



Government data expert Don Gemberling

Improve enforcement of Data Practices Act, increase transparency of Legislature

A Minnesota Legislative Process Interview

June 15, 2018

Present

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Summary

According to Don Gemberling of the Minnesota Coalition on Government Information (MNCOGI), in 1974, the Minnesota Legislature became the first political system in North America to pass a law, later titled the Data Practices Act, dealing with the regulation of the collection and use of personal information by the government. The Legislature tasked the state Department of Administration with implementing the law and Gemberling was put in charge of that work. He says there is a lot of ignorance-both among the general public and in the Legislature-about existing laws governing information, data privacy and transparency.

Gemberling decries the lack of transparency in the Legislature and points to the 2018 Omnibus Appropriation bill, which was 989 pages long. He notes that bills are required by Minnesota's State Constitution to relate to only a single subject, but says no one is enforcing the requirement. He believes the courts could force the Legislature to abide by the single-subject rule. Or citizens could tell legislators they can't do business the way they're doing it today, he says.

Gemberling relays an example of an individual having to go to court to get the Hennepin County Sheriff's Department to release public data under the Data Practices Act. Gemberling says part of the reason for government's response to public data requests is that they know most people won't sue. He says the media used to be the pillars of enforcement of the Data Practices Act, but it's rare now for the media to sue to get public data released.

Gemberling calls for better enforcement of the Data Practices Act. He says that over the past 25 years, three different citizens groups looking at ways to improve the law have all recommended creation of an entity, probably in state government, to enforce the Data Practices Act and the Open Meeting Law. The response from the Legislature, he says, has been that legislators weren't going to create more government or spend more on government.

He points out that the Canadian province of Ontario has an Information and Privacy Commissioner with more than 100 employees charged with enforcing access to government information. Gemberling recommends that model.

Biography

Don Gemberling serves on the board of the Minnesota Coalition on Government Information (MNCOGI), where he is a member of the board's Legislative Committee. He also serves as MNCOGI's spokesperson and testifies before the Legislature.

He began working professionally with issues of transparency, governmental accountability, the implications of technology on humans, and data privacy in 1973. For over 30 years, he was the only staff member or managed functions in the Minnesota Department of Administration that involved helping government agencies comply with the Data Practices Act and related law and helping citizens exercise their rights under those laws. He retired in 2004.

Gemberling received a B.A. degree from Macalester College and a J.D. degree from William Mitchell College of Law. He is available to answer questions and enjoys training citizens in how best to use transparency and data privacy laws.

Background

Continuing its focus on Minnesota's competitiveness, the Civic Caucus has been undertaking a review of the quality and effectiveness of Minnesota's legislative process. The Civic Caucus interviewed Don Gemberling of the Minnesota Coalition on Government Information (MNCOGI) to learn more about access to public information under the Minnesota Data Practices Act and making government, including the Legislature, more transparent.

About the Minnesota Coalition on Government Information (MNCOGI). According to its [website](#), MNCOGI adheres to the following principles:

- Democratic government is possible only if individuals have access to the government information they need in order to hold their government accountable.
- Government at all levels has a responsibility to promote public participation by support of open access to all public government information.
- Government information, regardless of physical form, must always, to the greatest extent possible, be available to the public. Government information is broadly defined to include all data held by the government, including databases, information accumulated from raw data, documents, reports, maps and other publications, and all forms of correspondence.

- Creation and preservation of government information that documents governmental operations are fundamental parts of assuring government accountability.
- Research and public education about access to and availability of government information are essential to preserve and improve public access.

To support these principles, MNCOGI sponsors presentations by experts, hosts a speakers bureau, offers information on its website about how to use Minnesota law to access government information, hosts a blog for discussion of issues about access to government information, and promotes and supports research on these topics.

Civic Caucus Chair Paul Ostrow is also a member of MNCOGI'S board of directors.

Discussion

In 1974, the Minnesota Legislature became the first political system in North America to pass a law, later titled the Data Practices Act, dealing with the regulation of the collection and use of personal information by the government. Minnesota Coalition on Government Information (MNCOGI) board member Don Gemberling said that in 1973, when he began his career working on information issues in the state Department of Administration, discussions were taking place about what government ought to do about the collection and maintenance of personal information. A mixed citizen and government official committee he was assigned to staff was looking into what the state should do about issues of privacy.

