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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Tony Webster, Plaintiff, v. The City of Bloomington, Defendant.	Case Type: Other Civil Case No.: 27-CV-15-10552 Judge: Hon. Laurie J. Miller Filed & Served Electronically

BRIEF OF *AMICI CURIAE*
PUBLIC RECORD MEDIA, THE MINNESOTA COALITION ON GOVERNMENT INFORMATION, & MR. WILLIAM BUSHEY

In Support of Plaintiff Tony Webster's Motion to Compel

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Amici Identity, Interest, & Authority to File

A. The Identity of the Amici: Public Record Media, the Coalition on Government Information, and Mr. William Bushey.

The Amici are two nonprofit organizations and a leader in Minnesota's civic technology community, each of whom are concerned with the proper interpretation and enforcement of the Minnesota Government Data Practices Act.

Public Record Media ("PRM") is a non-partisan, Minnesota-based nonprofit that advances "transparency and democracy through the use, application, and enforcement of freedom of information laws."[1] PRM has used the Data Practices Act to inspect and publish thousands of city and state documents on everything from the military's use of the Twin Cities metro area for urban warfare training, to the state assets pledged to secure the 2018 Super Bowl, to the prolonged retention of license plate tracking data by St. Paul.[2] PRM also educates the public on how to use the Data Practices Act[3] and participates in legal and administrative actions to enforce the Act.[4]

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1 *About PRM,* PUBLIC RECORD MEDIA, http://www.publicrecordmedia.org/about-prm/; *see also* Kevin Duchschere, *A Need to Know Drives St. Paul Nonprofit's Mission*, MINNEAPOLIS STAR TRIB. (July 23, 2015), http://strib.mn/1CTdnZN.

2 *See* Jay Olstad, *Downtown Military Training Exercises Scrutinized*, KARE-11 (July 15, 2015), http://www.kare11.com/story/news/2015/07/14/new-information-revealed-about-downtown-military-training/30171637/; Doug Belden, *Super Bowl Documents Suggest What NFL Will Seek from Legislature*, PIONEER PRESS (Dec 8, 2014), http://www .twincities.com/politics/ci_27094803/super-bowl-documents-suggest-what-nfl-will-seek; Eric Roper, *St. Paul Meets Minneapolis on Vehicle Tracking Data Retention*, MINNEAPOLIS STAR TRIB. (Nov. 14, 2012), http://strib.mn/1cTf9IC.

3 *See Press,* PUBLIC RECORD MEDIA, http://www.publicrecordmedia.org/press/.

4 *See, e.g.,* Minn. Comm'r of Admin., Advisory Op. 14-011 (Sept. 17, 2014), http://www.ipad.state .mn.us/opinions/2014/14011.pdf (providing advisory opinion on the meaning of the Data Practices Act at the request of PRM).

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The Minnesota Coalition on Government Information is a non-partisan non-profit "dedicated to government transparency and public access to information."[5] The Coalition has testified before the Minnesota Legislative Commission on the Data Practices Act[6] and helped the City of Minneapolis develop an open data policy.[7] Coalition board member and spokesperson Don Gemberling is also a leading state authority on the Data Practices Act,[8] having overseen compliance with the Act at every level of state and local government for over 30 years as Director of the Information Policy Analysis Division at the Minnesota Department of Administration.[9]

Mr. William (Bill) Bushey is a leader within Minnesota's civic technology community. In this capacity, he has helped over 20,000 Twin Cities residents share information and discuss local public issues.[10] He has also co-founded a grassroots group, Open Twin Cities, which harnesses "open government and civic technology for

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5 Letter from Gary Hill, Chair, Minn. Coal. on Gov't Info., to Minneapolis City Council Member Andrew Johnson (July 14, 2014), http://www.mncogi.org/wp-content/uploads/2015/01/MPLSODP02.pdf.

6 *See, e.g., Overview of Health Plan Data Classification*, MINN. COAL. ON GOV'T INFO (Oct. 28, 2014), http://www.mncogi.org/wp-content/uploads/2015/01/LCDPHMO07A.pdf. *Law Enforcement Use of "Body Cam" Recorders: Overview of Classification & Operational Issues*, MINN. COAL. ON GOV'T INFO. (Oct. 10, 2014), http://www.mncogi.org/wp-content/uploads/2014/12/LCDP2014012.pdf.

7 *See* Letter from Gary Hill, *supra* note 5.

8 *See, e.g., In re Quinn,* 517 N.W.2d 895, 899–900 (Minn. 1994); *Montgomery Ward v. Cnty. of Hennepin*, 450 N.W.2d 299, 307 (Minn. 1990); *IBEW, Local No. 292 v. City of St. Cloud*, 750 N.W.2d 307, 315 (Minn. App. 2008); *Itasca Cnty. Bd. of Comm'rs v. Olson*, 372 N.W.2d 804, 807 (Minn. App. 1985).

9 *See* Mike Mosedale, *Data Man*, CITY PAGES (Jan. 9, 2002), http://www.citypages.com/news/data-man-6702399.

