



Advisory Opinion 11-005

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 March 28, 2011, 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 April 7, 2011.

IPAD, on behalf of the Commissioner, wrote to David L. Lillehaug, attorney for JCI, in response to Mr. Helmberger's request. The purposes of this letter, dated April 8, 2011, were to inform Mr. Lillehaug of Mr. Helmberger's request and to ask him to provide information or support for JCI's position. Mr. Lillehaug responded, in a letter dated April 25, 2011.

The Commissioner also invited Charles Rick, District Superintendent, to submit comments. Michelle D. Kenney and Stephen M. Knutson, attorneys for the District, responded in a letter dated April 25, 2011.

A summary of the facts follows. According to Mr. Helmberger, on January 21, 2011, he asked for data, including the following, from ISD 2142: "Annual operational cost projections" for waste and storm water treatment facilities and water towers "for the north and south schools."

Mr. Helmberger wrote that he first asked the District for the data at issue, and Mr. Rick "informed me by phone that the district did not have the ... data. He said he had asked JCI to provide it to me."

Mr. Helmberger also asked the District for a copy of the contract with Architectural Resources, Inc. (ARI) "as it relates to the school facilities project currently under construction by ISD 2142 under contract with JCI."

Mr. Helmberger wrote:

Mr. Rick notified me by email ... and in a personal conversation that the district did not have information on the operating costs of the above-noted systems and informed me that he had asked JCI to provide the information.

In addition, Mr. Rick indicated to me in person that the district does not maintain a copy of the contract and referred the request to JCI.

Mr. Helmberger then wrote to JCI and asked for the data. In response, Mr. Lillehaug denied his request, “in part, citing JCI’s previous claim that they are not subject to the MDPA. In addition, Mr. Lillehaug claims that I owe JCI \$3,900 for my previous request for information [which] Mr. Lillehaug is demanding be paid before he will consider any further requests for information.” (Advisory Opinion 11-001 addressed Mr. Helmberger’s previous data request to JCI; the invoice at issue here relates to that request.)

In his comments to the Commissioner, Mr. Lillehaug challenged the Commissioner’s authority to issue this opinion (see Discussion below), and stated that JCI properly denied Mr. Helmberger’s March 4, 2011, data request because he had not paid the \$3,900 charge.

According to Mr. Lillehaug:

JCI’s unpaid invoice is itself sufficient reason to refuse to spend more time researching or copying documents for Mr. Helmberger. See *Salminen v. City of Hibbing*, 1989 WL 14922 (Minn. Ct. App. Feb. 28, 1989) (“We find that City has no duty to research or copy documents for Salminen until the bill is paid ... for previous costs incurred by the City”).

On March 18, 2011, JCI advised Mr. Helmberger that his latest request is not so specific that, on its face, it seeks less than 100 pages of documents. JCI notified Mr. Helmberger that it was not prepared to begin any search without a deposit or other tangible commitment that Mr. Helmberger would pay for the actual costs in the event that the search produced more than 100 pages of documents. Mr. Helmberger has failed to make such a commitment to pay.

Mr. Lillehaug further stated that the JCI-ARI subcontract contains trade secret information. He wrote:

...Minnesota courts have held that parties can establish certain contract pricing data (e.g., leasing information) as trade secret information under the Act. See *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, 2004 WL 1837990 (Minn. Tax Ct. 2004).

The contract between JCI and ARI contains information on pricing, margin, and profit expectations, including hourly rates charged and the scope of services required by JCI. This is confidential business information. The information derives economic value from this confidentiality, as competitors with this information would find it possible to anticipate the costs and profits expected by JCI on any particular project and use this information to underbid JCI.

According to Ms. Kenney and Mr. Knutson:

The data requested which is the subject of Mr. Helmberger’s present advisory opinion request is not maintained by the School District. Mr. Helmberger was so advised by Dr. Charles Rick, Superintendent of Schools, in email correspondence on March 28, 2011. In addition, Dr. Rick informed Mr. Helmberger that his request had been forwarded to Johnson Controls, Inc. (“JCI”). The School District has acted in conformance with Advisory Opinion 011-001 dated January 3, 2011.

