covered Under the Law?

The OML applies to any public body, which includes a state agency, board, commission, or department when it is required or permitted by law to transact public business in a meeting, the governing body of any school district, unorganized territory, county, city, town, or other public body, and a committee, subcommittee, board, department, or commission of a public body subject to the law.

Although "public body" is not explicitly defined in the statute, the Minnesota Supreme Court has stated that "[i]n common understanding, 'public body' is possibly the broadest expression for the category of governmental entities that perform functions for the public benefit." *Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004).

An amendment to the OML in 2000 established that corporations created by political subdivisions are subject to OML's coverage.

#### Are Committees, Advisory Groups, Sub-Committees Covered?

Yes. Committees and sub-committees are covered by the law. There is no reference in the OML to advisory groups, but courts have held that they might consider an advisory committee to be a committee of the governing body depending on the number of members of the governing body involved and on the form of the delegation of authority from the governing body to the members. Whether advisory bodies are subject to the OML depends on a fact-specific, case-by-case basis.

#### Types of Gatherings Covered

The OML covers gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee board, department or commission at which members discuss, decide or receive information as a group on issues relating to the official business of that governing body.



The Minnesota Supreme Court held that “chance or social gatherings” are not subject to the OML even if a quorum is present. *St. Cloud Newspapers Inc. v. District 742 Community Schools*, 332 N.W.2d 1, 6 (Minn. 1983).

### What Meetings Must Be Open?

Any meeting that includes a majority of a quorum of the members of a public body must be open if it is held for the purpose of discussing public business.

Meetings may be held by interactive television if the following specified conditions are met to ensure openness and accessibility for attendees:

- (1) all members of the body participating in the meeting, wherever their physical location, can hear and see one another and can hear and see all discussion and testimony presented at any location at which at least one member is present;
- (2) members of the public present at the regular meeting location of the body can hear and see all discussion and testimony and all votes of members of the body;
- (3) at least one member of the body is physically present at the regular meeting location; and
- (4) each location at which a member of the body is present is open and accessible to the public.

The OML provides that each member of the public body who participates in an interactive meeting is considered present for determining a quorum and participation. Minn. Stat. § 13D.02(2).

The OML specifies that various government entities specified in the statute have broader authority to hold meetings by telephone conference call or other electronic means.

### Exceptions: Closed Meetings

The OML does not explicitly define a closed meeting. It defines the subject matter of the meetings that are exempt from the provisions of the OML. A two-tiered system exists for mandatory versus discretionary closure of meetings. Any portion of a meeting must be closed if expressly required by other law or if the following types of data (*i.e.*, records) are discussed:

- (1) data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults;

- (2) active investigative data as defined in Minnesota Statutes, Section 13.82(7) or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision;
- (3) educational data, health data, medical data, welfare data, or mental health data that are not public data under Minnesota Statutes, Sections 13.32, 13.3805(1), 13.384, 13.46(2) or 13.46(7); and
- (4) an individual's medical records governed by Minnesota Statutes, Sections 144.291 to 144.298.

In addition, a public body must close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. If the members conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must be open. Further, the OML does not apply to any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary hearings.

A meeting *may* be closed under the following conditions:

- If disclosure of the information discussed would pose a danger to public safety or compromise security procedures or responses;
- To discuss strategy and proposals for labor negotiations conducted under the Public Employment Labor Relations Act;
- To evaluate the performance of an individual who is subject to its authority, so long as the public body identifies the individual to be evaluated prior to closing a meeting and at its next open meeting, the public body summarizes its conclusions regarding the evaluation;
- If the closure is expressly authorized by statute or permitted by the attorney-client privilege; to determine the asking price for real or personal property to be sold by the government entity;
- To review confidential or nonpublic appraisal data under Minnesota Statutes, Section 13.44(3); and
- To develop or consider offers or counteroffers for the purchase or sale of real or personal property.

The 2008 Omnibus Data Practices Bill (Minnesota Session Laws 2008, Chapter 315) revised the OMA to require that all closed meetings of a public body be electronically recorded at the expense of the public body (except those meetings closed as permitted by the attorney-client privilege). The revised law mandates that these recordings must be preserved for at least three years, unless otherwise provided by law.

