



Advisory Opinion 11-001

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 November 8, 2010, the Information Policy Analysis Division (IPAD) received an email from Marshall Helmberger, on behalf of the *Timberjay Newspapers*. In his email, Mr. Helmberger asked the Commissioner to issue an advisory opinion regarding his right to get access to certain data Johnson Controls, Inc. (JCI), a contractor with Independent School District 2142, St. Louis County, maintains. IPAD asked for additional information, which Mr. Helmberger provided on November 16, 2010.

IPAD, on behalf of the Commissioner, wrote to Shamus P. O'Meara, attorney for JCI, in response to Mr. Helmberger's request. The purposes of this letter, dated November 17, 2010, were to inform Mr. O'Meara of Mr. Helmberger's request and to ask him to provide information or support for JCI's position. Mr. O'Meara responded, in a letter dated December 13, 2010. IPAD then asked JCI to provide additional information, i.e., copies of contracts it has entered into with the District. Mr. O'Meara provided copies of "executed proposal contracts" on December 18, 2010.

The Commissioner also invited Charles Rick, District Superintendent, to submit comments. Stephen M. Knutson, attorney for the District, responded, in a letter dated December 13, 2010.

A summary of the facts follows. According to Mr. Helmberger, in a letter dated October 20, 2010, he asked JCI for access to the following data related to the restructuring of the District:

- 1) Detailed construction budgets for both of the new school projects.
- 2) A detailed spreadsheet showing how JCI achieves its purported savings of \$5.6 million from the restructuring.
- 3) Detailed documentation supporting the JCI invoices submitted by the company to date.
....
- 4) Any revisions, or proposed revisions in the JCI contract, since the ones signed in January of this year.

Mr. Helmberger had earlier requested the same data from the District, and was told by Superintendent Rick, in a letter dated October 13, 2010, that the District or JCI had

already provided Mr. Helmberger with access or the District did not maintain data responsive to his request, or he needed to clarify the data he was seeking. Superintendent Rick also stated that the District was advising JCI of Mr. Helmberger's request and that if JCI "does not have any objection or basis for withholding the data, to provide the responsive data directly to you."

Regarding item 1 above, Mr. Rick informed Mr. Helmberger that the District "does not maintain the data as JCI has taken back information it provided based upon the position that it constitutes JCI's proprietary information."

In his response to Mr. Helmberger, Mr. O'Meara wrote:

You have requested information from JCI, a private business, and thus no response is required.

We are also advised that you have requested the same information from the St. Louis County School District, and that the District has interacted with you concerning the requested information. To the extent the requested information constitutes government data in the possession of the District JCI would have no obligation to provide the requested information even if the government practice act data [sic] is applicable to your request to JCI. *See* Minn. Stat. 13.05, subd. 11.

In his comments to the Commissioner, Mr. O'Meara wrote:

In April of 2008, the District hired JCI to lead Phase I of a three phase process co-developed by JCI and the District to help determine the District's future school organization. In September of 2008, the District, with consultation from JCI, began working on Phase II of their process.

.... In approximately December, 2008, the District, working with JCI, established a financial baseline from which to frame the financial sustainability of the plan options and allow for reinvestment of additional educational enhancements.

In his comments to the Commissioner, Mr. Knutson wrote:

.... The School District and JCI are parties to a number of contracts under which JCI has provided various services to the School District

.... [The District] ... advised Mr. Helmberger that School District representatives were shown certain data by JCI representatives and that data was retrieved by JCI. Consequently, that data was not maintained by the School District.

....

While the School District is a government entity subject to the requirements of Chapter 13, JCI, a private entity, is not generally subject to the requirements of Chapter 13. The Department has recognized that where a private entity has a contractual relationship with a governmental entity, there may be situations where the private entity, itself, or the data created/collected by the private entity as part of fulfilling its contractual obligations maybe subject to Chapter 13. *See* Advisory Op. 99-027 (August 20, 1999.)

To determine whether the public is entitled to gain access to the data requested by Mr. Helmberger depends on the contractual relationship between the School District and JCI. The School District and JCI have entered into a separate contract at each phase of the three-phase approach devised for the overall project. The data requested by Mr. Helmberger appears to arise from services provided by JCI in Phases II and III.

Issue:

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

Did Johnson Controls, Inc. comply with Minnesota Statutes, Chapter 13, when it denied access to data related to a contract JCI has entered into with Independent School District 2142, St. Louis County?

Discussion:

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

Generally, private organizations, such as JCI, are not subject to the requirements of Minnesota Statutes, Chapter 13. However, they are obligated to comply with Chapter 13 if they enter into a contract with a government entity to perform any of its functions and maintain government data in connection with that contractual relationship.

Pursuant to Minnesota Statutes, section 13.05, subdivision 11:

(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.

Mr. Knutson wrote to the Commissioner:

A review of the contracts for Phases II and III reveal that there was no language included therein that makes JCI itself subject to Chapter 13. However, [Chapter 13] provides that a private party who has contracted with a government entity to perform a government function has a duty to provide the public with government data unless the government entity also maintains the data.

Mr. Knutson discussed the applicability of a 2003 Minnesota Appellate Court case, which the Commissioner addressed 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.)

See also Advisory Opinion 03-033.

Mr. Knutson has stated that the District believes it does not maintain data responsive to Mr. Helmberger's request. If that is the case, then per section 13.05, subdivision 11(b), JCI is obligated, as a private party under contract with a government entity to perform a government function, to provide the public with access to public government data it maintains, that the District does not.

Based upon the information the parties provided, the Commissioner is not aware of any provision of state or federal law that classifies the kind of data Mr. Helmberger requested as other than public. In his response to Mr. Helmberger, Mr. O'Meara suggested several possible ways by which JCI might properly deny access to data it maintains in connection with its contracts with the District: as "trade secret information ... or protected by the attorney client privilege or the work product doctrine;" as "proprietary information," or to protect data "involved in a pending civil action." However, he did not provide any specific bases to enable the Commissioner to determine whether any of the data in question may be classified as trade secret, or protected by attorney-client privilege or as work product. Furthermore, Chapter 13 does not classify "proprietary information," and in order to protect data "involved in a pending civil action," the chief attorney acting *for the government entity* must determine whether a civil legal action is pending. (See Minnesota Statutes, section 13.39.)

Accordingly, if it has not already done so, JCI must provide to Mr. Helmberger the public government data he has requested, that JCI maintains but the District does not.

As a final note, pursuant to Minnesota Statutes, section 15.17, the District must create and maintain records that document its official activities. The Commissioner opined in Advisory Opinion 10-018:

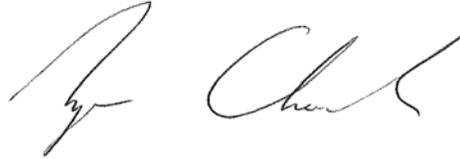
[E]ven if the Foundation has not provided to the City the names of the contributors and amounts pledged and contributed, under section 15.17, these data are records "necessary to a full and accurate knowledge of [the entity's] official activities" and, as such, should be maintained by either the City 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 Mr. Helmberger raised is as follows:

Johnson Controls, Inc. did not comply with Minnesota Statutes, Chapter 13, when it denied access to data related to a contract JCI has entered into with Independent School District 2142, St. Louis County.

Signed:



Ryan Church
Acting Commissioner

Dated:

January 3, 2011