



Advisory Opinion 09-014

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2008). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On May 21, 2009, Information Policy Analysis Division (IPAD) received a letter, dated same, from Anna Kurth, on behalf of the *Hibbing Tribune*. In her letter, Ms. Kurth asked the Commissioner to issue an advisory opinion regarding *Hibbing Tribune's* right to get access to certain data from the Minnesota Municipal Utilities Association (MMUA.)

IPAD, on behalf of the Commissioner, wrote to Jack Kegel, Executive Director of MMUA, in response to Ms. Kurth's request. The purposes of this letter, dated May 26, 2009, were to inform him of Ms. Kurth's request and to ask him to provide information or support for MMUA's position. Kaela Brennan, attorney for MMUA, responded, in a letter dated June 11, 2009.

A summary of the facts follows. In a March 16, 2009, email, *Hibbing Tribune* wrote to Mr. Kegel, asking for access to all data that relate to "meetings conducted or sponsored by MMUA at which representatives of Excelsior Energy [a private business] have been allowed or invited to make presentations."

In a March 19, 2009, email, Mr. Kegel replied, stating that MMUA "is a private, nonprofit trade association and is not subject to [Chapter 13.]"

In her comments to the Commissioner, Ms. Brennan provided some background:

MMUA was created in 1931 as a private, non-profit corporation under Chapter 317A of Minnesota Statutes and qualified as a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Code. MMUA performs trade-association services to Minnesota Cities engaged in utility enterprises, including gas, electricity, and water. MMUA's Restated Articles of Incorporation define its purpose 'to protect and assist municipally-owned utilities in the state of Minnesota,' including disseminating information of interest to municipal utilities, meeting, conferring, and interchanging ideas for greater efficiency and economy of municipal utilities.

Issues:

Based on Ms. Kurth's request, the Commissioner will address the following issues:

1. Is the Minnesota Municipal Utilities Association subject to Minnesota Statutes, Chapter 13?
2. If the answer to Issue 1 is yes, did MMUA comply with Minnesota Statutes, Chapter 13, in its response to a March 16, 2009, request for access to certain data?

Discussion:

Pursuant to Minnesota Statutes, section 13.03, government data are public unless otherwise classified.

Issue 1. Is the Minnesota Municipal Utilities Association subject to Minnesota Statutes, Chapter 13?

In her comments to the Commissioner, Ms. Kurth wrote, in support of *Hibbing Tribune's* position that MMUA is obligated to provide access to the data in question:

It appears to us that, rather than being a separate, private entity, [MMUA] is purely a creature of the state's municipal electric, natural gas and water utilities. Municipal utilities are of course governmental agencies, governed by a city council or an appointed utility commission. Furthermore, the support services the association provides are so thoroughly intermingled with its member utilities' operations that it is often hard to distinguish the two.

. . . .

Taken together, the MMUA's existence as an entity created by governmental agencies, and its involvement in its member utilities' training, planning, policy discussions, project financing and day-to-day operations, adds up to what to us seems a convincing case that, in key respects, the association functions as a government entity, and should therefore be subject to the Government Data Practices Act.

Lastly, it is our view that the MMUA may come within the provisions of Minnesota Statute 13.05, Subd. 11, because it would seem virtually certain that – even if it is a private entity – it maintains a contractual relationship with its government agency members.

In her response to the Commissioner, Ms. Brennan stated that MMUA is a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Service Code, and as such, is not a government entity for purposes of Minnesota Statutes, section 13.02, subdivision 7a, and therefore is not subject to Chapter 13.

The Commissioner acknowledges *Hibbing Tribune's* position that, given that MMUA is an association whose member municipal utilities are all subject to Chapter 13, its data ought to be accessible to the public. Nonetheless, MMUA is a private entity, whose data, generally, are exempt from public exposure.

However, government entities, which are subject to Chapter 13, frequently contract with private organizations, such as MMUA, to perform functions on their behalf. MMUA provides services under some sort of arrangement to its members, which are, according to Ms. Brennan, municipal utilities operated by Minnesota cities. Those member municipal utilities are subject to Chapter 13, and they may not enter into associations with private organizations that enable them to shield their activities from the public.