Gemberling said one of the things the committee did was to give feedback about a piece of legislation dealing with these issues introduced by state Rep. John Lindstrom (DFL-Willmar). In the 1974 legislative session, state Sen. Robert Tennessen (DFL-Minneapolis) introduced bills relating to "fair information practices." A compromise Data Practices Act passed at the end of the 1974 legislative session. The Legislature tasked the Department of Administration with implementing the law and Gemberling was put in charge of that work.

Gemberling said that by 1979, the Data Practices Act had, with a big push from the media, evolved into the Minnesota counterpart of a freedom of information act, including a presumption that all government data are public

He said he spent 30-plus years answering questions from government people on the Data Practices Act and, later, other laws like the Family Educational Rights and Privacy Act and the Minnesota Medical Records Act. In addition, he became a resource to the Legislature on making policy in this area.

Part of the reality of policy in this area is that there are high degrees of ignorance about it.

Gemberling said we have a lot of law dealing with information, data privacy and transparency, but the vast majority of people don't know about these laws or understand them. He said that kind of ignorance has become quite rampant in the Legislature. "That's one of the issues the Minnesota Coalition on Government Information (MNCOGI) tries to work on," he said.

He said MNCOGI offers "Cogitations" every quarter, which are public meetings on various information-related topics. A Cogitation in June 2018 dealt with sexual harassment and the lack of transparency about that issue in the Legislature. An earlier Cogitation dealt with retention of government information and how easy it is to destroy public information, especially e-mails. Gemberling said the Cogitations draw groups interested in a specific topic, reporters, citizens, government officials, policy people and, occasionally, legislators.

There is a lack of transparency in the Legislature. Gemberling displayed a copy of the 2018 Omnibus Appropriation Bill, which was 989 pages long. Its title alone was five and one-half pages long. He said the Legislature did not print copies of the bill for citizens or individual legislators. Each legislative body, he said, was provided with only 10 copies of the bill. "Legislators had to stand in line and try to look at it," he said.

He noted that legislative bills are required by Minnesota's State Constitution to relate to only a single subject, which must be included in the title. He said he believes that requirement must be enforced.

Former Minnesota State Senator Jack Davies (DFL-Minneapolis) and current State Senator John Marty (DFL-Roseville) are separately looking for plaintiffs for lawsuits aimed at enforcing the single-subject requirement. Gemberling said the courts could force the Legislature to abide by the single-subject rule. Or citizens could tell legislators that they can't do business the way they're doing it today, he said.

"I don't see anything suggesting how to do that," an interviewer responded. "Who can suggest one thing to change it?"

(Note: In September 2017, the Civic Caucus joined the American Civil Liberties Union and 16 other *amicis* on the *Rebecca Otto vs. Wright County* lawsuit before the Minnesota Supreme Court. The Civic Caucus and the other *amicis* were supporting the part of the lawsuit that claimed the single-subject rule had been violated by the Legislature in the law it passed allowing outside auditors to audit local governments. In April 2018, the Supreme Court eventually ruled against Otto and made no separate ruling on the single-subject question of the lawsuit. [See Civic Caucus news release on the *amicis*/filing.](#))

In Minnesota today, if you do the right paperwork, you can essentially dump any government information you want to dump in a period of 30 days or less. Gemberling said a bill was introduced at the Legislature two years ago requiring that government e-mail messages be kept for a minimum of six months. He and another MNCOGI volunteer appeared before the House Government Operations Committee, where each of the bill's proponents and opponents-including lobbyists for a number of government associations-was given five minutes to testify.

"Explaining how the state historically has dealt with issues of data retention is not a story you can tell in five minutes," he said. "I did the best I could."

He said there were a number of lobbyists at the hearing representing local governments, such as the Association of Minnesota Counties, the League of Minnesota Cities and the Minnesota School Boards Association. "Every one of those lobbyists is there on my tax dollars, since the organizations

are financed by member dues," Gemberling said. "They've come to understand how transparency is threatening to them. The bill didn't go anywhere at the end of the hearing."

He also noted that once a person leaves state employment, the I.T. group in state government automatically deletes the person's emails after 30 days.

