FYi

From the Information Policy Analysis Division

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Can I make a FOIA request in Minnesota?

Every so often IPAD receives a question from a customer asking how to make a request under the Freedom of Information Act or a "FOIA request." We explain that Minnesota government entities aren't subject to FOIA and that a request for information should be made under Minnesota's open records and privacy law – the Government Data Practices Act (Minnesota Statutes, Chapter 13). This type of question is frequent enough that we decided to highlight some similarities and differences in FOIA and Chapter 13.

The public has a right to information. Both laws give the public rights to access government data. FOIA operates on the premise that federal agency records are accessible unless protected from disclosure by nine broad exemptions and three law enforcement exclusions; whereas, Chapter 13 presumes all government data are public unless protected by a specific classification in state law or by federal law. Minnesota's system of strict classification is unique among other states (which mostly follow the FOIA model) in that only the Legislature may classify data. Government entities generally do not have discretion to release not public data.

Quick Facts

- FOIA is short for the Freedom of Information Act, 5 U.S.C. § 552, originally enacted in 1966
- FOIA only applies to data maintained by federal agencies
- Chapter 13 only applies to data maintained by certain MN government entities
- Both FOIA and Chapter 13 require requests to be sent to the agency or entity that maintains the data – there isn't one central office that answers requests

FOIA's exemption and exclusion scheme. Federal agencies are not required to release data that fall under one of nine "exemptions" (such as internal personnel rules or individual personal privacy) or three "exclusions" (records are not subject to FOIA). Agencies have certain discretion to release data that fall within an exemption which, compared to Minnesota's classification system, are more general in nature and the courts play a significant role in interpreting their application. Unlike a Minnesota government entity, a federal agency is not required to respond to requests that fall under the exclusion category, which means it need not acknowledge the existence of data. Exclusions are limited to certain types of criminal investigations or foreign intelligence. (*See 5 U.S.C. § 552(b) and (c); 74 Fed. Reg. 4683 (Jan. 26, 2009)*).

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The following are some significant differences in FOIA and Chapter 13.

Charging for inspection

FOIA: An agency cannot charge for the first two hours of search time. For search time beyond two hours, an agency can charge for recovery of certain direct costs related to search, duplication or review. (*5 U.S.C. § 552(a)(4)(A)(iv)(II)*)
Chapter 13: Inspection of government data is always free. (*Minn. Stat. § 13.03, subd. 3*)

Response time to a request

FOIA: Generally, an agency must respond to requests within 20 business days, although the time period may be extended depending on various circumstances. (*5 U.S.C. § 552(a)(6)*)
Chapter 13: Responses to requests from a data subject must be immediate if possible, or within ten business days. Responses to requests for public data must be in a prompt manner and within a reasonable time. A reasonable response depends on the nature of the request. (*Minn. Stat. § 13.03, subd. 2(a); Minn. Rules, part 1205.0300*)

Fees for copies

FOIA: There is usually no charge for the first two hours of search time or for the first 100 pages of duplication. Fees may be reduced or eliminated if disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not for a commercial purpose. However, there is no *in forma pauperis* status (unable to pay fees) in FOIA. A requester may be required to pay fees even if a search does not locate records responsive to the request, or if the records are exempt from disclosure. (*5 U.S.C. §552(a)(4)(A)*)
Chapter 13: Government entities may charge for copies of data. Paper copies of public data are 25¢ per page for the first 100 pages. All other charges for copies of data involve "actual cost." An entity can never charge the time it takes to separate public from not public data. (*Minn. Stat. § 13.03, subd. 3(c) and § 13.04, subd. 3*)

Request to expedite or process requests faster than usual

FOIA: Requesters, under certain circumstances, may be entitled to have a request processed on an expedited basis. While the situation varies for each agency, every agency will allow one:

1. If the lack of expedited treatment could reasonably be expected to pose a threat to someone's life or physical safety, or
2. If an individual will suffer the loss of substantial due process rights.

A request will not normally be expedited merely because the requester is facing a court deadline in a judicial proceeding. (*5 U.S.C. § 552 (a)(6)(E)*)
Chapter 13: There is no expedited process request available under Chapter 13. IPAD encourages requesters to work with government entities to create a timeline that works for both parties.

Quick Facts

- FOIA requests generally must be in writing (5 U.S.C. § 552(a))
- Chapter 13 requests are not required to be in writing, but an entity's policy may require it (advisory opinion 95-030)
- Neither FOIA nor Chapter 13 requires an agency or entity to do research for you, analyze data, answer written questions, or create records in response to your request

While FOIA and Chapter 13 work in different ways, they each serve as a valuable tool to learn more about your government. For more information about FOIA, visit IPAD's website at www.ipad.state.mn.us and click on our external links page.

