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### Advisory Opinion 10-018

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2010). It is based on the facts and information available to the Commissioner as described below.

#### **Facts and Procedural History:**

On May 27, 2010, the Information Policy Analysis Division (IPAD) received a letter from Matt Von Pinnon, then-editor of *The Forum* newspaper. In his letter, Mr. Von Pinnon asked the Commissioner to issue an advisory opinion regarding the newspaper's right to gain access to certain data related to a new City of Fergus Falls ice arena. IPAD requested additional information which Mila Koumpilova, current editor of *The Forum*, provided on July 28, 2010.

IPAD, on behalf of the Commissioner, wrote to Mark Sievert, Administrator of the City, in response to Ms. Koumpilova's request. The purposes of this letter, dated August 6, 2010, were to inform him of Ms. Koumpilova's request and to ask him to provide information or support for the City's position. The City did not provide a response.

A summary of the facts as Ms. Koumpilova provided them is as follows. In his May 27, 2010, letter to the Commissioner, Mr. Von Pinnon wrote:

Last year, the Fergus Falls City Council approved building a new ice arena in town – a project that would combine roughly \$4 million of public funding and about \$3 million in private donations, in addition to \$1.6 million in land and equipment donated by the Fergus Falls Public Schools. The City will own, operate and maintain the new facility.

The City has since signed an agreement with the [Fergus Falls 544 Education Foundation], a non-profit 501(c)(3) organization, to collect pledges and donations toward the arena project on behalf of the City. The Foundation is briefing the City on the overall amount of pledges and donations collected, but it is not disclosing information about the identities of contributors or the size of their pledges or donations.

(Mr. Von Pinnon provided to the Commissioner a copy of the agreement, which the parties signed in January 2010.)

In a letter dated April 8, 2010, *The Forum* made a data request to the Foundation:

I am requesting a list of individuals and corporations that have made contributions or pledges toward the Fergus Falls Community Arena and the amounts they have contributed or pledged.

We believe ... the documents requested are public records because the Education Foundation has a written agreement with the City of Fergus Falls, a public entity, to collect pledges on its behalf. The relevant Minnesota statute is 13.05, subdivision 11.

The Foundation responded on April 15, 2010:

... At this time, the information requested is private information and the Foundation needs to respect the private nature of the information held by it.

.... The Foundation is a non-profit 501(c)(3) organization, and is not subject to [Minnesota Statutes, Chapter 13]. ... The [Foundation] is not performing any governmental function, but instead is simply serving as a facilitator for collections of private donations, which are solicited by the Fergus Falls Ice Arena Fundraising Committee and transferred to the City of Fergus Falls. ...

At IPAD's request, *The Forum* then requested the same data from the City. Ms. Koumpilova requested the data in a letter dated June 24, 2010. She wrote, "The agreement between the [Foundation], the Fergus Falls Ice Arena Fundraising Committee and the City of Fergus Falls states it is an obligation of the [Foundation] to 'provide monthly information to the Committee and the City as to what funds have been received and by whom.'"

In response, on June 28, 2010, the City provided a print-out for the period 1/1/2007 – 6/25/2010 that lists "the contributions and donations from private sources." The City also provided copies of the "actual checks the City received in conjunction with these donations." Of the copies of eight checks the City provided, three are from a specific charitable foundation, and the rest are from the Foundation. The City's attorney wrote, "This is the extent of the data that is in the City's possession."

In her July 28, 2010, letter to the Commissioner, Ms. Koumpilova wrote, "As you will see from the documents enclosed, the City provided copies of checks that merely listed the [Foundation.] Again, we feel the names of individual donors and the amounts they have pledged or contributed should be made available to the public."

**Issue:**

Based on Ms. Koumpilova's opinion request, the Commissioner agreed to address the following issue:

Did the City of Fergus Falls comply with Minnesota Statutes, Chapter 13 and Minnesota Statutes, section 15.17, in responding to a data request for data on individuals and corporations that have made contributions or pledges toward the Fergus Falls Community Arena and the amounts they have contributed or pledged?