10 *See Our People*, E-DEMOCRACY.ORG, http://forums.e-democracy.org/about/people/; *see also Twin Cities Neighbor Forums – BeNeighbors.org*, E-DEMOCRACY.ORG, http://forums.e-democracy.org/twincities?beneighbors.

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positive social impact."[11] Finally, he has served on the City of Minneapolis's Open Data Policy Working Group. Through these efforts, Mr. Bushey has become an outspoken advocate for public access to government data, especially at the city level.[12]

B. The Amici's Interest in *Webster v. City of Bloomington*.

The Amici are interested in *Webster* because this case concerns a vital dispute over whether the Minnesota Government Data Practices Act requires government entities to make their original electronic files—and the metadata associated with these files—available for public inspection. How this question is answered will affect requests under the Data Practices Act for years to come. This includes requests by the Amici, who depend on the Act to obtain government information that is vital to promoting civil engagement on a variety of critical issues. Therefore, as users and caretakers of the Act, the Amici seek to clarify why government metadata is subject to the Act's disclosure requirements. The Amici also seek to illuminate why a contrary view would jeopardize the Act's most important and intentional features —namely, a presumption of public access to government data and an emphasis on data rather than records.

C. The Amici's Authority to File in *Webster*.

On October 13, 2015, this Court gave the Amici permission to file this brief.

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11 *Mission Statement*, OPEN TWIN CITIES, http://opentwincities.org/about/mission/; *see also* MaryJo Webster, *Minnesotans Using Technology to Boost Open Government*, PIONEER PRESS (Nov. 12, 2013), http://www.twincities.com/columnists/ci_24506514/minnesota-using-technology-boost-open-government.

12 *See* Bill Lindeke, *Embracing Open Data: A Big Shift in Culture for Minneapolis*, MINNPOST (Aug. 5, 2014), https://www.minnpost.com/cityscape/2014/08/embracing-open-data-big-shift-culture-minneapolis.

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Introduction

The Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01–13.99, represents Minnesota's "fundamental commitment to making the operations of [its] public institutions open to the public." *Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety*, 658 N.W.2d 876, 883–84 (Minn. App. 2003). The Act serves this important function by guaranteeing the public's right to inspect and copy government data in whatever condition it may be found. *See* Minn. Stat. § 13.02, subd. 7. The central question of this case, *Webster,* is whether that public right-to-access also reaches the data that exists at the margins of an electronic document: in short, "metadata."

Answering this question ultimately requires understanding what metadata is. Metadata is the story of a document. It reflects everything about a document's creation, use, transportation, maintenance, and even its destruction. Inspecting the metadata of government documents, in turn, makes it possible to expose misconduct by officials and advance government transparency. But none of this is possible unless the public is free to review government documents with their metadata fully intact.

This reality has led courts in four states to hold under state freedom-of-information laws that public records must be produced in their native format to enable public inspection of these records' metadata. The Minnesota Government Data Practices Act compels the same conclusion given the Act's explicit focus on ensuring public access to government *data*. Thus, to decide *Webster,* this Court need only reiterate what the Act's text, purpose, and history already make clear: that the public is entitled to inspect and copy public government metadata in its native format.

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Argument

1. Metadata is the story of a document, and consequently an integral part of any government document's public meaning.

To understand why the Minnesota Government Data Practices Act mandates public inspection and copying of government metadata, it is first necessary to understand what "metadata" is. Metadata is "commonly defined as 'data about data.'" 7 James Wm. Moore et al., *Moore's Federal Practice* § 37A.03[1] at 37A-15 (3d ed. 2015). In more precise terms, metadata is information that "describ[es] the history, tracking, or management of an electronic document." *Williams v. Sprint/United Mgmt. Co.*, 230 F.3d 640, 646 (D. Kan. 2005). Metadata reveals the "who," "what," "when," "where," "why," and "how" of a document's creation, use, transportation, maintenance, and even its destruction. *See id.* Hence, metadata is the story of a document. *See id.*

There are three basic types of metadata: application metadata, system metadata, and embedded metadata. *See Aguilar v. Immigration & Customs Enf't Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 354–55 (S.D.N.Y. 2008). Application metadata is data "'created as a function of the application software used to create the document or file' and reflects substantive changes made by the user." *Id*. For example, the application metadata in a Microsoft Word document includes every version of the document saved by a user, edits to the document made by a user, and comments or highlighting added to the document by a user. *See* 7 *Moore's* § 37A.03[1] at 37A-17, 18. Application metadata is thus "embedded in the document it describes and remains with the document when it is moved or copied." *Aguilar*, 255 F.3d at 354. By contrast, a "hard-copy printout or an

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imaged file [e.g., a PDF] will not necessarily reveal" a document's application metadata like embedded comments. 7 *Moore's* § 37A.03[1] at 37A-18.