Issues:

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

1. Did Johnson Controls, Inc. (JCI) comply with Minnesota Statutes, Chapter 13, when it charged \$3,900 for copies of government data related to a contract JCI has entered into with Independent School District 2142, St. Louis County?
2. Did Johnson Controls, Inc. (JCI) comply with Minnesota Statutes, Chapter 13, in its response to a request for access to government data related to a contract JCI has entered into with Independent School District 2142, St. Louis County?

Discussion:

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

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. [Emphasis added.]

(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.

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.

As noted above, Mr. Lillehaug objected to the Commissioner's decision to issue this opinion for a number of reasons.

Mr. Lillehaug stated that the Commissioner's authority to issue advisory opinions under Minnesota Statutes, section 13.072, is limited to determinations "made by a government entity" and does not extend to a private party with which an entity enters into a contract. According to Mr. Lillehaug, because JCI is not a government entity:

Minn. Stat. § 13.05, subd. 11, ('Subdivision 11'), which creates a right to data from certain private contractors, does not bestow jurisdiction on the Commissioner to issue advisory opinions in disputes between a requester and a contractor. To the contrary, Subdivision 11 specifically distinguishes between a "government entity" and a "private person." Further, Subdivision 11 expressly limits the remedies against a private person to

those in [Minnesota Statutes] Section 13.08, and makes no mention whatsoever of Section 13.072 or advisory opinions. Accordingly, the Commissioner has no jurisdiction under the Act to issue an advisory opinion in a dispute between a requester and a private entity such as JCI.

The Commissioner respectfully disagrees with Mr. Lillehaug. Minnesota Statutes, section 13.072, confers authority for the Commissioner to issue an opinion to a person who disagrees with an entity's data practices determination. JCI is obligated under Minnesota Statutes, section 13.05, subdivision 11, to comply with Chapter 13 as if it were a government entity. Section 13.05, subdivision 11, makes explicit that the Minnesota Statutes, section 13.08, remedies are applicable, but contains no language (e.g., "notwithstanding section 13.072") that explicitly excludes section 13.072.

Mr. Lillehaug also objected to the Commissioner's decision to issue this opinion because "JCI is not performing a government function," a necessary condition for Minnesota Statutes, section 13.05, subdivision 11, to apply. According to Mr. Lillehaug, JCI entered into three contracts with the District in 2008 and 2009, and "two additional contracts on February 25, 2010: one to provide professional services on the construction of two new schools and one for professional services for renovations to three existing schools."

Pursuant to Minnesota Statutes, section 123B.02, subdivision 2:

It is the duty *and the function of the district* to furnish school facilities to every child of school age residing in any part of the district. [Emphasis added.]

Numerous other statutory provisions address school districts' duties and authority regarding the construction and renovation of public schools. (See, for example, Minnesota Statutes, sections 123B.51, 123B.71, and 123B.72.) Accordingly, JCI is performing a governmental function for the District.

In summary, the Commissioner respectfully rejects each of Mr. Lillehaug's objections to his authority to issue this opinion. JCI is a private party subject to the requirements of Minnesota Statutes, section 13.05, subdivision 11, by virtue of its contractual relationship with the District, notwithstanding their failure to include in their contracts the language required by that section.

Issue 1. Did Johnson Controls, Inc. (JCI) comply with Minnesota Statutes, Chapter 13, when it charged \$3,900 for copies of government data related to a contract JCI has entered into with Independent School District 2142, St. Louis County?

When an individual requests copies of more than 100 pages of data of which s/he is not the subject, the government entity may charge its actual *reasonable* costs to search for and retrieve the data and make the copies, but may not charge its costs to separate public from not public data. (See Minnesota Statutes, section 13.03, subdivision 3(c), and Minnesota Rules, part 1205.0300.) In addition, pursuant to section 13.03, subdivision 1, entities must maintain government data so that they are easily accessible for convenient use.

