



April 13, 2017

Dear House and Senate Leadership and Committee Chairs:

As we begin to work through the omnibus bills, the administration would like to express concerns with rulemaking, data practices, and other provisions contained within proposed legislation. There are multiple bills and provisions that would limit the ability of our agencies to properly function to ensure Minnesotans receive the best services possible.

This administration's core mission is to serve Minnesotans. The purpose of the rulemaking process is to allow agencies to use their expertise to implement legislation with clear, specific rules when authorized by the Legislature. The rulemaking process is designed to allow agencies to write substantive standards using their experience and expertise and provide opportunities for meaningful public input. We all share the same goal of ensuring state government is efficient, responsive, and streamlined and accessible to the public. We ask that you strongly oppose the proposals listed in this letter.

*The following policy provisions pose problems for rulemaking that significantly delay implementing rules, eliminate government transparency, and end up costing Minnesota taxpayers more:*

- **Requiring Legislative Approval for the Adoption of Rules (Senate State Government Bill, SF 605)**. Minnesota's current rulemaking process already provides for full participation by all interested parties, including the public, agencies, and the legislature. SF 605 adds an additional time-consuming step that will increase costs and efforts as agencies await legislative action, which can occur only during session. If the legislature delays approving a proposed rule, or fails to approve a rule, the situation would be further exacerbated. State agencies have the subject matter expertise to develop and work with interested stakeholders to produce workable rules that are necessary to implement the laws passed by the legislature. The Office of Administrative Hearings (OAH) performs an independent legal review to ensure agencies have the authority to adopt every rule agencies propose as part of its legal review process. The Chapter 14 rulemaking process requires many states and months of work. Under existing law, if the legislature has concerns with an adopted rule, the legislature can pass a law to address those concerns or repeal the rule. It is also important to note that state agencies only have rulemaking authority to the extent that the legislature grants it to them. The legislature always has oversight. Passing a law that hinders the rulemaking process for all in Minnesota by waiting for legislative approval is unnecessary. Both Governor Dayton and Governor Pawlenty have vetoed similar legislation in the past for these exact reasons. Here are just two examples of how this policy causes issues within agencies:

- **The Minnesota Department of Health and the Minnesota Department of Agriculture** jointly administer Minnesota's Food Code, Chapter 4626. The agencies are currently revising the entire code for the first time since 1999. This revision has been underway for several years and is approaching completion. Food establishments, grocery stores, and the hospitality industry have been heavily involved in shaping outdated rules to meet current needs as well as the agencies' need to better protect public health. Further delay would hamper everyone in the state.
- **The Minnesota Department of Human Services** has over 60 sets of rules that it has implemented to govern the agency and its programs. Many of these rules, like those governing the Child Care Assistance Program, affect children and families living in Minnesota. The Child Care Assistance Program helps low-income families afford child care for over 29,700 Minnesota children each month, to allow parents to work or go to school with the assurance that their children are well cared for and prepared for school. DHS is currently seeking legislative authority to bring Minnesota into conformity with updated federal laws and regulations for the Child Care Development Block Grant and Child Care Development fund. If DHS is granted the authority, the agency can work quickly to make requisite changes in the rules governing the Child Care Assistance Program to take full advantage of the federal benefit. Obtaining further approval from the legislature once changes are made will create considerable challenges, delays, and costs for implementing this important program that serves a significant number of children and families in Minnesota.
- **Disposition of Contested Case Hearings by the Administrative Hearings Office (Senate State Government Omnibus Bill, SF 605)**. Shifting decision-making authority in contested cases to the Office of Administrative Hearings for administrative law judge (ALJ) disposition undermines agencies' ability to apply their technical expertise and experience. Administrative law judges have honed legal expertise and fact-finding skills. ALJs, however, do not possess the technical background or specific knowledge critical to agency decisions. For these reasons, Governor Dayton vetoed similar legislation in the past.
  - Permitting decisions by the **Department of Natural Resources** involve such diverse technical areas as hydrology, hydrogeology, dam-safety engineering, and mining. Judicial deference to agency decisions presumes that the agency decision-maker has the expertise necessary to decide technical matters within the scope of the agency's authority. Making the ALJ the final decision-maker would eliminate the foundation of technical training, education, and experience underlying this principle of deference. The ALJ also would not have knowledge of, or access to, the body of past permitting decisions to ensure consistency among permittees when making permitting decisions. The proposed change does not appear to include a mechanism for an agency to seek judicial review from an adverse or technically deficient ALJ decision.
  - The Veterans Preference Act, administered by **the Minnesota Department of Veterans Affairs**, excludes certain positions from Veterans Preference protections. In one case, the question was whether a Veteran's position fell within one of these exceptions. The ALJ took a broad view of what kinds of positions were excluded and recommended that the Veteran's position was not entitled to protection. The Commissioner took a more narrow view of who was excluded, and reversed the ALJ.