### **Procedures for Closed Meetings**

Generally, before closing a meeting, a public body must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed. Special provisions apply to certain closing meetings, as follows:

- To discuss labor negotiations, the time and place of the closed meeting must be announced at a public meeting;
- If the meeting to be closed is regular, special or emergency, the public body must follow the notice provisions that apply to the particular type of meeting to be closed; and
- And if a public body proposes to close a meeting to evaluate the performance of an individual subject to its authority, it must identify the individual at an open meeting, prior to closing the meeting.

### **Public Notice of Time and Place for Meetings: Requirements for Agendas**

The OML establishes the following notice and agenda requirements:

#### *Regular Meetings:*

Public bodies must keep schedules of regular meetings on file at their offices.

If a person receives actual notice of meeting of a public body at least 24 hours before the meeting, all notice requirements of the OML are satisfied with respect to that person regardless of the method of receiving notice.

A schedule of the regular meetings is on file in the City Clerk's office and available to City staff and the public. If there is a deviation in the meeting time or place, notice must be provided as required for a special meeting.

*Special Meetings:*

The public body must give three days' written notice of the date, time, place and purpose of a special meeting. The notice of a special meeting shall include the "purpose of the meeting" and be posted on the principal bulletin board of the public body, or if the public body has no principal bulletin board, on the door of its usual meeting room.

In addition to posting the notice, the public body must mail or deliver a copy of the notice to each person who has filed a written request for notice of special meetings with the public body.

*Emergency Meetings:*

There is no time limit for giving notice of an emergency meeting, though the statute provides that notice must be given "as soon as reasonably practicable after notice has been given to the members."

*Closed Meetings:*

Notably, the OML requires public bodies to comply with the notice provisions listed above for all meetings for closed meetings.

The Minnesota Supreme Court has held that the OML must be construed to require "adequate" notice to the public. *Sullivan v. Credit River Township*, 299 Minn. 170, 174, 217 N.W.2d 502, 506 (1974). The Court has further stated that conducting business before the time publicly announced for the meeting constitutes an OML violation. *Merz v. Leitch*, 342 N.W.2d 141 (Minn. 1984).

The OML fails to specify agenda requirements for meetings covered by the statute. If printed materials relating to agenda items are prepared by or at the direction of the governing body, and are distributed or available to those members, one copy of these same materials must be available in the meeting room for inspection by the public.

**Recordkeeping for Meetings: Minutes Requirements**

The OML does not specifically require that minutes be taken of events occurring at a regular meeting. The only statutory requirement is that votes taken at a meeting required to be public will be recorded in a journal kept for that purpose, which must be open to the public during normal business hours. The vote of each member must be recorded on appropriations of money, except for payments of judgments and claims and amounts fixed by statute.

### Taping or Filming Meetings

The OML is silent regarding whether meetings may be taped or filmed. However, the Attorney General has opined that an individual may tape a meeting as long as the taping does not have a significantly adverse effect on the order of the proceedings or impinge on constitutionally protected rights. Minn. Op. Atty. Gen., 63a-5, Dec. 4, 1972.

### Are Electronic Mail Communications a Meeting?

OML is silent regarding whether electronic mail communications constitute meetings, and no court decision directly addresses this issue.

### Summary of Pivotal State Supreme Court OML Decisions

Previously, the Minnesota Supreme Court held that parties could seek an order rendering the decision taken at a wrongfully closed meeting invalidated. *Quast v. Knutson*, 276 Minn. 340, 150 N.W.2d 199 (1968). After the state legislature amended the OML to include civil penalties, the Supreme Court concluded that invalidation was not available. *Sullivan v. Credit River Township*, 217 N.W.2d 502 (Minn. 1974).

### Opinion by the Commissioner of Administration

Both public bodies subject to the OML and individuals may seek advice on the application of the law and compliance guidance from the Commissioner of Administration. A governing body or person requesting an opinion of the Commissioner of Administration must pay a \$200 fee if the commissioner decides, within his or her discretion, to issue an opinion. There is no time limit for requesting an opinion from the Commissioner of Administration.

If the Commissioner decides not to issue an opinion, he or she will provide a notice of that decision within 5 days of the receipt of the request. If the Commissioner issues an opinion, it must occur within 20 days of receipt of the request, however, the commissioner may “for good cause” extend this deadline for one additional 30-day period.

Opinions of the Commissioner of Administration are not binding, but a 2008 amendment to OMA has established that a court is now required to give the opinions deference. A governing body that conforms to an opinion is not liable for fines, attorneys’ fees or any other penalty, or forfeiture of office.