Mr. Helmberger and Mr. Lillehaug disagree on the facts as to whether all of the data JCI provided to Mr. Helmberger are responsive to his request. The Commissioner cannot resolve

that factual disagreement. Accordingly, this discussion is about whether, generally, JCI's \$3,900 charge for copies of some 135 pages is allowable under Chapter 13.

The Commissioner has addressed appropriate copy charges in numerous opinions. In Advisory Opinion 99-039, the Commissioner opined:

In situations where a private party ... is acting as the government entity's agent (in this case via a contract for services) by housing/maintaining government data, the rights of the individual seeking data have not changed. In other words, the requester has the right to obtain copies of data; also, any fee either the government entity or its agent assesses must fall within the parameters prescribed in Chapter 13.

Further, the fact that [a private party] maintains [requested] data ... does not mean that [the requester] should pay unreasonably high charges simply because the data are in the possession of [the private party.]

Here, JCI claims that it took 41 hours, charged at hourly rates ranging from \$45.00 to \$120.00 per hour, to provide Mr. Helmberger with approximately 135 pages of data. Mr. Helmberger noted that the District pays an average hourly clerical wage, including benefits, of \$19.00 per hour. Regardless whether each of the 135 pages of data JCI provided Mr. Helmberger is responsive to his request, the Commissioner does not find its copy charge of \$3,900 reasonable, and therefore it is not allowable under Chapter 13. JCI must adjust its charges in light of the guidance the Commissioner has provided in previous opinions.

Issue 2. Did Johnson Controls, Inc. (JCI) comply with Minnesota Statutes, Chapter 13, in its response to a request for access to government data related to a contract JCI has entered into with Independent School District 2142, St. Louis County?

Mr. Lillehaug characterized the data in the JCI-ARI contract as "confidential business information" that are protected as trade secret information under Minnesota Statutes, section 13.37, subdivision 1(b), which provides:

'Trade secret information' means government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

Pursuant to subdivision 2 of section 13.37, trade secret data are classified as nonpublic (data not on individuals) and as private (data on individuals).

Mr. Lillehaug also asserted that a Minnesota Tax Court case, *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, 2004 WL 1837990 (Minn. Tax Ct. 2004) held that parties can establish certain contract pricing data (e.g., leasing information) as trade secret information under the Act. However, *EOP-Nicollet Mall* carries no precedential value. (See *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 769 (Minn. 2006).) Thus, it does not control the outcome here.

The Commissioner has previously noted that Minnesota Statutes, section 13.37, does not classify proprietary information, and the Legislature set a narrow standard for classification under this provision, which the information Mr. Lillehaug provided does not meet. (See Advisory Opinions 03-017 and 08-018.) Accordingly, the Commissioner respectfully disagrees that the JCI-ARI contract is trade secret information for purposes of section 13.37. Pursuant to Minnesota Statutes, section 13.03, the contract is public. (See also Advisory Opinion 03-027.)

Minnesota Statutes, section 13.03, does not contain a provision that allows a government entity (or its contractor) to withhold government data on the basis of an unpaid, disputed copy charge. It is important to note that the *Salminen* case Mr. Lillehaug cited is unpublished and, pursuant to Minnesota Statutes, section 480A.08, subdivision 3, carries no precedential value. Thus, it does not control the outcome here. Accordingly, if it has not already done so, JCI must provide Mr. Helmberger access to the JCI-ARI contract. (See Advisory Opinion 03-046.)

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issues Mr. Helmberger raised is as follows:

1. Johnson Controls, Inc. (JCI) did not comply with Minnesota Statutes, Chapter 13, when it charged \$3,900 for copies of government data related to a contract JCI has entered into with Independent School District 2142, St. Louis County.
2. Johnson Controls, Inc. (JCI) did not comply with Minnesota Statutes, Chapter 13, in its response to a request for access to government data related to a contract JCI has entered into with Independent School District 2142, St. Louis County.

Signed: 

 Spencer Cronk
 Commissioner

Dated: _____
 May 26, 2011