The Commissioner looked at this particular Veteran's circumstances, the type of work he was actually performing, and the nature of this particular workplace to determine that the Veteran's job did not fall within the exception and that he was entitled to a hearing before he could be terminated. With this proposed change, this would not be allowed.

- **Requiring determination of impacts of proposed rules (Senate State Government Omnibus Bill, SF 605 and House Jobs Omnibus Bill, HF 2209).** Requiring agencies to determine whether a proposed rule will increase the cost of a new home by more than \$1,000 will seriously jeopardize the ability to adopt new building codes within the two-year statutory deadline. Additional time will be required to provide a detailed cost analysis of each code requirement and justify the determinations. Adopting new building codes into law as quickly as possible is important to the homebuilding and remodeling industries, so they can implement the latest advancements in building methods and materials. Further, adoption of new building codes allows for new systems and technologies which can result in cost savings for homeowners, some of which may be realized later as is often the case with increased energy efficiency. Here are some examples of clarifications or reduction of requirements that were accomplished by adopting the last Residential Building Code:
  - Lowered the minimum ceiling height permitted in existing basements and stairways to 6'4" to accommodate existing older housing and allow them to finish these spaces legally.
  - Allowed bedroom escape windows to be replaced with like-in-kind size without having to perform costly reconstruction to fit new "code-size" windows.
  - Clarified that basements do not need more than one escape window as long as they are provided in any basement bedrooms. This prevents costly mis-interpretation of the code.
  - Clarified that window-fall protection devices are not required if just replacing existing windows.
  - Added an exception that, in addition to concrete, allows garage floors to be constructed of sand, gravel, crushed rock, or natural earth. This less costly alternative is especially warranted in Greater Minnesota for storage of vehicles, equipment, machinery, etc.

While this provision may be intended to impact only the agency or agencies that deal with the Minnesota Residential Code, its effect is to require every agency to determine whether any rulemaking will on average increase the cost of a new home by \$1,000 or more. This is wasteful, costly and unnecessary.

- **Amending the Administrative Procedure Act (House State Government Omnibus Bill, HF 691).** Amending the Administrative Procedure Act (APA) is extremely troublesome. Rulemaking authority is assigned to agencies to work out the details for implementing the overall policy that the Legislature sets in statute. Agencies apply expertise to the subject matter that require specialized knowledge. Agencies have focused on increased efficiency in carrying out duties, including improving the timeliness of their work, and reducing the costs to do it. The APA process allows for full public participation. The Legislature has multiple ways to be involved with rulemaking. More specifically, Article 4 of HF 691 is troubling because it adds costs and inefficiency without adding value in the following ways:

- Allows the legislature to object to proposed rules, another way of requiring legislative approval of rules.
- Changes the standard so that all proposed rules must be performance-based, which is not always realistic.
- Adds a definition of “substantial economic impact,” which triggers creation of the panels described below to review the rules, so that rules cannot take effect until the legislature approves them.
- Changes the legal reviewing standard for interpretative statements in enforcement challenges to be “without deference” to the agency and imposes a presumption on the agency that it must overcome.
- Requires the EQB, PCA, DNR, and MnDOT to explain why their mandatory environmental assessment worksheets or impact statements should not be eliminated.
- Eliminates agency authority to subsequently amend or repeal rules without obtaining additional rulemaking authority.
- Requires the agency, if its proposed rule has substantial economic impact, to submit the rule to a five-person peer-review advisory panel at agency expense, as well as preventing the rule from taking effect until the legislature enacts a law. It also removes existing exemptions.
- Allows legislative committees to request the legislative auditor to conduct an impact analysis of the proposed rule using a review panel, and if substantial economic impact exists, the agency cannot move the rule forward until a date 12 to 18 months later.
- Condenses and revises the eight regulatory analyses required in the statement of need and reasonableness (SONAR) into five, expanding the analysis into greater technical detail and requiring additional, expansive research, all at greater expense of time and money.
- Removes the exclusion for the time that the legislature takes to approve rules from the agency’s time limit for completing rulemaking so that rules could expire without being adopted.
- Removes the agency’s ability to request that a petitioner post a bond when challenging agencies for enforcing possible un-adopted rules.
- Allows a petitioner challenging the validity of any agency policy, guideline, or bulletin that the petitioner believes might be a rule, to sue directly in the Court of Appeals and suspends enforcement action until the Court of Appeals rules, all at agency expense.

Under the proposed changes, economic impact trumps all other concerns, such as consumer protection, human health, and privacy issues, when looking at the merits of a proposed rule. These changes alter the separation of powers between the legislative and executive branches by giving the Legislature the ability to veto rules, which raises constitutional concerns. In addition, this alters the checks and balances between the two legislative bodies in some cases, allowing a committee of one legislative body to delay a rule the other body might want. As mentioned before, Governor Dayton and Governor Pawlenty have both vetoed the legislative approval of rules.

*This administration remains dedicated to ensuring transparency in State Government, however the following proposed policy changes are concerning:*

- **Setting Records Retention for Agencies & Official Records (SF 719/HF 1185).** Current law in the Official Records Act and Records Management statutes works effectively. Government entities are in the best position to determine what their own official records are and how long those records need to be maintained based on the mission and unique business needs of each entity. An additional three-year retention mandate will vastly expand unnecessary bureaucratic requirements and add significant cost to every records transaction within the state. Here are some examples of how data retention policy changes will affect agencies:
  - **The Department of Transportation** generates about 1.2 million emails per month and the rate is increasing. This bill would require MnDOT to maintain those emails (because email fits the definition of communication).
  - **Minnesota Pollution Control Agency** currently has 19.2 million records that are available for public inspection. This bill would add at least another 6.6 million records that MPCA would have to manage. In addition to the expense of storing these extra records for 3 years, there would be a huge staff cost for sorting the email for any data practices request.
  - **The Department of Education's** School Safety Technical Assistance Center team and other divisions, in particular compliance and assistance, frequently email each other about how to respond to concerns presented to them by parents or schools. Often a parent will email with a very specific concern about something happening with their child at school and the two divisions will brainstorm together by email how to respond and help the parent. The final response might be an official record, but the intra-agency work deciding how to categorize the problem, who is the best division to respond and how is not an official record. These emails would be retained under the proposed bill requiring additional staff time and more costs.
  
- **Modifying Electronic Access (Senate & House Data Practices Omnibus Bill, SF 817/HF 857).** Under Minnesota Statutes, section 13.15, all Minnesota government entities are required to protect the identity of any person who accesses that government entity's computer to gain access to, or transfer data, or information, or to use government services. The identities of citizens, employees of private organizations, and government employees are all protected. The proposed changes found in HF 857/HF 1701/SF 2026 would remove this classification of data for Minnesota government employees, making their identities public under the presumption in section 13.03. Below are examples of why this is not acceptable for the safety of government employees:
  - **Discrete Active Investigations.** This proposed law could undermine discrete active investigations. As part of the ongoing investigation, the government employee (state or local) may run queries into different databases to get information needed for the investigation. If the subject of the investigation makes a request for the computer access information, the subject could find this recent activity and learn that the investigation is occurring and frustrate the process.