### Enforcement

The appropriate mechanism to enforce the OML is to bring an action in district court seeking injunctive relief or damages. There are no time limits on bringing a lawsuit in state court. Notably, the Minnesota Supreme Court has held that courts cannot void the decisions made at meetings that were improperly closed. *Sullivan v. Credit River Township*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (Minn. 1974).

### Penalties for Violation

A person who intentionally violates the OML is subject to a civil penalty up to \$300 for a single occurrence, which cannot be paid by the public body. An individual who intentionally violates the law in three or more legal actions involving the same governmental body forfeits the right to serve on that body for a time equal to the term the person was serving.

### Are Criminal Penalties Assessed Regularly?

Criminal penalties are not available in OML cases.

### Availability of Attorneys' Fees for OML Litigation

The court may award reasonable costs, disbursements, and attorneys' fees of up to \$13,000 to any party in an OML action. Attorneys' fees may not be awarded against a member of the public body unless the court finds there was an intent to violate the law. The court may also award costs and attorneys' fees to a defendant, but it must find the action was frivolous and without merit.

Pursuant to 2008 amendments to the OML, a court now may award monetary penalties or attorneys' fees when it finds "an intent to violate" the statute as opposed to "a specific intent" to violate the statute. Additionally, the court must award reasonable attorneys' fees to a prevailing plaintiff if defendant public body was the subject of a Commissioner of Administration advisory opinion (*i.e.*, the court must give deference to the advisory opinion).

### Whether Attorneys' Fees Are Usually Granted

Attorneys' fees are usually granted to prevailing plaintiffs.

### General Areas Litigated Most Commonly and Typical Outcomes

Minnesota courts have frequently ruled on whether closed sessions were properly convened under the OML. In particular, closing meetings to discuss threatened or pending litigation has engendered substantial litigation. The Minnesota Supreme Court rejected the argument that there should be a *per se* exception to the OML when there is threatened or pending litigation and established a balancing test that must be employed to analyze whether the exception applies. *Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002) (threat of a lawsuit if a city council decision did not support a request did not warrant closing a meeting).

The Supreme Court in *Prior Lake* found that the attorney-client privilege exception only applies when the purposes for the exception outweigh the purposes of the OML. An appellate court following the *Prior Lake* ruling however held that the need for absolute confidentiality, when balanced against purposes of state open-meeting law, justified the closing of the city council's meeting with counsel retained by its insurer, under the OML's attorney-client privilege exception. *Brainerd Daily Dispatch v. Deben*, 693 N.W.2d 435 (Minn.App. 2005).

## CASE IN POINT

**County officials** in Blue Earth County and city officials in Eagle Lake and Mankato have been reported to be walking a thin line regarding conducting public issues over private e-mail. In Eagle Lake, a former city administrator resigned because the City Council discussed public items over e-mail and did not take the matter seriously after they were told that doing so was probably a violation of the OML. The former city administrator brought forth paper copies of e-mails that show council members discussing an upcoming housing project.

Mayor Tim Auringer sent an e-mail to at least three council members describing the project and giving his opinion about it. Another councilman replied with a few questions. Smith reported the matter to the city attorney who found there appeared to be a violation of the OML. The former city administrator claims the city officials disregarded and ignored his protests.

Although the law is unclear about how electronic communications relate to the requirement of transparency under the OML, the state's information Policy Analysis Division has stated that it would be likely that a court would analyze use of e-mail in the same way as it has telephone conversations and letters. One on one meetings between public officials, known as serial meetings, are illegal in under the OML. E-mails and letters can be used to conduct business concerning public issues and build a consensus outside of the public's eye, the sort of activity that the OML is seeking to eliminate.

The entire story can be found at:

[www.mankatofreepress.com/local/local\\_story\\_357191117.html?start:int=15](http://www.mankatofreepress.com/local/local_story_357191117.html?start:int=15)



# Freedom of Information Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<b>Coverage</b>	All public bodies, including legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of the state.	All public bodies, including state agencies, county and other local governments, school boards, other boards, departments, commissions, councils, and public colleges and universities. If an entity receives more than half of its funding through a state or local authority, it is considered a public body.
<b>Public Records Open to Disclosure</b>	Any handwriting, typewriting, printing, photostating, photographing, photocopying and every other means of recording, including letters, words, pictures, sounds or symbols, or combinations thereof, as well as papers, maps, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.	A writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function.
<b>Form of Records</b>	Requestor's choice; can be paper or other medium if public body normally maintains records in that form.	Requestor's choice; can be paper or other medium.
<b>Electronic Mail</b>	E-mails are covered.	E-mails are covered.
<b>Fees for Public Records</b>	Only for actual cost of reproduction and certification; not for cost of labor.	Fees may be charged for the necessary copying of a public record for inspection or providing a copy of a public record to a requestor. Fees also may be imposed for search, examination and review and the separation of exempt information in those instances where failure to charge a fee would result in unreasonably high costs to the public body. The fee must be limited to actual duplication, mailing and labor costs.