System metadata is "information created by the user or by [an] organization's information management system." *Aguilar,* 255 F.3d at 354. For any given electronic file, this includes "a list of authors, modification times, the time spent on edits, the name of the network server or hard disk where the file is saved, other file properties and summary information, and hyperlinks to other documents." 7 *Moore's* § 37A.03[1] at 37A-16. System metadata thus enables users "to access, search, and sort large numbers of documents efficiently." *Aguilar,* 255 F.3d at 354. System metadata also "reveal[s] the evolution of a document," capturing "dates of revisions or deletions [to a file] and the identities of persons revising the file" as well as "anyone downloading, printing, or copying a specific file." 7 *Moore's* § 37A.03[1] at 37A-16. But such metadata can only be seen when a file "is stored on a CD-ROM, floppy diskette, or other media" because system metadata "is external and physically located outside the file." *Id.*

Embedded metadata is "text, numbers, content, data, or other information" that a user "directly or indirectly input[s]" into a document but which "is not typically visible" to another user when viewing "the output display" of the document. *Aguilar,* 255 F.3d at 354–55. In this regard, embedded metadata can include "spreadsheet formulas, hidden columns, externally or internally linked files (such as sound files), hyperlinks, references and fields, and database information." *Id.* at 355. This makes embedded metadata "often crucial to understanding an electronic document." *Id.* For example, "a complicated spreadsheet may be difficult to comprehend without the

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ability to view the formulas underlying the output in each cell." *Id.* Inspecting this kind of information requires access to a spreadsheet (or other electronic document) in its original format, versus a hard copy or PDF, precisely because of "the hidden, or not readily visible, nature of [such] metadata." *Williams,* 230 F.3d at 647.

Metadata is therefore more than a document's visible surface-level characteristics like a Word document's "size, editing time, and the date modified, created, and printed." (City Br. 5.[13]) In reality, "there are more than 80 accessible system-file and application metadata [elements] generated for each Microsoft Word and Excel document." 7 *Moore's* § 37A.03[1] at 37A-18. Also while "[s]ome of this metadata is readily accessible . . . other types require a special utility to read them." *Id.* For this reason, Microsoft advises use of its Document Inspector utility to "[i]nspect documents for hidden data and personal information"[14]—as does the U.S. Court of Appeals for the Seventh Circuit.[15] Among the types of hidden data that Microsoft states can be revealed through its Inspector utility are "[c]omments, revision marks from tracked changes, versions, and ink annotations"; "e-mail headers, send-for-review information, routing slips, and template names"; hidden text; and document server properties.[16]

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13 "City Br." denotes the City of Bloomington's Memorandum of Law in Opposition to Plaintiff's Motion to Compel in *Webster* (Sept 28, 2015), Dkt. No. 16.

14 *Inspect Documents for Hidden Data and Personal Information*, MICROSOFT OFFICE, https://support.office.com/en-us/article/Inspect-documents-for-hidden-data-and-personal-information-85951777-89dd-45dd-960a-fc979414e8fc (last viewed Oct. 17, 2015).

15 *Removing Sensitive Metadata in Word 2007 Documents*, U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, https://www.ca7.uscourts.gov/guides/MetadataWord_2007.pdf; *see also* Minn. Lawyers Prof'l Resp. Bd., Opinion No. 22: A Lawyer's Ethical Obligations Regarding Metadata at 2 (Mar. 26 2010).

16 *Inspect Documents*, *supra* note 14.

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Inspecting metadata thus requires access to electronic documents in their "native format." *See* 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2219 (3d ed. 2009) ("[E]lectronically stored information with metadata and embedded data intact may be said to be in 'native format.'"). Access to paper printouts of an electronic document is not enough. Such printouts stand to omit any metadata that can only be revealed by a special program or that exists outside the document, like system metadata. Hence, as the D.C. Circuit Court of Appeals recognized over two decades ago, paper printouts of electronic documents "cannot accurately be termed 'copies'—identical twins—but are, at most, 'kissing cousins.'" *Armstrong v. Executive Office of the President*, 1 F. 3d 1274, 1283 (D.C. Cir. 1993). This led the court to reject the view that electronic documents may be sufficiently preserved through screen printouts. *See id.* at 1282–85. The court instead recognized that screen printouts "amputated" a litany of metadata integral to understanding their source material, including "distribution lists or directories maintained only in electronic form." *Id.* at 1284–85 & n.8.

This observation remains true today—and applies equally to computer "images" of electronic documents. A PDF image of an email message, for example, may "include only a generic reference to a distribution list that fails to refer to the individuals who received the message or may exclude the names of any recipients receiving blind copies." 7 *Moore's* § 37A.03[1] at 37A-18. As such, "[a] portable document file (pdf) or tagged image file format (tiff) . . . limits the information provided to the actual text or superficial content of [the original] document. Only when an electronic document is

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produced in its 'native' form can metadata be disclosed." *Matter of Irwin v. Onondaga Cnty. Res. Recovery Agency*, 895 N.Y.S.2d 262, 268 (N.Y. App. Div. 2010).

