

PUBLIC RECORDS LAWS & DATA

Most, but definitely not all, of the data you might want to use for an analysis would be kept by a government entity of some sort, and should be covered by a federal or state public records law.

The public records law that applies to the data you request will depend on the level of government involved. If the data is maintained by a federal agency (with some exceptions), the pertinent public records law is the U.S. Freedom of Information Act. At the state, county and city level, it will be the public records law of whatever state you are in (often called “sunshine laws”)

In Minnesota, all cities and counties are governed by the "Minnesota Government Data Practices Act" (chapter 13 of the state statutes). Townships, courts and the state legislature are EXEMPT from this law. So this means that court records are not covered by the DPA. But the court system has its own set of “rules” that outline what’s public and what’s not. The state legislature on the other hand is a bit of a beast. They essentially give out what they want, when they want and there’s not much you can do to hold their feet to the fire.

***KEY POINT: Both the Minnesota and federal open records laws have a basic premise that **all data is public unless specifically exempted**. So if someone denies your request for data, they must cite the specific portion of the statute that makes that data non-public. They can't just say "you can't have that." There isn't a place in the law that specifically says “this data is public.” (In MN, there are a couple of strange exceptions to this, however)

This document focuses on Minnesota, but keep in mind that GENERALLY these same concepts and issues will apply for the FOIA and public records laws in other states.

The big issues:

1) How long it takes

Unfortunately Minnesota’s statute is vague when it comes to how long an agency can take to respond. There have been some commissioner opinions, however, that say a delay of about six months is too long. It all depends on the scope of your request, however.

This is something you should ask about before you make your request, especially if you really need the data within a specified period of time. Ask the person you’re dealing with if he/she can give you an estimate on how long it might take to turn around.

Second thing to do: Include a note in your request letter nicely asking them to meet a particular deadline.

The best way to avoid a delay is to regularly check in with the person handling your request. A friendly “What’s the status of my request?” email once a week is a good idea. Be sure to do this via email so you have a paper trail.

Electronic data is particularly problematic because usually an agency has just one or two people who are capable of exporting data from the database. I’ve run into numerous occasions

where I had to wait for data because the “data person” was on vacation or tied up with some other project.

As a result of this, you need to be prepared that your data might not arrive in the timely fashion that you had hoped. Planning ahead is key.

****KEY POINT: Always, always pick up the items you requested, even if your deadline has passed and it’s too late to use it. An agency won’t take you seriously next time if you don’t follow through.

2) What’s public vs what’s non-public

Minnesota law says agencies are SUPPOSED to keep their data in such a way that private information is stored separately from public information, or at least that it’s very easy for an agency to separate the two when data is requested. Unfortunately, this doesn’t happen as often as it should.

It’s highly UNLIKELY that an entire database would be deemed non-public. Typically there are just portions of a database that need to be redacted— usually certain fields/columns; sometimes certain records (like juveniles are not included in arrest records).

For example, a government agency’s payroll database would contain fields, such as Social Security Number, date of birth, home address, that agencies can exclude when they give you a copy. Police agencies are also allowed to withhold payroll records for undercover detectives (so in this case, entire rows of data would be left out)

It’s incumbent upon the agency to give us the public stuff if we request it, but to use their own money/time to separate out the non-public or private information.

How do you find out if the data you want is non-public or not? If a government agency that is covered by the DPA has a database you want, you should ASSUME that at least some of it is public.

There are some cases – particularly in the human services realm – when their detailed data is non-public, but they are required by law to make “summarized” data available. For example, they can’t give us a database with one record for each child in foster care, but they can tell us the number in each county or totals for the state, or some other summarized version. In these cases, ask them questions about the various pieces of information they have and various ways they could summarize their data.

Side note: They will often “suppress” some summary data if the number is too small (their theory is that this might make it possible for you to find out who those kids are). For example, if a county has less than 3 children in foster care, they might give you data with the number for that county essentially redacted.

***KEY POINT: Make your request and if they come back and say it’s “private” or “non-public”, they must provide you with the specific statute in the DPA that makes it off-limits to the public.

Then you must carefully read the statute and see if their argument holds water.

3) Wording your request properly

First some broad suggestions:

If an official asks you “why” you want something, you don’t have to answer. A polite “Is it really necessary that I answer that question?” or “I didn’t think you were supposed to ask that question of the public” will usually resolve the issue.

Most public records laws — including MN and WI — say that an agency is not required to “create a new record” to fulfill a request. You can only ask for a copy of something that already exists. Beware of how you word your request and what you ask for, but also don’t let an agency use this as an excuse. Again, knowing what they have and what format it is in will help you navigate this one.