Advisory opinion highlights

Data in Automatic Crime Mapping Program

Opinion 12-014: A County asked whether implementing a web-based automated crime mapping program would violate the rights of data subjects. The Commissioner opined that certain data subjects' rights could be violated by the automated system as described by the County. The program, which uploads law enforcement data to the program automatically each evening, did not allow for the County to perform its duty to exercise discretion in certain situations as required by Minnesota Statutes, section 13.82.

Charter School Data

Opinion 12-015: A charter school asked whether it was required to share not public data with the Minnesota Board of Teaching, following an initial report to the Board by the school. The Commissioner determined that pursuant to Minnesota Statutes, section 122A.20, a school is required to share with the Board any termination or disciplinary proceeding, any settlement or compromise, or any investigative file in the school's files, regardless of any provision in Chapter 13.

Elections Related Data

Opinion 12-016: A newspaper asked whether a county responded appropriately to its request for access to voter challenge status data. The County responded that the names and/or numbers of voters whose eligibility was challenged by the County were not accessible to the public under Minnesota Statutes, section 201.091. Section 201.091, subdivision 1 restricts access to the "master list"; however, voter challenge status is not an element on that list. Subdivision 2 grants access to the "public information list" as well as "other information from the statewide registration system." Based on the plain language of the law, Minnesota Rules, part 8200.9120, and advisory opinion 00-038, the Commissioner opined that the newspaper should have been given access to the voter challenge status data.

Data Maintained by a County Attorney

Opinion 12-017: A reporter asked a county attorney for access to data about a crime lab. The attorney stated to the Commissioner that the requested data are used, collected, stored and disseminated exclusively in connection with his professional activities as a prosecuting attorney, and that the crime lab data relate to on-going as well as previous criminal prosecutions. As such, pursuant to Minnesota Statutes, section 13.393, those data are exempt from disclosure.

The Commissioner did not review the data in question and cannot determine whether the county attorney maintains any other data regarding the crime lab that are not exempt from disclosure under section 13.393. For example, if the county attorney maintains data related to any agreements his office has entered into with the lab, those data likely are not protected by section 13.393.

Caselaw update

In ***State v. Hokanson***, ___N.W.2d___ (Minn. 2012), [No. A11-0359, A11-2227 (Minn. Oct. 3, 2012)], appellant alleged that the District Court violated his constitutional right to present an alternative perpetrator defense by denying him full access to requested protected data, including full access to certain social services child protection data.

The Minnesota Supreme Court held that the District Court did not err by reviewing the privileged data *in camera (or "in private")*. Although individuals do have a broad right to discovery, for presenting an alternative perpetrator defense, that right does not extend to data that is protected under law. If the defendant establishes that the information would be plausibly material and favorable to his defense, the District Court may screen privileged data, *in camera*, to balance the defense rights of the defendant against the privacy rights of victims and witnesses.

In ***Helmberger v. Johnson Controls Inc.et al.,*** ___N.W.2d ___ (Minn. Ct. App. 2012), [No. A12-0327 (Oct. 9, 2012)], plaintiff newspaper publisher alleged a violation of the Minnesota Government Data Practices Act (Minnesota Statutes, Chapter 13) after a school district's contractor refused to release a copy of a school construction and renovation subcontract. The case was dismissed by an administrative law judge for failing to demonstrate probable cause that the contractor violated Chapter 13 and because the subcontract did not involve the performance of a governmental function within the meaning of Chapter 13.

On appeal, the Court of Appeals reversed and remanded, holding that the contractor was performing a governmental function within the meaning of Chapter 13 when it provided project management, construction, and architectural services to the school district. A petition for certiorari (request for review) to the Supreme Court is pending.

Ramsey County District Court Judge John H. Guthmann issued an order on October 31, 2012 (***National Council on Teacher Quality v. Minnesota State Colleges and Universities, et al.,*** File No. 62-CV-12-4789), requiring the Minnesota State Colleges and Universities (MnSCU) to provide course syllabi to the National Council on Teacher Quality (NCTQ) per NCTQ's request under the Minnesota Government Data Practices Act (Minnesota Statutes, Chapter 13). MnSCU originally denied NCTQ's request on the basis that the syllabi are intellectual property of the teacher-authors and MnSCU did not have authority to release them absent faculty member consent. MnSCU offered NCTQ the opportunity to inspect the syllabi without providing copies.

In an issue of first impression, Judge Guthmann determined that compliance with Chapter 13 – to provide NCTQ copies of public data – would not compel a violation of the Federal Copyright Act (FCA), because NCTQ proposes a fair use of the syllabi as defined in the FCA. Therefore, providing copies of the syllabi for fair use would give effect to both the Federal and State laws.