This disclosure matters, in turn, because metadata has always been important to our understanding of documents, even before the digital age. Consider the metadata of physical books: "broken spines, dog-eared chapters, [and] marginalia."[17] A broken spine reveals how often a book has been read. An email's "broken spine"—i.e., system metadata reflecting every time an email has been opened—does the same thing. Likewise, a Word document's "marginalia"—i.e., application metadata reflecting comments and highlighting added by various users—can be just as revealing as its physical counterpart. The point is that all metadata, physical or electronic, is the product of human volition (e.g., a user's decision to turn a page or open a file) that can give new meaning to a document. The public accordingly has every reason to review such metadata when it comes to public government documents.

2. Public inspection of government metadata is critical to detecting misconduct by officials and maximizing government transparency.

Given the importance of metadata in understanding documents, the public has a strong interest in reviewing metadata associated with government documents. Indeed, "public access to electronic records, including metadata, is essential to safeguarding the public's ability to open government conduct to public scrutiny."[18] This is true for

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17 Sam Anderson, *'What I Really Want Is Someone Rolling Around in the Text'*, N.Y. TIMES MAG., Mar. 4, 2011, http://nyti.ms/1O9hlyu.

18 Peter S. Kozinets, *Access to Metadata in Public Records: Ensuring Open Government in the Information Age*, ABA COMM. LAWYER, July 2010, at 1, 1.

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several reasons. *First*, government metadata can "verify the authenticity and integrity of a public record."[19] *Second*, government metadata can "reveal what officials knew about critical actions or decisions and when they knew it."[20] *Third*, government metadata can "render intelligible vast storehouses of government data that would otherwise be useless when separated from their metadata."[21] Public inspection of government metadata thus advances political transparency and accountability.

In this regard, here are just a few examples of what can be achieved through the public inspection of metadata held by government bodies and officials:

- *Wired* discovered that the California Attorney General's Office appeared to be preparing a "legislative assault" on peer-to-peer (P2P) file-sharing at the undisclosed behest of the Motion Picture Association of America (MPAA).[22] *Wired* made this discovery based on a draft letter "circulated by [California Attorney General] Bill Lockyer to fellow state attorneys general [that] characterize[d] P2P software as a 'dangerous product.'"[23] As *Wired* observed, "the metadata associated with the Microsoft Word document indicates it was either drafted or reviewed by a senior vice president of the Motion Picture Association of America."[24] This led *Wired* to conclude the draft's metadata raised serious questions about "the propriety of a commercial organization effectively placing words in the mouth of an elected official."[25]

- The Arizona Center for Investigative Reporting discovered that several Arizona congressmen petitioning the Federal Trade Commission (FTC) to crack down on alleged deceptive marketing by rooftop solar companies appeared to be doing so at the instigation of one of their largest campaign donors: Arizona Public Service (APS), Arizona's largest non-solar electrical

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19 *Id.*

20 *Id.*

21 *Id.*

22 Xeni Jardin, *P2P in the Legal Crosshairs*, WIRED (Mar. 15, 2004), http://archive.wired.com/entertainment/music/news/2004/03/62665?currentPage=all.

23 *Id.*

24 *Id.*

25 *Id.*

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utility.[26] The Center made this discovery based on its comparison of the final letter sent by the congressmen to the FTC with an earlier Word draft whose metadata revealed that it had been authored by an APS lobbyist and most recently edited by the chief of staff for one of the congressmen.[27]

- The Associated Press discovered that U.S. Representative Aaron Schock (R.-Ill.) spent over $40,000 in "taxpayer and campaign funds on flights aboard private planes owned by some of his key donors."[28] The Associated Press made this discovery based on its review of "pictures and videos" that Rep. Schock uploaded "to his Instagram account."[29] In particular, the Associated Press "extracted location data associated with each image then correlated it with flight records showing airport stopovers and expenses later billed for air travel against Schock's office and campaign records."[30]

- The *New York Times* discovered that national railroads were systematically breaking "federal rules by failing to promptly report hundreds of fatal accidents . . . denying the federal authorities the chance to investigate when evidence [was] fresh and still available."[31] The *Times* also discovered government enforcement of the accident-reporting rules in question was "so lax that federal officials said they were not even aware of the reporting problems."[32] The *Times* made these discoveries based on "a computer analysis of federal data" that included thousands of federal accident reports.[33]

- The *Washington Post* discovered that law enforcement nationwide was seizing "hundreds of millions of dollars in cash from motorists and others not charged with crimes."[34] The *Post* specifically found that "61,998 cash seizures [had been] made on highways and elsewhere since 9/11 without search

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26 Evan Wyloge, *APS Employee Drafted Anti-Solar Letter Signed by AZ Congressmen*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Jan 16, 2015), http://azcir.org/2015/01/16/aps-employee-drafted-anti-solar-letter-signed-by-az-congressmen/.

27 *Id.*

28 Jack Gillum, *Lawmaker with Lavish Décor Billed Private Planes, Concerts*, ASSOCIATED PRESS (Feb. 24, 2015), http://bigstory.ap.org/article/e2f1f52c3eb34caca7d74e5bf90f27f9/lawmaker-lavish-decor-billed-private-planes-concerts.