The Commissioner addressed an issue that is similar to *Hibbing Tribune*'s characterization of the operation of MMUA, in Advisory Opinion 01-044, in describing an arrangement between a government entity and a private nonprofit:

The gist of [the] argument is that when the Authority entered into contract with the Nonprofit, it . . . delegated its operating authority to the Nonprofit. . . . In essence, this shields the operation of the Aquarium from public scrutiny. This is the very type of situation the Legislature rectified by amending Chapter 13 to include the contract language now codified at section 13.05, subdivision 11.

Minnesota Statutes, section 13.05, subdivision 11, which was effective August 1, 1999, provides:

(a) If a government entity enters into a contract with a private person to perform any of its functions, the government entity shall include in the contract terms that make it clear that all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and that the private person must comply with those requirements as if it were a government entity. The remedies in section 13.08 apply to the private person under this subdivision.

(b) This subdivision does not create a duty on the part of the private person to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract.

Ms. Brennan stated that MMUA does not perform any government function and therefore Minnesota Statutes, section 13.05, subdivision 11 is not applicable. However, the cases she cited in support of MMUA's position do not construe the phrase "government function" in section 13.05, subdivision 11, and, in the Commissioner's opinion, do not apply here. The Commissioner believes that section 13.05, subdivision 11, does apply to any agreements/arrangements/contracts MMUA and its member municipal utilities entered into after August 1, 1999, which she assumes are renewed/revised on a regular basis.

Issue 2. *If the answer to Issue 1 is yes, did MMUA comply with Minnesota Statutes, Chapter 13, in its response to a March 16, 2009, request for access to certain data?*

In Advisory Opinion 05-034, the Commissioner opined:

In *WDSI, Inc. v. The County of Steele*, 672 N.W.2d 617 (Minn.App. 2003), the Court discussed a situation in which a contract between a private person and Steele County did

not contain the language required in section 13.05, subdivision 11. The Court held that the District Court's decision to not infer the language was in error:

To accept WDSI's argument and the district court's reasoning would be to simply ignore the mandate of the statute. Although the mandate was not expressly reflected in the contract, it applies nevertheless, and neither contracting parties nor courts can simply ignore it. [See WDSI, p.622. Also see Advisory Opinion 01-075.]

MMUA did not provide copies of its agreements/arrangements/contracts with its member municipal utilities, but it appears that MMUA is providing them services of the kind the Legislature contemplated when it enacted section 13.05, subdivision 11. If so, then the data that relate to performing agreed-upon services that MMUA creates, collects, etcetera after August 1, 1999, are government data subject to the requirements of Chapter 13. Per *WDSI*, even if the required language was not in the contracts, it must be inferred.

Ms. Brennan wrote “MMUA has not entered [sic] a contract with government entities concerning the subject of Hibbing Tribune’s request.” However, contracts and other agreements typically contain broader statements that refer to services in general, and she stated that MMUA’s services include “meeting, conferring, and interchanging ideas.” Thus, the data *Hibbing Tribune* requested, i.e., data that relate to “meetings conducted or sponsored by MMUA” are subject to disclosure.

Clearly under section 13.05, subdivision 11(b), the member municipal utilities must provide *Hibbing Tribune* with the data in question if they maintain it. However, it is reasonable to assume that because MMUA arranged for Excelsior Energy to attend/present at MMUA-sponsored events, MMUA may maintain related data that none of its members maintains. Thus, if the data in question are not available from the member utilities, MMUA must provide the data. (See also Advisory Opinion 09-003.)

Opinion:

Based on the facts and information provided, my opinion on the issues that Ms. Kurth raised is as follows:

1. The Minnesota Municipal Utilities Association is subject to Minnesota Statutes, Chapter 13, to the extent that its arrangements with its member cities obligate it to comply with Minnesota Statutes, section 13.05, subdivision 11.
2. MMUA did not comply with Minnesota Statutes, Chapter 13, in its response to a March 16, 2009, request for access to certain data, if those data are maintained only by MMUA, and are not accessible from its government entity members.

Signed: Sheila M. Reger
Sheila M. Reger
Commissioner

Dated: June 30, 2009