In the "glory days" of the Legislature dealing with these data issues, part of the reason things worked reasonably well was there were legislators who cared. Gemberling mentioned the following legislators as among that group: Sen. Robert Tennessen (DFL-Minneapolis), Sen. Gene Merriam (DFL-Coon Rapids), Sen. Don Betzold (DFL-Fridley), Rep. John Lindstrom (DFL-Willmar), Rep. Tom Pugh (DFL-South Saint Paul), Rep. Mary Liz Holberg (R-Lakeville) and, currently, Rep. Peggy Scott (R-Andover).

"They would take the time to sit down and discuss what's going on, why it's important and what might be able to be done about it," Gemberling said. "And then they would act on that."

The most critical problem is lack of enforcement. Gemberling said Tony Webster, an information technology professional, is quite concerned with what law enforcement is doing with technology. He went to the Hennepin County Sheriff's Office several months ago and asked, under the Data Practices Act, for access to all of the office's e-mails that include terms like facial recognition technology, unscrambling cell phones, imaging technology and more. "The Hennepin County Sheriff's Office blew him off," Gemberling said. "They basically said nothing."

Gemberling explained that under the Data Practices Act, a person wanting access to public information has a right to that access in a reasonable amount of time. He said opinions regarding the Data Practices Act have clearly said that no response is *not* an appropriate response under the law.

Gemberling said Webster went back to the Sheriff's Office and asked for the information and threatened to sue if he didn't get a response. After getting no response, he did sue the Sheriff's Office. The Minnesota Supreme Court recently decided that the Sheriff's Office providing no response to the data requester wasn't appropriate under the Data Practices Act. Hennepin County had also argued before the Court that the data request was burdensome and that people shouldn't be able to make burdensome requests under the law. The Court called that argument not a real argument, even though this particular request was a large one.

Gemberling noted that the Data Practices Act doesn't require that the government provide data in a certain amount of time. "I used to advise agencies that if they received a large data request, they should respond that they would provide the data, but it might take six or eight months," he said. "Someone suing about the length of time involved will not win."

"Part of the government response in the real world is that they know most people won't sue, because they don't have the money to sue or they're Minnesota Nice," Gemberling said. "It used to be that the pillars of enforcement were the media. But with the changes in the media, they will sue sometimes, but not as often as they used to. It rarely happens anymore."

Civic Caucus Chair Paul Ostrow, also a member of the MNCOGI board, commented, "Only crazy people sue and I'm one of those people." He said he's been concerned about the money from

Minneapolis taxpayers that's gone into paying for the Minnesota Vikings Stadium, the ramp for Vikings premium ticketholders and The Commons park just outside the stadium, which he said is primarily for the use of the Vikings.

Ostrow said Arlene Fried of [Minneapolis Park Watch](#) had concerns about The Commons park and worked with him to file eight separate Data Practices Act requests related to the park. "The issue she was trying to get at is the myth out there that the parking ramp and The Commons were paid for by magical revenues, not public money," he said. "The fact is that city property taxes are going into paying for these things."

Ostrow said the requests asked for the city's financial projections that the park didn't require public money. He said the city kept offering excuses for not providing the data. Ostrow and Fried asked the Minneapolis Park Board to wait on voting on The Commons until the city provided the information.

But the Park Board went ahead and approved The Commons Park in December and the City Council approved it the next day. "The very next day after the City Council's approval," Ostrow said, "the Minneapolis City Clerk called Fried and said he had her requested information-*after* the final decision was made and 10 months after the data request was made."

The remedy is better enforcement. Gemberling said over the last 25 years, three different citizens groups-including one that was a mixed legislative and executive branch task force-have looked at the Data Practices Act to determine ways in which it could be improved. Every one of the groups, he said, recommended the creation of some entity, probably in state government, to enforce the Data Practices Act and the Opening Meeting Law.

The groups presented their recommendations to the Legislature, along with wording for legislation based on the recommendations, Gemberling said. The language in the proposed legislation was based on models in other states and countries that actually work, he said. The response from the Legislature, he said, was that they weren't going to create more government or spend more on government. "Essentially," he said, "that kills it."

Gemberling said even when people make the argument that the state is already spending significant amounts of money on these issues through things like attorneys' fees and people getting fired, it doesn't carry the day.

Gemberling recommends the Canadian model of enforcing access to government information.

Unlike Europeans, Canadians have a tradition of access to government information, he said. John Finnegan, former editor of the *Pioneer Press*, was a major player in this area for many years, Gemberling said. Finnegan was leery of turning enforcement over to the government, because he thought it might become another way for the government to hide information. But he changed his mind after he became familiar with a Canadian model, Gemberling said.