29 *Id.*

30 *Id.*

31 Walt Bogdanich, *In Deaths at Rail Crossings, Missing Evidence and Silence*, N.Y. TIMES (July 11, 2004), http://nyti.ms/1F5HrxM.

32 *Id.*

33 *Id.*

34 Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/.

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> warrants or indictments . . . totaling more than $2.5 billion."[35] The *Post* made this discovery based on its review of "a database from the Justice Department containing details about 212,000 seizures since 1996."[36] The *Post* obtained the database "[t]hrough Freedom of Information Act requests."[37]

The examples above prove that public inspection of government metadata can reveal everything from corruption by special interests, to misuse of taxpayer funds, to direct threats posed by government activity (or inactivity) to the lives and property of ordinary citizens. And against this backdrop, a growing number of state courts have ruled that government metadata is an inseparable part of a public record and therefore must be produced under state freedom-of-information laws. This trend now includes courts in Arizona, Washington, New York, and Pennsylvania. *See Lake v. City of Phoenix*, 218 P.3d 1004, 1007–08 (Ariz. 2009); *O'Neill v. City of Shoreline,* 240 P.3d 1149, 1153–55 (Wash. 2010); *Matter of Irwin v. Onondaga Cnty. Res. Recovery Agency*, 895 N.Y.S.2d 262, 266–68 (N.Y. App. Div. 2010); *Scott v. Se. Penn. Transp. Auth.*, No. 1600, 2012 Phila. Ct. Com. Pl. LEXIS 471, at *5–16 (Phila. Ct. Com. Pl. Aug. 3, 2012). The facts of these cases, in turn, only confirm the importance of public access to government metadata.

Consider *O'Neill v. City of Shoreline,* for example, which arose from a dispute over an email that a public official claimed was sent by a certain citizen. *See O'Neill,* 240 P.3d at 1151. The official used this email to impugn the citizen at a council meeting. *See id.* The citizen then filed a request under Washington's Public Records Act for all metadata related to the email. *See id.* at 1151–52. And the Washington Supreme Court upheld this

35 *Id.*
36 *Id.*
37 *Id.*

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request because "[m]etadata may contain information that relates to the conduct of government and is important for the public to know," including "whether a document was altered, what time a document was created, or who sent a document to whom." *Id.* at 1153–54. The court thereby refused to "deny [Washington's] citizenry access to a whole class of possibly important government information" under a state law intended "to ensure that the public maintains control over their government." *Id.* at 1154.

Such reasoning ultimately reflects "an emerging national consensus on the role of [government] metadata" and how "disclosure of [government] metadata best serves the . . . purposes of transparency and accountability." *Scott*, 2012 Phila. Ct. Com. Pl. LEXIS 471, at *13–14. But the Minnesota legislature knew this to be true over 30 years ago, leading it to enact a groundbreaking freedom-of-information law focused on government data—not merely "public records." Indeed, the Minnesota Government Data Practices Act makes the following promise to all citizens: "All **government data** collected, created, received, maintained or disseminated by a government entity **shall be public,**" absent a specific restriction under state or federal law. Minn. Stat. § 13.03, subd. 1 (emphasis added). Accordingly, as explained below, this Act entitles the public to inspect and copy government metadata in its native form.

3. The Minnesota Government Data Practices Act ("MGDPA") entitles the public to inspect and copy government metadata.

The Minnesota Government Data Practices Act is the net result of the Minnesota Legislature's ongoing effort since 1974 "to balance the rights of individuals (data subjects) to protect personal information . . . with the right of the public to know what

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the government is doing." *Demers v. City of Minneapolis*, 468 N.W.2d 71, 72 (Minn. 1991).[38] This effort has led the Legislature to "use[] statutory techniques, establish[] definitions and impose[] requirements on [government] agencies which are without precedent in this and other jurisdictions."[39] Proper interpretation and enforcement the Act therefore often requires close examination of the Act's plain text as well its statutory purpose and legislative history. But when it comes to government metadata, one does not have to squint at the Act to recognize that it empowers the public to inspect and copy such metadata, be it as a matter of text, purpose, or history.

A. The MGDPA's text establishes a presumption that all government data is accessible to the public—a presumption that plainly mandates public access to government metadata.

The Data Practices Act establishes an explicit textual "presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public." Minn. Stat. § 13.01, subd 3. The Act defines "government data," in turn, to mean "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." *Id.* § 13.02, subd. 7.

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38 *See* Act of Apr. 11, 1974, ch. 479, 1974 Minn. Laws 1199*; see also* Act of June 5, 1979, ch. 328, 1979 Minn. Laws 910 (giving the Minnesota Government Data Practices Act its formal name and establishing the presumption that all government data is publicly accessible); *see generally* Donald A. Gemberling & Gary A. Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act – From "A" to "Z,"* 8 WM. MITCHELL L. REV. 573, 574–75 & nn.8–10 (1982).