- **Large-scale criminal investigations.** The State Patrol and the Bureau of Criminal Apprehension are involved with large-scale drug investigations often in partnership with local law enforcement. Drug traffickers could easily use data requests to ascertain the number of queries on a license plate as counter-surveillance to find out the best routes for drug trafficking. They could also identify the law enforcement officers around Minnesota who are routinely in a certain area running plates, causing a safety concern for those officers. This is also true for other large-scale criminal operations like fraud investigations.
- **Undercover Officers.** If an undercover officer runs a query on an individual in one or more of the computer systems available in support of criminal justice activities, that individual could make a request, identify that officer and potentially “out” them, jeopardizing their safety and making it impossible for them to work undercover. This concern applies to all undercover law enforcement officers working around the state for various law enforcement agencies, state and local. Agencies such as departments of Natural Resources, Public Safety, and Commerce all have undercover officers that can be exposed to danger.
- **Compliance and Enforcement.** This language could be an issue in compliance and enforcement cases, where staff at any level of government often have to access information that is not public, but the staff’s names who did the accessing of the information are public.
- **Exposure of Individual and Agency Data to Hacking.** Agencies use the current statute as a basis for redacting data including user names, passwords, and IP addresses. If made public, these are the elements cyberterrorists need to gain entry to sensitive state systems, as well as personal information (e.g. W2 forms).
- **Protecting Public Servants.** Government employees who interact with citizens are routinely harassed on a personal basis. Examples include mailing threatening legal documents, threats towards personal safety, and threats or attempts to place liens on their homes. These individuals could request public data each month and target any government employee who accessed the individual’s data in the course of performing their official duties. State employees are also Minnesota citizens and deserve the same protections as other Minnesota citizens

In closing, we as an administration oppose any bill with these provisions as they diminish rather than help us carry out our obligations to Minnesotans. Essentially, these provisions will result in irresponsible governing and cause further confusion to Minnesotans looking for clear guidance. Thank you for your consideration of this feedback. Should you have any questions, we all stand available to answer them at any time.

Sincerely,


*Signatures on next page*

House and Senate Leadership and Committee Chairs

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Page 7

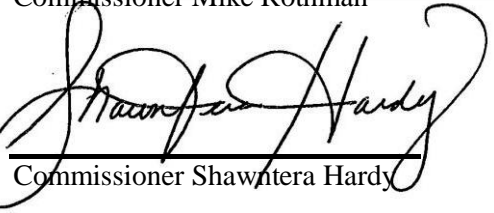
  
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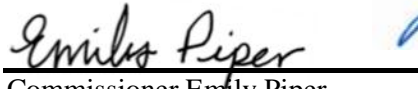
  
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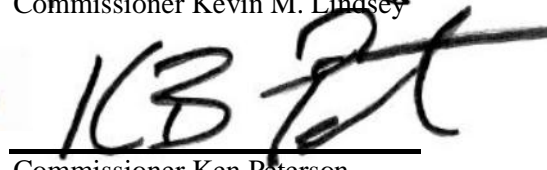
  
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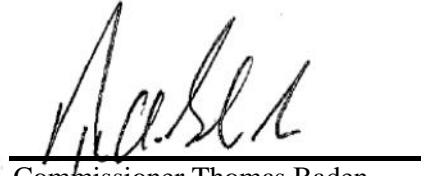
  
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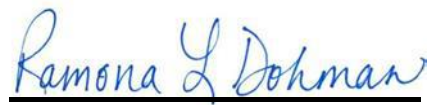
  
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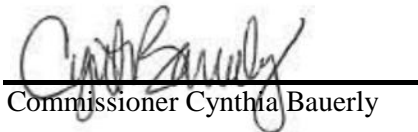
  
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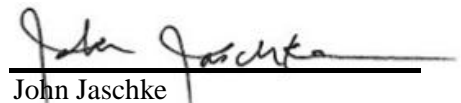
  
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