MINNESOTA	OHIO	WISCONSIN
<p>All government entities, including state agencies, record-keeping systems, political subdivisions, corporations or non-profits under contract, state university system and school districts, and any officer, board, or authority appointed for an agency or ordinance or any level of local government (counties, districts, charter cities, towns, etc.).</p>	<p>All public bodies, including state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by any alternative school in the state of Ohio kept by a non-profit or for profit entity.</p>	<p>All government “authorities,” including a state or local office, elected official, agency, board, commission, committee, council, department, or public body corporate and politic created by constitution, law, ordinance, rule, or order, and any governmental or quasi-governmental corporation (except for the Bradley Center sports and entertainment corporation).</p>
<p>Regardless of physical form, all information collected, created, received, maintained, or disseminated by the government.</p>	<p>Regardless of physical form, any document, device, or item which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.</p>	<p>Regardless of physical form, all material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved and has been created or is being kept by an authority.</p>
<p>Must be “easily accessible for convenient use.”</p>	<p>Requestor’s choice; can be paper or other medium if public body normally maintains records in that form.</p>	<p>Requestor’s choice; can be paper or other medium.</p>
<p>E-mails are covered.</p>	<p>E-mails relating to office functioning are covered.</p>	<p>E-mails are covered.</p>
<p>If copied amount is less than 100 pages, the fee is limited to 25 cents per page. If over 100 pages, charge can cover actual costs of searching for, compiling, or electronically transmitting the data (including employee time under certain conditions).</p>	<p>Only for actual cost of reproduction and mailing; not for cost of labor.</p>	<p>Only for the “actual, necessary, and direct cost” of reproducing records; not for the cost of labor. Costs associated with locating records may be assessed when more than \$50 is required to locate records.</p>

# Freedom of Information Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p><b>Public Records Exempt from Disclosure</b></p>	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> <li>- records related to litigation</li> <li>- medical records</li> <li>- personnel records</li> <li>- tax assessments</li> </ul>	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> <li>- information or records subject to the attorney-client privilege</li> <li>- law enforcement information</li> <li>- trade secrets</li> </ul>
<p><b>Deadline for Production of Public Records</b></p>	<p>Seven business days, additional seven business days with extension.</p>	<p>Five business days, additional ten business days with extension for unusual circumstances.</p>
<p><b>Denial of a Records Request</b></p>	<p>Public body must, in writing, provide explanation, identify responsible parties, and explain appellate process.</p>	<p>Public body must provide written explanation and inform requestor of right to seek judicial review within five days, or within fifteen days under unusual circumstances.</p>
<p><b>What Information Must a Requestor Provide</b></p>	<p>None. Requestor may provide identification and purpose for a waiver of fees in the “public interest.”</p>	<p>None. Reason for request may be disclosed but cannot constitute effective denial.</p>
<p><b>Appeal Process (Administrative or State)</b></p>	<p>Requestor must appeal denial to the head of the public body in writing. If such administrative appeal is denied or ignored, requestor may file action in circuit court for injunctive or declaratory relief.</p>	<p>Requestor must appeal denial to the head of the public body in writing. If such administrative appeal is denied or ignored, requestor may try to compel disclosure in circuit court.</p>