39 *See* Donald A. Gemberling, *Minnesota Government Data Practices Act: History & General Operation*, *in* GOVERNMENT LIABILITY 241, 243 (Minn. CLE Cmte. ed., 1981).

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Thus, to determine whether the public is entitled to access government metadata under the plain text of the Data Practices Act, it is necessary to answer two questions. *First,* does government metadata constitute "government data" under the Act? *Second,* if government metadata is "government data," then is there a "federal law, a state statute, or a temporary classification of data" that serves to render this data "not public?" Because the answer to the first question is "yes" and the answer to the second question is "no,' the Data Practices Act plainly mandates public access to government metadata "for both inspection and copying." Minn. Stat. § 13.01, subd 3.

i. Metadata is "government data" under the MGDPA.

As the explanation of "metadata" provided in Part I above makes clear, government metadata is "data collected, created, received, maintained or disseminated by any government entity." Minn. Stat. § 13.02, subd. 7. Just picture a public official opening a Word document on a government computer. The official creates data when she edits, highlights, or adds comments to the document (i.e., application metadata). *See* 7 *Moore's* § 37A.03[1] at 37A-17, 18. The official then creates more data when she saves the document to a particular folder on her computer—data that is maintained by the government's chosen file management system (i.e., system metadata). *See id.* Finally, the official creates and maintains data when she copies-and-pastes hyperlinks or images into the document (i.e., embedded metadata). *See Aguilar,* 255 F.3d at 354–55.

All this metadata came into existence because of a public official's volitional conduct in dealing with a Word document. All this metadata must therefore constitute

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"government data" under the plain language of the Data Practices Act. To conclude otherwise would betray the Act's plain mandate: "to regulate every aspect of how the government manages the information it collects and records." *Keezer v. Spickard*, 493 N.W.2d 614, 618 (Minn. App. 1992). Put another way, the Act cannot be said to "regulate[] the collection, creation, storage, maintenance, dissemination, and access to government data" unless this broad mandate also covers government metadata. Minn. Stat. § 13.01, subd. 3; *see also Keezer,* 493 N.W.2d at 618 ("By referring separately to each function . . . subdivision [3 of Minn. Stat. § 13.01] indicates the Act is intended to do more than simply regulate physical access to government records.").

Further support for the conclusion that metadata is "government data" under the Data Practices Act may be found in a litany of Minnesota cases indicating the wide range of informational content that qualifies as "government data" under the Act. *See, e.g., IBEW, Local No. 292 v. City of St. Cloud,* 765 N.W.2d. 64, 65, 67 (Minn. 2009) (presuming that employee home addresses and payroll information retained by a city-hired independent contractor were "government data")*; Navarre v. S. Wash. Cnty. Schs.*, 652 N.W.2d 9, 24–26 (Minn. 2002) (holding that a school superintendent's "personal commentary" on an ongoing school-related investigation was "government data"); *Nat'l Council on Teacher Quality v. Minn. State Colls. & Univs.,* 837 N.W.2d 314, 315, 319 (Minn. App. 2013) (presuming that course syllabi produced by faculty working for a statewide system of public colleges and universities were "government data").

The advice given by the League of Minnesota Cities on city records management in its *Handbook for Minnesota Cities* also serves to establish that metadata is "government

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data."[40] The League tells cities to **"[m]aintain identifying metadata"** as part of the League's "guidelines for an effective records management strategy."[41] The League also declares that: "Identifying metadata should be attached to electronic records. Metadata makes it possible to search for, identify, and retrieve electronic records."[42] (*Contra* City Br. 12 n.4 (claiming that "metadata is not collected, created, received, maintained, or disseminated by a government entity" and that "[t]he City does not take any affirmative steps to collect, create, receive, maintain, or disseminate metadata").)

Of course, the League's discussion of metadata is limited to system metadata—i.e., "information created by the user or by [an] organization's information management system." *Aguilar,* 255 F.3d at 354. But what is true of system metadata—that it is data "created" and "maintained" by a government entity—is even truer of application and embedded metadata. This is because both application and embedded metadata by definition reflect "substantive changes" to a document. *Aguilar,* 255 F.3d at 354–55. These changes may be as simple as the addition of electronic comments. *See id.* These changes may also be as complex as embedding "spreadsheet formulas, hidden columns, externally or internally linked files (such as sound files), hyperlinks, references and fields, and database information." *Id.* Either way, these changes exist in the form of data "created" or "maintained" by a government entity. *See id.* This makes these changes "government data" under the plain terms of the Data Practices Act.

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40 *See Records Management, in* LEAGUE OF MINNESOTA CITIES, HANDBOOK FOR MINNESOTA CITIES 20 (2015), http://www.lmc.org/media/document/1/chapter27. pdf?inline =true (last updated Sept. 3, 2015) (last accessed Oct. 19, 2015) (emphasis added).

41 *Id.*

42 *Id.*

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ii. All "government data" is presumed public under the MGDPA absent an explicit classification otherwise—and no such classification exists for metadata as such.