**Discussion:**

According to the agreement, the Foundation is a not-for-profit corporation registered as a 501(c)(3) with the Internal Revenue Service. Generally, such organizations and their data are not subject to the requirements of Chapter 13 except in situations where they have a contractual relationship with a government entity.

Minnesota Statutes, section 13.05, subdivision 11, states:

(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.

Here, the City and the Foundation entered into an agreement in January 2010. The obligations of the Foundation include:

- Provide for an escrow account on behalf of the City to hold directed fundraising monies in the type and place as directed by the Committee.
- Deposit monies raised directly by the Committee or monies specifically designated for the purpose of building a new ice arena located in Fergus Falls, Minnesota, into this account as the funds are received.
- Provide monthly information to the Committee and City as to what funds have been received and by whom.

(The Committee is the group appointed by the Foundation as its “non-exclusive licensee to use the name and logo of the [Foundation] in connection with the administration of the fundraising efforts for the term of this agreement.”)

The obligations of the City include:

- Receive monies from the [Foundation] on a monthly or more frequent basis for the purpose of providing funding for development, construction and maintenance of a new ice arena facility in Fergus Falls, Minnesota.
- Oversee the use of those funds and financing, upon the conditions satisfactory to the City and in accordance with the applicable law, for the purpose of a new ice arena facility in Fergus Falls, Minnesota.

In soliciting and collecting contributions for the new arena that the City will own, operate, and maintain, the Foundation (and its committee) is performing a function that the City otherwise would have to undertake itself. Therefore, pursuant to section 13.05, subdivision 11, the related data are government data and, as such, are subject to the requirements of Minnesota Statutes, Chapter 13 - regardless of whether the City or the Foundation maintains the data.

Pursuant to Chapter 13, government data are public unless otherwise classified. (Minnesota Statutes, section 13.03, subdivision 1.)

The Commissioner notes that Minnesota Statutes, section 13.792, classifies, as not public, certain gift data maintained by several specific organizations, i.e., the Minnesota Zoological Garden, the University of Minnesota, the Minnesota State Colleges and Universities, the Twin Cities Regional Parks Foundation, and State Services for the Blind. However, the City of Fergus Falls is not one of the entities that has data classified by section 13.792.

Minnesota Statutes, section 15.17, requires that government entities create and maintain records that document their official activities. In its June 28, 2010, response to *The Forum's* data request, the City appeared to be stating it did not have *in its possession* a list of the individuals and corporations that have made contributions or pledges toward the Arena and the amounts they have contributed or pledged. This raises two issues. First is that, in the agreement, one of the obligations of the Foundation is to “provide monthly information to the ... City as to what funds have been received *and by whom.*” [Emphasis added.] Thus, based on the agreement, it appears the City should maintain the data.

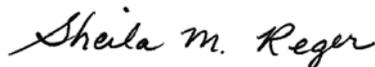
Second, even if the Foundation has not provided to the City the names of the contributors and amounts pledged and contributed, under section 15.17, these data are records “necessary to a full and accurate knowledge of [the entity’s] official activities” and, as such, should be maintained by either the City or the Foundation (on behalf of the City). Therefore, even if the City is not maintaining the data, the City must be able to retrieve the data from the Foundation or the Foundation, upon request, must provide the data to a data requestor.

**Opinion:**

Based on the facts and information provided, the Commissioner’s opinion on the issue that Ms. Koumpilova raised is as follows:

The City of Fergus Falls did not comply with Minnesota Statutes, Chapter 13 and Minnesota Statutes, section 15.17, in responding to a data request for data on individuals and corporations that have made contributions or pledges toward the Fergus Falls Community Arena and the amounts they have contributed or pledged.

Signed:




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Sheila M. Reger  
Commissioner

Dated:

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September 14, 2010