

# 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.

We'll quickly do a refresher overview of the federal and Minnesota public records laws, but I'm assuming that you've already learned the basics in other classes. So we'll try to focus our time on the various problems you might run into using these laws that are particular to requesting electronic data.

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 of these 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 private. 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)

We'll focus today's discussion on the Minnesota law since you'll be far more likely to use that in the near term. 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. You really have no timeline to force them to comply with.

My experience has been that an agency will get you the information when they feel like getting you the information. There are some really fabulous ones out there that will respond immediately (like within hours, even). Others will drag their feet. The only way I've found to fight this is to keep pestering them. Every few days give them a call and/or send an email asking

for a status update on your request. Generally people get annoyed after awhile and simply want to do whatever it takes to make you go away. Set reminders in your calendar to make a call or send an email at regular intervals.

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.

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.

\*\*\*\*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 private

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.

It's highly UNLIKELY that an entire database would be deemed private. Typically there are just portions of a database that are private — usually certain fields/columns; sometimes certain records (like juveniles are not included in arrest records). For example: the Pioneer Press and Star Tribune both get data from the state government's human resources and payroll databases every year. I'm certain those databases contain fields/columns with information that is private — SSN, date of birth, home address, etc. They give us everything else except those fields. 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 private.

This is an important concept for you to know because when someone tells you that the database is private, but in reality it's just that a few fields are private, you can show them that you're not that stupid by telling them that it's very simple to export data from a database and only export the public fields. This is something we'll learn how to do when we get into Access.

How do you find out if the data you want is private 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.

\*\*\*KEY POINT: Make your request and if they come back and say it's "private", they must provide you with the specific statute in the DPA that makes it private.

Then you have to go carefully read the statute they give you and see if their argument holds water. We'll talk more about fighting this kind of denial later.

### 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. But 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 there? 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.

So then 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 doesn’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)

- Tell them what format you want the data in (delimited text file)

- Tell them how to transfer it to you (is it small enough to email? Put it on a CD and you will pick up? Or they need to mail it to you?)

- 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 private.

- 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 private thing is hardly ever an issue. But they will slap a huge price tag on it, essentially putting it out of my reach (especially in this day and age of budget-tightening at news organizations).

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.

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, 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 that person's salary.

My rule of thumb is that I seriously question the price tag if they estimate it's going to be more than \$50. My reasoning is this: it should take less than 1 hour for a computer person to query the database and export the data I want. And most computer people make in the range of \$40 to \$50 per hour.

The main thing to remember: make sure to find out what, if any, fees might be involved BEFORE telling 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. We'll talk more about this precedent in a little bit.

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.

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. But I don’t always win this argument.

## 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.

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 IPAD in the state Department of Administration. 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.

IPAD is part of the Department of Administration and part of their 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 Admin 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 <http://www.ipad.state.mn.us/>

**By MaryJo Webster**

**@MaryJoWebster**

**[Mjwebster71@gmail.com](mailto:Mjwebster71@gmail.com)**