Because metadata is "government data" for purposes of the Data Practices Act, such metadata must be accessible to the public unless "there is federal law, a state statute, or a temporary classification of data" providing otherwise. Minn. Stat. § 13.01, subd 3. On this score, there is no law, statute, or temporary classification specifically classifying metadata—by itself—as "not public" government data under the Act. *See* Minn. Stat. §§ 13.01–13.99; (*see also* City Br. 11–20 & n.4 (citing no such law).)

The legal importance of this observation cannot be overstated. The Minnesota Legislature enacted the Data Practices Act's presumption "in response to media requests that the general concept of openness in government be incorporated into the legislative plan for data practices."[43] The Legislature embraced this presumption because it "put the burden on the government agency to cite the authority upon which it relies to classify a particular datum as not discloseable."[44] And Minnesota courts have enforced this reasoning insofar as they have observed that the Data Practices Act's presumption is "[a]t the heart of the act" and, thus, a "political subdivision resisting disclosure of data bears the burden of identifying the law preventing its disclosure." *Demers*, 468 N.W.2d at 73; *see also, e.g., KSTP-TV v. Metro Transit,* 868 N.W.2d 920, 2015 Minn. App. LEXIS 68, at *13 (Minn. App. 2015) (explaining that "the crux" of the Data Practices Act is the rule that "all government data are presumed public").

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43 Gemberling & Weissman, *supra* note 38, at 580.

44 *Id.*

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In this light, the plain text of the Data Practices Act requires the disclosure of government metadata for the same reasons that led the Minnesota Supreme Court to hold in *Demers v. City of Minneapolis* that the Act required disclosure of "complainants on nonpending, noncurrent police department internal affairs complaint forms"—such information was government data, and no law provided "express protection" of this information from public inspection. 468 N.W.2d at 72–74. For this reason, the *Demers* court found its holding was "dictated by the plain language of the act." *Id.* at 74. The *Demers* court also noted the "compelling need for public accountability" that supported its holding. *Id.* The same goes for government metadata, which is just as important to ensuring public accountability. *See supra* Part II (providing examples).

B. The MGDPA's intent, as made clear by its title, is to ensure public access to government *data*—not merely records.

Putting aside the plain text of the Data Practices Act, the Act's intent also proves that the Act mandates public access to government metadata. *See* Minn. Stat. § 645.16 (2015) (object of statutory construction "is to ascertain and effectuate the intention of the legislature"). The best evidence of this legislative intent may be found in the Act's title itself, which speaks of *data* rather than *records*. This is no accident.

Indeed, the Minnesota Legislature knew that if the Act were "focused on records, such a focus would allow an agency, in response for a request for access to a record, the possibility of responding to the effect that the agency maintains no such 'record.'"[45] Government bodies would then be in a position to avoid disclosing "computerized and

45 *See* Gemberling, *supra* note 39, at 258.

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seemingly disconnected bits of information" in their possession, even when "the 'wonders' of electronic data processing" would enable this information to be compiled into a form "traditionally thought of as a 'record.'"[46] The Legislature therefore made "a conscious decision . . . to direct the regulatory features of the Act to the most basic level of information organization": the "data element level."[47]

Of course, the Data Practices Act contains no specific definition of "data"—though the Act does define "government data" in very broad terms. This silence, however, only confirms the breadth of information to which the Act guarantees public access. The Minnesota Supreme Court has implicitly acknowledged this point insofar as it has seen fit to fill this silence, when necessary, with broad dictionary definitions of "data." *See, e.g., Schwanke v. Minn. Dep't of Admin.*, 851 N.W.2d 591, 593 (Minn. 2014) ("'Data' are '[f]acts that can be analyzed or used in an effort to gain knowledge or make decisions' or, more broadly, are 'information.' *The American Heritage Dictionary of the English Language* 462 (5th ed.2011)."); *Westrom v. Minn. Dep't of Labor & Indus.*, 686 N.W.2d 27, 34 (Minn. 2004) ("Although the term 'data' is not defined in the MGDPA, 'data' usually is said to mean 'individual facts, statistics, or items of information[.]' *The Random House Dictionary of the English Language* 508 (2d ed.1987).").

The Minnesota Supreme Court's decision in *Star Tribune Co. v. University of Minnesota Board of Regents* also makes it clear that when the Act is silent in regard to a particular form of government data, this indicates that the Act favors disclosure of such

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46 *Id.*

47 *Id.*

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data. 683 N.W.2d 274 (Minn. 2004). At issue in *Star Tribune* was whether the Act granted public access to the University of Minnesota's presidential search data. *See id.* at 278. The court observed that "specific categories of data are expressly addressed in the act in order to create exceptions to the general rule of public availability." *Id.* at 280. This led the court to hold that the Act granted public access to the data in question because "[g]iven the legislature's approach in drafting the Data Practices Act, its silence with regard to the University's presidential selection process more likely indicates intent to subject that process to the requirements of the [A]ct than to exclude it." *Id.*