Before you start writing your request letter, you need to do some homework. This requires some basic reporting. Basically, you need to figure out:

- Name of the data you are seeking (usually a database has a specific name or terminology they use to refer to it)
- A basic understanding of what the data contains. You need to make sure this data is going to be what you want. Get someone at the agency to explain to you what the database is used for? what kinds of information is stored in it? What records are included or not included? (for example, the state patrol has a database of accidents, but it’s only fatality, injury or significant damage accidents. Even then, it’s possible accidents won’t end up in this database if the state patrol is not notified)
- What time frame/universe of data you want. Do you want the last year of data? Last five years of data? Do you want it to include just records for certain types of people? Or certain geographic areas? Or certain types of records?

Here’s why it’s important to know what you’re asking for in advance:

I have seen numerous instances where a reporter asked for data from an agency and the people at the agency misunderstood the request --- typically they think the request is more elaborate or complicated than it really is.

Here’s one example: a reporter at the Pioneer Press asked for data from the state Department of Human Services regarding day care and foster care families. She wanted to find cases where families had their licenses suspended or revoked, including what the reason was for the revocation or suspension. She specifically asked for that in her request. The agency came back to her steaming and spouting off about how difficult and expensive this was going to be. She came to me for help. Something just didn’t seem right. So I first asked them for a record layout of their database. They happily sent it over. It was a big complicated layout, without a lot of explanation. Just a listing of the tables and the names of the fields in them. It was hard for us to discern whether it contained what we wanted.

We asked for a conference call with the people who maintain the database. Luckily they were willing to do that. We got on the phone and it took about three minutes before we figured out the source of their uneasiness. Turns out the database didn’t yet contain a field with the reason for the revocation or suspension. That’s only stored in the paper records. Basically the database is just an indexing system for the paper records — it’s not set up for the kind of analysis we wanted

to do. The agency thought we expected them to plow through all of their paper records and find the reason for revocation or suspension for every single case (which legally we can't ask them to do).

Once the air was cleared, they were willing to provide us with a spreadsheet listing out all the cases where a suspension or revocation occurred — it just wouldn't contain the reason. They sent it to us within a matter of hours and I don't think they charged us.

But this whole process took more than a month. A lot of hand wringing and head-banging on both sides. And the problem started because the reporter didn't do any homework before firing off a DPA request.

When you write your letter it's important to include:

- Very specific listing of what you want. The name of the database. The universe of data in terms of time and scope.

- Ask for record layout(s) and codesheet(s) or data dictionary

- Tell them what format you want the data in (delimited text file or other format compatible with spreadsheet or database software)

- Tell them how to transfer it to you (is it small enough to email? Put it on a CD and you will pick up? FTP server? Dropbox account?)

- If any or all of this request will be denied or redacted, please notify me in advance in writing including the specific DPA citation that categorizes this information as non-public.

- request a fee waiver

- If there will be any cost, please provide a written estimate in advance

- (optional) if you have a particular deadline, ask NICELY for them to get you the data by a particular date

- if you have any questions, please contact me

4) Cost

Most of my problems in getting data from an agency have revolved around cost. The public versus non-public thing is hardly ever an issue. But they will slap a huge price tag on it, essentially putting it out of my reach.

However, usually that big fat price tag is not the real price and if you know what you're doing you will get it down to the correct price — and one you can afford.

My biggest success: I got a \$10,000 price tag knocked down to \$32.

My rule of thumb is that any cost estimate over \$50 is worth questioning. My rationale is that an agency can charge the hourly rate of the lowest-paid person capable of doing the job, regardless if that person is the one actually doing it. Plus, public data is supposed to be readily available to the public so it shouldn't take them more than an hour to do the work.

Whether or not you will get hit with fees for copying data (either paper or electronic) varies widely depending on the agency you're dealing with and the scope of your request. The laws all have provisions allowing agencies to charge fees, but it doesn't say they **MUST** charge. Ask for a fee waiver since you are requesting the data/documents "in the public interest."

The public records law in Minnesota is very specific when it comes to PAPER records. It's a per-page fee and there is really no way for an agency to pad it. If paper copies are less than 100 pages, they may charge no more than 25 cents per page. (Remember places like the court system are not covered under DPA; so for example, Hennepin County court charges \$8 per DOCUMENT, even if that document is only 1 page long)

If dealing with paper records, you can avoid costs altogether by asking to examine or inspect the records at the agency. They can't charge you for that. They can only charge you if you want to make copies.

However, the law is much more vague when it comes to electronic data.

In Minnesota, the law states they may charge for "actual costs of searching for and retrieving government data, including the cost of the employee time, and for making, certifying, compiling, and electronically transmitting the copies."

They MAY NOT charge for separating public from private data. They MAY NOT charge for maintenance of photo copier or the normal operating expenses of a computer. They MAY NOT charge for "validating" the data or confirming the accuracy of the data.

So basically this cost boils down to the number of hours that the employee will spend copying the data multiplied by the salary of the lowest-paid person capable of doing the work.

The main thing to remember: make sure to find out what, if any, fees might be involved BEFORE asking an agency to fill a request. If it's paper records, find out the per page cost. If it's electronic data, have them itemize the specific costs. Don't let them get away with giving you a single number as a total cost, without explaining exactly what that will be used for.