MINNESOTA	OHIO	WISCONSIN
<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> <li>- law enforcement information</li> <li>- proprietary information and trade secrets</li> <li>- personnel data</li> <li>- private, confidential, nonpublic and protected nonpublic data</li> </ul>	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> <li>- medical records</li> <li>- trial preparation records</li> <li>- records pertaining to adoption hearings</li> <li>- trade secrets</li> </ul>	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> <li>- law enforcement information</li> <li>- proprietary information and trade secrets</li> <li>- patient health care records</li> <li>- personnel records</li> </ul>
<p>“As soon as reasonably possible,” but no exact time period. Ten days for private and summary data.</p>	<p>“Promptly prepared,” but no exact time period.</p>	<p>“As soon as practicable and without delay,” but no exact time period.</p>
<p>Requestor has right to be informed of the specific law or classification that justifies the denial.</p>	<p>Public body must provide explanation, including legal authority. The explanation is not required to be written, unless the requestor so requests.</p>	<p>If oral request, the government authority may deny the request orally unless the requestor asks for a written statement of the reasons for denial within five business days of the oral denial. If written request, a denial or partial denial must be in writing. Reasons for the denial must be specific and sufficient.</p>
<p>None for public and summary data. Specifications vary regarding access to private data and confidential data.</p>	<p>None. Public body may ask for written request, requestor’s identification and reason, but must disclose non-mandatory nature.</p>	<p>None. A requestor does not need to provide his or her identity or the reason why the requestor wants particular records.</p>
<p>No administrative appeal process exists. Requestor may try to compel disclosure in district court. Personally affected individuals have the right to appeal to the government authority administratively regarding their personally identifiable information.</p>	<p>No administrative appeal process exists. Requestor may file a mandamus action to compel disclosure in the court of common pleas.</p>	<p>No administrative appeal process exists. Requestor may bring a mandamus action asking a court to order release of the record or submit a written request to the district attorney of the county where the record is located or to the Attorney General requesting that a mandamus action be brought. Personally affected individuals have the right to appeal to the government authority administratively regarding their personally identifiable information.</p>

COMPARE AND CONTRAST

# Freedom of Information Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p><b>Penalties for Violation</b></p>	<p>None.</p>	<p><i>Punitive damages:</i> Up to \$500. <i>Actual or compensatory damages:</i> awarded by courts.</p>
<p><b>Availability of Attorneys’ Fees for Prevailing Plaintiffs in Litigation</b></p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>
<p><b>Typical Outcome of Request for Attorneys’ Fees by Prevailing Plaintiffs in Litigation</b></p>	<p>Not often awarded.</p>	<p>Not often awarded.</p>
<p><b>Statute of Limitations to File Administrative Appeal or to File Action in Circuit Court</b></p>	<p>None.</p>	<p>FOIA requestors who face a full or partial denial of their records requests may submit a written appeal to the head of the appropriate public body, or may directly file a claim in court within 180 days of the purported denial.</p>

MINNESOTA	OHIO	WISCONSIN
<p><i>Exemplary damages:</i> Between \$1,000 and \$10,000. Civil penalties: Up to \$1,000 awarded by courts, payable to the state general fund.</p>	<p><i>Statutory damages:</i> \$100 per business day, up to \$1,000.</p>	<p><i>Statutory damages:</i> minimum \$100 and other actual costs (except no such recovery by committed or incarcerated persons). <i>Punitive damages:</i> up to \$1,000 for a government authority's custodian who is responsible for an arbitrary and capricious delay or denial.</p>
<p>Yes, but not for <i>pro se</i> plaintiffs.</p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>
<p>Not often awarded.</p>	<p>Not often awarded.</p>	<p>Usually awarded.</p>
<p>None.</p>	<p>None.</p>	<p>When the request comes from a committed or incarcerated person, the claim must be filed within 90 days after the request is denied.</p>

COMPARE AND CONTRAST

# Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p><b>Coverage</b></p>	<p>Any public body, including any legislative, executive, administrative, or advisory bodies of the state, counties, townships, cities, villages, incorporated towns, school districts, and all other municipal corporations, boards, bureaus, committees, or commissions, and any subsidiary bodies of any of the foregoing. Does not apply to private, non-profit corporations under any conditions.</p>	<p>Any public body, including any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform such a function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement. A board of a nonprofit corporation formed by a city under the Home Rule City Act is a public body, however, courts have found no coverage for a nonstock, nonprofit corporation created independent of state or local authority without the assistance of public funds or generally for private non-profit corporations.</p>
<p><b>Are Committees, Advisory Groups, Sub-Committees Covered?</b></p>	<p>Committees and sub-committees are covered by the law. Advisory committees that are supported in any part by tax revenue or which expend tax revenue are covered by the law pursuant to a balancing test.</p>	<p>Committees and sub-committees are covered by the law so long as they exercise governmental authority or perform a governmental function. Advisory groups are not expressly covered under the law. The Attorney General has suggested there is no coverage, however state appellate courts have found advisory committees subject to coverage in certain cases.</p>
<p><b>Types of Gatherings Covered</b></p>	<p>Coverage extends to a gathering of a majority of a quorum to discuss public business.</p>	<p>Coverage extends to any meeting of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under the Home Rule City Act. Also covered are information-gathering and fact-finding sessions called by the governmental body where a quorum of members are present and the session relates to the body's public business.</p>