This analysis in *Star Tribune* thus confirms "the proper conclusion to be drawn" from the Data Practices Act's use of the term "data" without further definition: that the Legislature "intend[ed] in this Act to regulate government information at its most simple and basic level—data, i.e., all of the millions of individual bits and items of information maintained by government agencies."[48] (*Contra* City Br. 12 n.4.). But that intention cannot be effectuated unless government metadata is understood to fall within the scope of the Act's public disclosure requirements. *See KSTP-TV v. Ramsey Cnty.*, 806 N.W.2d 785, 789 (Minn. 2011) ("[T]he MGDPA protects *data,* not *documents*."); *Nw. Publ'ns, Inc., v. City of Bloomington*, 499 N.W.2d 509, 511 (Minn. App. 1993) (noting the Data Practices Act's "focus" on "information, not documents").[49]

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48 *Id.* at 257.

49 The League of Minnesota Cities has also reached the same basic conclusion, as reflected by its following advice to Minnesota cities: "Note that the definition of 'government data' is broader than the definition of 'government record' under the Government Records Act because it includes all data even if it is not part of an official transaction." *Records Management, supra* note 40, at 8.

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C. The MGDPA's legislative history reflects a desire to prevent government gamesmanship in fulfilling data requests.

The Data Practices Act's legislative history points to an additional reason why the Act entitles the public to access government metadata. This history reveals that "[m]uch of the advice to the Legislature in its development of the initial Act came from . . . data processing professionals."[50] These professionals helped the Legislature realize "the infinite variety of gamesmanship advantages which are available to agencies in their disputes with the public."[51] As such, the Legislature drafted the Act with an "acute awareness" for how "in any contest between . . . the public and a government agency . . . only the agency has the advantage of knowing what types of data are maintained, how they are maintained and how the data can be made accessible."[52]

This led the Legislature to incorporate "several anti-gamesmanship provisions" in the Act.[53] For example, to ensure requestors were not forced to "run the gauntlets of multiple storage locations," the Legislature required government data to be kept "in such an arrangement and condition as to make [it] easily accessible for convenient use.'"[54] *See* Minn. Stat. § 13.03, subd. 1. The Legislature also defined "government data" in a way to stop "agencies from interposing technology as a barrier to access."[55] *See* Minn. Stat. § 13.02, subd. 7 (government data includes all data regardless of storage media). The Legislature even obliged agencies "to translate jargon and computer

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50 Gemberling, *supra* note 39, at 257–58.
51 *Id.*
52 *Id.*
53 Gemberling & Weissman, *supra* note 38, at 583.
54 *Id.*
55 *Id.*

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symbols."[56] *See* Minn. Stat. § 13.03, subd. 3(a) (establishing that upon request, a person "shall be informed of the . . . meaning" of public government data).

The Legislature's most significant, anti-gamesmanship contribution to the Act, however, was a detailed classification system for government data. *See IBEW, Local No. 292,* 765 N.W.2d at 66 (explaining how this system works). This system came about at "the strenuous insistence of the press representatives who believe[d] the classification of personal data" could not "be left to the proverbial faceless bureaucrat whose only interest [was] in protecting his dorsal region."[57] The press wanted "clear cut rules for some lowly clerk to follow," versus a regime of "administrative discretion in applying a balancing test would result in delays and expensive lawsuits."[58]

The end result has been a system that vests the Legislature alone with the power to impose lasting restrictions on access to government data. The Minnesota Department of Administration confirms this reality, noting that "[t]he legislature, through the enactment of the MGDPA, and as evidenced by subsequent actions, has . . . retained the authority to classify data. It [has] removed such discretion from government entities."[59] Hence, as there is no law in Minnesota barring public access to government metadata by itself, the legislative history of the Data Practices Act supports public access to such data. Any other conclusion would only subvert the Legislature's authority.

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56 *Id.*

57 Robert J. Tennessen (Minnesota State Senator), *Present Problems & Future Solutions: Criticism of the Minnesota Data Practices Act and a Proposed Alternative*, *in* GOVERNMENT LIABILITY 419, 425 (Minn. CLE Cmte. ed. 1981).

58 *Id.*

59 Minn. Comm'r of Admin., Advisory Op. 94-057 (Dec. 28, 1994), http://www.ipad.state.mn.us/opinions/1994/94057.html.

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Conclusion

Public access to government metadata is vital to a free society. Metadata enables citizens to understand the story of government documents. These stories can serve to expose misconduct by officials and identify government policies in need of reform. These stories risk being lost, however, whenever citizens are denied the right to review government documents in their native format. This reality has led courts in four states to rule that public records must be produced in their native format because metadata is an inseparable part of these records. Fortunately, Minnesota does not present the same issue because Minnesota guarantees public access to government *data* (not just records). This Court should thus hold in *Webster* that as a matter of plain text, statutory purpose, and legislative history, the Minnesota Government Data Practices Act entitles the public to inspect and copy public government metadata in its native format.

Respectfully submitted,

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