Gemberling said the Canadian province of Ontario has an Information and Privacy Commissioner, put in place by Ontario's Freedom of Information and Protection of Privacy Act. Gemberling said the last time he was in contact with the Commissioner's office, it had 110 employees.

Ontario's Information and Privacy Commissioner has the following responsibilities:

- Resolving access to information appeals and complaints when government or health care practitioners and organizations refuse to grant requests for access or correction;
- Investigating privacy complaints with respect to personal information held by government or health care practitioners and organizations;
- Ensuring that the government organizations and health information custodians comply with the provisions of the Acts;
- Educating the public about Ontario's access and privacy laws; and
- Conducting research on access and privacy issues, and providing advice and comment on proposed government legislation and programs.

Gemberling said the Ontario office has even developed a public school curriculum teaching the importance of transparency and issues of data privacy.

In the public-policy area, what's not public is whatever the Legislature says is not public in its regulation of government. Gemberling said conflicting case law can be overcome because the Legislature can regulate all levels of government. He said that near the beginning of the deliberations that led to the Minnesota Data Practices Act, the Legislature got into the issue of what ought to be public and what ought not to be public. The methodology the Legislature adopted was to say government data would be put into three piles: (1) a public pile, to which everybody can get access; (2) a private pile, to which only the subjects of the data can access; and (3) a confidential pile, to which no one in the public can get access. But Gemberling said there are problems with putting data into just those three piles.

Could there be too much transparency? Is the problem too much openness? Should people be able to talk behind the scenes in a non-open meeting? An interviewer asked those questions and Gemberling responded, "That has been an undercurrent in this discussion almost since Day One. Part of what is unique in Minnesota is that the Legislature really is in control. Most places have Freedom of Information Acts that spell out very broad categories of things that are exempt from public disclosure. Judges fill in the blanks."

Gemberling said when the basic foundation was being decided, the theory the media had was that if everything was done by the Legislature, the media would have much more influence than with the judges. "That's what they pushed for," he said. "In Minnesota, there must be a statute that specifically says certain data is not available to the public." But, he said, starting about 10 or 15 years ago, the media reduced its presence and coverage about information issues at the Legislature and stopped bringing attention to what's going on there.

He said over the last session, there was hardly anything in the *Star Tribune*, the *Pioneer Press* or *MinnPost* on data issues. "There was no coverage of hearings and discussion," he said.

Is there no market for transparency? An interviewer asked that question and Gemberling said it's partly true. He said there was a time when the media helped create a market for transparency. He noted that John Finnegan wrote frequently about transparency in government in the *Pioneer Press* during the 1970s and 1980s.

Often when the Legislature is faced with a contentious issue, legislators will have someone study the issue. Gemberling said then when the study report is turned over to the Legislature, that's often the last anyone ever hears of it. In contrast, he said, in the 1970s, the Department of Administration did two studies as the Legislature was working on data issues. Those studies became important parts of the information used by the Legislature.

"But what bothers me about the whole process," Gemberling said, "is that we have more information available to everybody than we have had in the entire history of human beings. But it doesn't seem to affect the Legislature. These days, they don't seem to care about information." He noted again the hearing where he was given five minutes to explain the history of records retention in Minnesota.

How can we introduce more transparency at the Legislature? An interviewer asked that question. Gemberling responded that historically, there was nothing transparent in the Legislature. "They didn't announce when committee hearings were to be held and you couldn't come to a conference committee meeting unless you were invited," he said.

"Periodically, the Legislature says it ought to be more transparent," he continued. "But it's always the minority party saying that. The Legislature thinks things work better if they don't have to do them in public."

MNCOGI tries to build a larger constituency for access to public information. Gemberling said a recent article in the *Star Tribune* reported that there are more requests for public data than there ever used to be. He said that gives him some hope. "But there aren't the constituencies out there that one would hope for," he said.

What is a nagging problem facing the Minnesota Legislature where difficulty in getting access to information is preventing legislators from designing a solution to the problem? An interviewer asked that question and Gemberling responded that in theory, the Legislature can get access to everything. He said Legislative Auditor Jim Nobles can take on that fight. His office has access to all related information. Nobles has used that authority when people challenge him, Gemberling said.

"The problem I see with the Legislature is not so much their access to information as how they choose to act on information," he said.