MINNESOTA	OHIO	WISCONSIN
<p>Any public body, including any state agency, board, commission, or department when it is required or permitted by law to transact public business in a meeting, the governing body of any school district, unorganized territory, county, city, town, or other public body, and a committee, subcommittee, board, department, or commission of a public body subject to the law. A 2000 amendment established that corporations created by political subdivisions are subject to coverage.</p>	<p>Any public body, including any board, commission, committee, council, or similar decision-making body of a state agency, any county, township, municipal corporation, school district, or other political subdivision. Coverage can be trumped by individual city charters due to the home rule provision in the State Constitution.</p>	<p>Any public body, including state or local agencies, commissions, departments, and councils. The law also applies to the state Legislature, but not to a partisan caucus of the Senate or Assembly. Governmental or quasi-governmental corporations are also covered by the law. The statute does not address coverage for non-profit corporations, though Attorney General opinions lean toward coverage for non-profits as quasi-governmental entities.</p>
<p>Committees and sub-committees are covered by the law. Advisory groups are not expressly covered under the law, but courts have held that an advisory committee may be covered depending on the number of members of the governing body involved and on the form of the delegation of authority from the governing body to the members.</p>	<p>Committees and sub-committees are covered by the law. Advisory groups are not expressly covered under the law and Ohio courts are split on whether advisory groups constitute public bodies.</p>	<p>Committees and sub-committees are covered by the law. Bodies created by a directive and advisory bodies created by a constitution, statute, ordinance, rule, or order and bodies created by a directive are also covered.</p>
<p>Coverage extends to gatherings of a governing body reaching a quorum, or a quorum of a committee, subcommittee board, department or commission at which members discuss, decide or receive information as a group on issues relating to the official business of that governing body.</p>	<p>Coverage extends to a prearranged meeting of a public body in which a majority of its members attend and discuss public business.</p>	<p>Coverage extends to gatherings of a majority of the public body where the body meets to engage in business, including discussion, decision, or information-gathering on issues within the body's responsibilities. A negative quorum (sufficient number of members to determine a public body's course of action if the group votes as a block) or walking quorum (series of meetings, telephone conferences, or some other means of communication such that groups of less than a quorum are effectively meeting) can satisfy the majority requirement.</p>



# Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p><b>Exemptions: Closed Meetings</b></p>	<p>A meeting may be closed under 24 exemptions. Examples include personnel matters, purchase of property, probable or imminent litigation and collective bargaining.</p>	<p>A meeting may be closed under 10 exemptions. Examples include personnel matters, purchase of property, pending litigation and collective bargaining.</p>
<p><b>Public Notice of Time and Place for Meetings: Requirements for Agendas</b></p>	<p>Public bodies must post an agenda for each regular meeting at least 48 hours in advance at both the principal office of the public body and at the meeting location. A schedule listing the times and places of regular meetings must be available at the office of the public body. A public body that has a website maintained by the full time staff of the public body must post all agendas and notices on its website regarding all public body meetings.</p>	<p>Public bodies must post a notice containing the dates, times, and places of the public body’s regular meetings, as well as the name of the public body, its telephone number and its address at least 18 hours before a meeting. It is required that public bodies post this notice at their principal office and any other location deemed appropriate.</p>
<p><b>Procedures for Closed Meetings</b></p>	<p>A majority of a quorum of the public body must vote to hold a closed meeting. The vote of each member and the citation to the specific closed session exemption must be publicly disclosed and entered into the minutes of the meeting.</p>	<p>A 2/3 roll call of members of the public body is required, except for the closed sessions permitted. The roll call vote and the purpose for calling the closed session must be entered into the minutes of the meeting where the vote takes place.</p>