Since the electronic data cost is the employee's hourly salary times the number of hours they estimate it will take, that's what you should see when they return an itemized breakdown.

One time I had an agency tell me that the data was going to cost \$500. I asked them to itemize it and it turns out that they use the fees for copying data to essentially pay to run the entire office. So at the start of the year, they estimate how many data requests they will get and look at what their overall expenses are (salaries, paper clips, electricity, etc) and then do the math to figure out how much they need to charge per request. The sad part is that there are a lot of commercial businesses out there that willingly pay this fee without asking a single question. The good news is that there's some precedent in Minnesota essentially barring this practice and I was able to lean on that to nudge them off this \$500 charge.

Itemization:

The big problem with asking an agency to itemize their costs is that they will usually send you something that is a bunch of technical jargon because they list out each "action" the person has to take. Sometimes this is good. For example, one time it showed they were charging me for "CPU time" — this is the time that it takes the computer to run the query. They can't charge you for that — it's essentially paying for the computer to run. They can only charge you for the

person's time. So make sure they aren't double charging you for the computer time and the person time.

The person's time should only be for writing a query or code needed to extract the pertinent data from their computer system.

Sometimes when you get this itemization you will need to call them and nicely ask them to explain each of the items and what it means in layman's terms.

When requesting electronic data in MN, there's one more provision: agencies are allowed to charge more if the data has "commercial value". In these cases, they are allowed to recoup — through these requests — the costs of building the database in the first place. Sometimes I've been able to convince an agency that a news organization is working in the public good and does not use the data for commercial purposes. Other businesses frequently buy public data and use it to earn money in some way, so I see why they should be charged a commercial rate. I'm not seeing this as frequently as I did in the past, however.

5) Fighting denials

Some of the areas where you'll typically encounter exemptions in the law:

- personnel disciplinary/performance records
- ongoing criminal investigations
- student-level education records
- patient health care records
- 911 audio recordings
- juvenile criminal records

You also might encounter records that might be protected by HIPAA (the health care privacy act). But only health care providers are allowed to claim HIPAA. So, for example, an EMS service can claim HIPAA, but the police department can't. One of the tricky spots is when a fire department also runs an EMS service – are the data on calls for service public or private? The answer seems to depend on who's in charge of the department.

Sometimes record keepers will simply tell reporters "you can't have that" and reporters will unwittingly believe them and walk away. Sometimes the record keepers don't even know the law themselves or they misunderstand how an exemption should be applied.

There are a lot of "excuses" agencies might give you. The most frequent one I run into with data is that they will say something to the effect of "there's a lot of data here. I'm not sure you can handle it!"

Most government employees are used to dealing with reporters who can't even open a spreadsheet, let alone analyze thousands or millions of records. So they think even 1,000 records might be "a lot." I simply tell them that I routinely work with databases with millions of records and ask them to tell me what "a lot" means in their database.

The key to dealing with this problem when a request is denied is to make sure that you get an exact citation of the statute exempting the records you're asking for. And ask them to put it in writing (In MN they are required to do this even if your original request was not in writing). This is the most important point I can convey

After getting the written denial that includes the exact statute citation, you still have recourse if you think you are being fed a line of baloney. The first thing I would do is to make sure that someone higher up in the food chain (beyond the person you're dealing with) is aware of the denial and agrees with it. If you aren't already dealing with their Data Practices Act compliance official, that's the person you should go to. This person should be named as such on the agency's website.

Once you have the citation, go online to the state statutes and look it up. Read it carefully and see if it makes any sense. Sometimes you will need a lawyer to help you figure it out. If you're working for a news organization that has counsel available, you can try that. If you don't, you could try calling the Data Practices Office in the state Department of Administration (it used to be called IPAD). They will answer some basic questions, but keep in mind you are not paying them to be your lawyer. So use them sparingly so they don't shut this door on us.

The Data Practices Office's job is to administer a mediation-type of process for open records and open meetings disputes. Anyone — including a public citizen or a government agency — can ask the Commissioner for an "advisory opinion" about a specific situation. You can ask if an agency acted correctly in denying your request, for example (caveat: your original request for the data must have been in writing; and their denial must be in writing — you need to submit these along with your request for an opinion).

These opinions are NOT binding in a court of law if for some reason you ended up fighting the denial into the court system. But, the general practice in Minnesota has been that if the Dept of Admin finds that data should be public, then the agency will usually comply.

The other great thing is that you can look up past advisory opinions and find ones that are relevant to a situation you are currently facing. I've found that referring to past opinions in my response letters — after a denial — I can usually get them to budge.

For example, remember the \$500 incident where they were charging me for all the office expenses? I referred to an opinion from the 1990s that WCCO-TV won against the Secretary of State's office. The itemization the Sec of State's office had supplied the TV station included a breakdown of office supplies, electricity, copier maintenance, etc. The commissioner opinion was very explicit in saying those things could not be included in the cost.

Search their online databases of past cases at <https://mn.gov/admin/data-practices/opinions/>

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