MINNESOTA COALITION ON GOVERNMENT INFORMATION (MNCOGI)

Written Testimony of Matt Ehling, MNCOGI board member, pertaining to SF 4132

Senate State and Local Government and Veterans Committee March 19, 2024

Dear Chair Dziedzic, Senator Mitchell, and committee members,

Thank you for the opportunity to submit written comments regarding SF 4132.

MNCOGI is a non-partisan, nonprofit organization, whose all-volunteer board seeks to ensure public access to government information — in particular, information related to governmental operations. Accordingly, our organization supports robust "open records" and "open meeting" laws, including provisions of those laws whereby violations can effectively be remedied, and public access protected.

First, MNCOGI would like to thank Senators Mitchell and Marty for their work on this important bill. SF 4132 contains certain updates to Minnesota's Open Meeting Law (OML), codified in Minnesota Statutes, Chapter 13D. These updates respond to a number of issues and developments in the OML area, which include the following:

Enhancements to deter misconduct in the OML context
Lines 3.18-3.21 of the bill address the outcome of the Minnesota Supreme Court decision in *Funk v. O'Connor* (Minn. 2018), which dealt with the circumstances under which the OML's "forfeiture of office" provision is triggered.

The OML contains a civil remedy § 13D.06, in order that citizens may seek relief in court in the wake of OML violations. Among the remedies available in § 13D.06 is a provision at § 13D.06 subd. 3(a), which provides that a person who has intentionally violated the OML may be forfeit from holding office under certain conditions:

> (a) If a person has been found to have **intentionally violated this chapter in three or more actions** brought under this chapter involving the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such

public body for a period of time equal to the term of office such person was then serving.

In *Funk v. O'Connor*, the Minnesota Supreme Court held that a person may only be removed from office if three or more intentional OML violations were found in three *separate*, *serial* (back-to-back) adjudications. If three or more separate, intentional OML violations were found in three *concurrently* filed actions instead, those findings would not be sufficient to remove a person from office under § 13D.06 subd. 3. (NOTE — In the facts underlying *Funk v. O'Connor*, the district court found that members of the Virginia City Council, as well as Virginia's mayor — who were all defendants in various OML lawsuits that ended up being consolidated into one single action — had intentionally violated the OML a total of 28 times; with each defendant responsible for six or more violations).

From a practical standpoint, § 13D.06 subd. 3 — as interpreted by the *Funk v. O'Connor* decision — ceases to be an effective deterrent to official misconduct in the OML context. Given that a legal action may take multiple years to arrive at resolution in district court — and then can take even *more* years to work through the appeals process — the threat of removing a serial offender of the OML from office is effectively empty under the current interpretation of § 13D.06 subd. 3. The timeframe for adjudicating three separate, back-to-back legal actions (including all the appeals) could stretch out over a decade — a timeframe far longer than many public officials even hold office for.

SF 1432 remedies this by re-structuring specific language interpreted by the Minnesota Supreme Court in *Funk*, so that going forward, a person who commits "three or more separate, intentional violations" of the OML could be removed from office pursuant to § 13D.06 subd. 3.

SF 1432 also updates § 13D.06 subd. 1 by increasing the monetary penalty that OML violators must pay after having been found guilty of intentionally violating the OML. The statute's current $300 fine has not been updated in many years (the original penalty, added in 1973, was for a fine of $100). Accordingly, SF 4132 raises the fine for a first intentional violation to $1000, and thereafter imposes a $1200 fine for each subsequent, intentional violation.

Recording of closed meetings expanded; in-camera review provided
SF 1432 also establishes that OML meetings that are closed for the purpose of attorney-client privilege must be recorded, just as other closed OML meetings are.

In the context of certain real estate transactions, OML meetings may be closed

under § 13D.05, subd. 3. That section also requires that if such meetings are closed, they "must be tape recorded at the expense of the public body." The same is the case with meetings closed for labor negotiations under § 13D.03.

In both situations, if an action is subsequently brought under § 13D.06 that alleges a violation in which a meeting was improperly closed, a court may review the recordings *in camera* to determine whether or not a meeting closure was appropriate; or whether a closure was merely a pretext to violate the OML. (*See* § 13D.03 subd. 3 and § 13D.05 subd. 3(c)(3)).

Under § 13D.05 subd.3(b), attorney-client privilege assertions made by government entities are a recognized reason for closing a meeting that would otherwise be open under the OML. Here, SF 1432 makes an important change, in that it further specifies that such closed meetings must be recorded, just as similar closed meetings are under the OML. It also specifies that if an action is brought under § 13D.06 which contests a government entity's attorney-client privilege rationale for a meeting closure, a court can review the meeting recording *in camera* to determine whether the closure was for legitimate attorney-client purposes, or if the closure was a Potemkin assertion that constitutes a violation of the OML.

In-camera review of governmental attorney-client privilege claims frequently occurs in the Freedom on Information Act (FOIA) context, where judges review documents during "open records" litigation under FOIA. *See*, for example, Memorandum Opinion in *Judicial Watch v. U.S. Department of State* (2019):

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1242-119

> "Assessing the government's attorney-client privilege claims follows neatly from the legal standard. **Based on the Court's in camera review**, the Court affirms the government's withholdings in documents 21 (in part), 76, 896, 899, 900, 901 (in part), 902, and 2475; but rejects the government's withholding in the duplicate documents numbered 1326, 1328, and 3636."

Similar *in camera* review is available in the context of the Minnesota Government Data Practices Act (MGDPA), in the civil remedies section, at § 13.08 subd. 4:

> "In an action involving a request for government data under section 13.03 or 13.04, the court may inspect in camera the government data in dispute, but shall conduct its hearing in public and in a manner that protects the security of data classified as not public."

Extending such *in camera* review to "attorney-client privilege" meeting recordings in the OML context will ensure that attorney-client assertions cannot be used as a pretext to conduct *other* unrelated business out of the view of the citizenry.

Other positive changes
SF 1432 also makes other positive changes to the OML, including allowing for reasonable attorneys fee awards in the OML context — awards that are also available in the MGDPA context.

In order for the OML to function properly, it must contain effective remedies to deter and correct official misconduct. Like the MGDPA, the OML is a lodestar of "good government" in Minnesota, and MNCOGI thanks Senators Mitchell and Marty for bringing forth a bill to protect it.

Sincerely,

Matt Ehling
MNCOGI board member