MINNESOTA	OHIO	WISCONSIN
<p>A meeting <i>must</i> be closed for a limited range of subjects, for instance if data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults, to discuss data regarding educational data, health data, medical data, welfare data, or mental health data that are not public data or for preliminary consideration of allegations against an individual subject to the government's authority. A meeting may be closed under limited conditions, for instance if disclosure of the information discussed would pose a danger to public safety or compromise security, for labor negotiations purposes, purchase of property or attorney-client privileged matters.</p>	<p>A meeting <i>may</i> be closed under 8 exemptions. Examples include personnel matters, purchase of property and collective bargaining.</p>	<p>A meeting <i>may</i> be closed under 11 exemptions. Exemptions include personnel matters, purchase of property, pending litigation and collective bargaining.</p>
<p>Public bodies must keep schedules of regular meetings on file at their offices. The law fails to specify agenda requirements for meetings covered by the statute. However, if printed materials relating to agenda items are prepared by or at the direction of the governing body, and are distributed or available to those members, one copy of these same materials must be available in the meeting room for inspection by the public. No time limit is provided in the statute for posting notices for regular meetings, though special meetings require at least three days' notice.</p>	<p>Public bodies must establish at least one reasonable method of informing the public of meetings (sign on the front door of town hall, published information in a general circulation). News media must be informed at least 24 hours before meetings (exempting emergency meetings).</p>	<p>Public notice must contain the time, date, place, and subject matter of the meeting, including issues that will be considered in a closed session. No detailed agenda is required. The public body must provide 24-hour notice of a meeting, which may be accomplished by posting in places likely to be seen by the public. The Wisconsin Attorney General has suggested a minimum of three locations.</p>
<p>A public body must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed. Special provisions apply to close a meeting to discuss labor negotiations or to evaluate the performance of an individual subject to the government's authority.</p>	<p>The public body must hold a roll call vote and have a majority of the quorum vote to enter executive session. The motion and vote must state which one or more of the closed session exemptions will be considered at the executive session.</p>	<p>The chief presiding officer must announce and record the nature of the business to be discussed and the closed session exemption that allows for the closed session. Then, the public body must pass a motion, by recorded majority vote, to meet in closed session.</p>

COMPARE AND CONTRAST

# Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p><b>Recordkeeping for Meetings: Minutes Requirements</b></p>	<p>Minutes must include the date, time and place of the meeting, the members of the body recorded as present or absent and a summary of discussion on all matters proposed, deliberated or decided, and a record of any votes taken.</p>	<p>Meeting minutes must be kept for each meeting showing the date, time, place, members present or absent, any decisions made, the purpose for which a closed session is held and all roll call votes taken at the meeting. Proposed minutes must be made available for public inspection within 8 business days after the meeting to which the minutes refer, and approved minutes must be available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.</p>
<p><b>Taping of Filming Meetings</b></p>	<p>Taping or filming meetings is permissible so long as it does not interfere with the meeting.</p>	<p>Taping or filming meetings is permissible so long as it does not interfere with the meeting.</p>
<p><b>Are Electronic Mail Communications a Meeting?</b></p>	<p>Email and Internet chat room communications are considered communications for meeting purposes under the law.</p>	<p>The law does not address whether electronic mail communications are meetings.</p>
<p><b>Enforcement</b></p>	<p>State's Attorneys and individuals may sue to enforce the law in the circuit court. The Public Access Counselor's Office has no punitive authority but may respond to citizen's complaints and occasionally refers potential violations to the State's Attorney for investigation.</p>	<p>Individuals, the Attorney General, and the prosecuting attorney of the appropriate county all have the authority to enforce the law by filing a civil action in the circuit court to compel compliance or to enjoin further noncompliance.</p>

MINNESOTA	OHIO	WISCONSIN
<p>The law does not specifically require that minutes be taken at a regular meeting. The only statutory requirement is that votes taken at a meeting required to be public will be recorded in a journal kept for that purpose, which must be open to the public during normal business hours.</p>	<p>Minutes of regular or special meetings of any public body need to be prepared promptly, filed, and maintained so that they are available to public inspection.</p>	<p>Governmental bodies do not need to keep detailed minutes of their meetings. The body must keep a record of the motions and roll call votes at each meeting. Statutes outside the Open Meetings Law require the county, village, and city clerks to keep a record of proceedings of their governing bodies.</p>
<p>The law does not specifically address, however, a Minnesota Attorney General's Opinion states that taping is permissible if it does not have a significantly adverse effect on the order of the proceedings or impinge on constitutionally protected rights.</p>	<p>The law does not specifically address, however, an Ohio Attorney General's Opinion states that taping or filming meetings is permissible if it does not unduly interfere with a meeting.</p>	<p>Taping or filming meetings is permissible so long as it does not interfere with the meeting.</p>
<p>The law does not address whether electronic mail communications are meetings.</p>	<p>The law does not address whether electronic mail communications are meetings.</p>	<p>The law does not address whether electronic mail communications are meetings, but the state Public Records Law lists "electromagnetic information" in its definition of a record and courts interpreting that law have held that e-mail and other electronic records must be released on request.</p>
<p>Only individuals may sue to enforce the law in a district court.</p>	<p>Only individuals may sue to enforce the law in a court of common pleas. However, if a citizen suit results in an injunction against a public body, the attorney general or prosecuting attorney is responsible for bringing an action against officials who violate the injunction.</p>	<p>Individuals, the Attorney General and the district attorney have the authority to enforce the law in circuit court (though an individual must first file a verified complaint with the district attorney for his or her office to prosecute the case).</p>

# Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<b>Relief/Penalties for Violation</b>	Available relief and penalties include mandamus, invalidation, injunction, costs and attorneys' fees. Criminal penalties include a fine of up to \$1,500 and imprisonment of up to 30 days.	Available relief and penalties include injunction, invalidation, damages up to \$500, criminal fines, costs and attorneys' fees. Criminal penalties for an intentional violation by a public official include a misdemeanor punishable by a fine of up to \$1,000, and a second intentional offense subject to a misdemeanor punishable by a fine of up to \$2,000 and/or imprisonment for up to 1 year.
<b>Are Criminal Penalties Assessed Regularly?</b>	Criminal penalties are rarely imposed for violations.	Criminal penalties are rarely imposed for violations.
<b>Availability of Attorneys' Fees for OMA Litigation</b>	Attorneys' fees are available for a prevailing party, but not for <i>pro se</i> plaintiffs.	Attorneys' fees are available where a violation was intentional and the plaintiff is successful, but not for <i>pro se</i> plaintiffs. Attorneys' fees will not be granted unless injunctive or declaratory relief is granted.
<b>Whether Attorneys' Fees are Usually Granted</b>	Attorneys' fees are usually not granted to prevailing parties.	Attorneys' fees are generally awarded when declaratory or injunctive relief is granted to a plaintiff.
<b>Public Comment Mandated at Public Meetings?</b>	No public comment required	Public comment <i>required</i>
<b>Statute of Limitation to File Lawsuit</b>	60 days	An action for injunctive relief must be filed within 180 days of the alleged violation. Litigation which seeks to invalidate a decision of a public body must be initiated within 60 days of the approved minutes, or within 30 days for decisions involving property, money, contracts or bond issuance.

MINNESOTA	OHIO	WISCONSIN
<p>Available relief and penalties include injunction, damages up to \$300, costs, attorneys' fees and removal from office. In addition, if a person is found to have intentionally violated the statute in three or more actions involving the same governing body, that person must forfeit any further right to serve on the governing body for a period of time equal to the term of office such person had served.</p>	<p>Available relief and penalties include injunction, \$500 civil forfeiture fine, costs, attorneys' fees, invalidation and removal from office. If the court deems the plaintiff's action was frivolous, the court may award all court costs and reasonable attorneys' fees to the public body.</p>	<p>Available relief and penalties include declaratory relief, injunction, mandamus, invalidation, damages from \$25 to \$300, costs and attorneys' fees.</p>
<p>Criminal penalties are not available for violations.</p>	<p>Criminal penalties are not available for violations.</p>	<p>Criminal penalties are not available for violations.</p>
<p>The court may award reasonable costs, disbursements, and attorneys' fees of up to \$13,000 to any prevailing party, but attorneys' fees may not be awarded against a member of the public body unless the court finds there was an intent to violate the law. Public bodies may recover attorneys' fees for frivolous lawsuits brought by plaintiffs without merit.</p>	<p>Attorneys' fees are available for a prevailing party if the court issues an injunction, but not for <i>pro se</i> plaintiffs. Public bodies may recover attorneys' fees for frivolous lawsuits brought by plaintiffs.</p>	<p>Attorneys' fees are available for a prevailing party, but not for <i>pro se</i> plaintiffs.</p>
<p>Attorneys' fees are usually granted to prevailing plaintiffs.</p>	<p>Attorneys' fees are generally granted to plaintiffs who prevail in winning injunctive relief. However, they are rarely awarded to defendant public bodies for frivolous lawsuits.</p>	<p>Attorneys' fees are usually granted to prevailing plaintiffs.</p>
<p>No public comment required</p>	<p>No public comment required</p>	<p>No public comment required</p>
<p>No time line</p>	<p>Two years</p>	<p>Once an individual files a verified complaint, the District Attorney has 20 days to enforce the law. After 20 days, if the District Attorney does not begin an enforcement action, the individual can bring the action in the name of the state for up to two years.</p>