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### Advisory Opinion 15-003

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2014). It is based on the facts and information available to the Commissioner as described below.

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

On March 30, 2015, the Information Policy Analysis Division (IPAD) received a letter dated March 25, 2015, from John Ksylyczyn. In his letter, Mr. Ksylyczyn asked the Commissioner to issue an advisory opinion about his right to gain access to certain data maintained by Foth Infrastructure and Environment, LLC (Foth), a contractor with the City of Bloomington. IPAD asked Mr. Ksylyczyn to provide clarification, which he did on April 8, 2015.

IPAD, on behalf of the Commissioner, wrote to Dan Krivit, Senior Project Manager at Foth in response to Mr. Ksylyczyn's request. The purposes of this letter, dated April 16, 2015, were to inform him of Mr. Ksylyczyn's request and to ask him to provide information or support for Foth's position. On May 1, 2015, IPAD received a response, dated same. IPAD also wrote to Jamie Verbrugge, Bloomington City Manager, and invited him to provide comments on behalf of the City of Bloomington. The City did not submit comments.

A summary of the facts as Mr. Ksylyczyn provided them follows. He wrote:

Since the beginning of 2015, I have filed numerous information requests with the City of Bloomington to review communications related to city council efforts to change their trash hauling system.

In 2013, the city retained Dan Krivit with Foth Infrastructure and Environment, LLC as their professional consultant for this effort....

On February 20, 2015, I filed a public information request with the city to review a spreadsheet of Bloomington city data that Mr. Krivit stated in emails that he was maintaining in his office....

I received a response from City Clerk Janet Lewis on February 20, 2015 that this spreadsheet was not in the possession of city staff. They informed me that it resided with Foth Companies and provided me their contact information.

On February 23, 2015, I sent a written public information request through email directly to Dan Krivit at Foth Companies. I asked to review this spreadsheet along with additional information.

...

The data I am requesting is from a singular project which has been broken up into four phases. I am in possession of two contracts representing what I believe is the first phase of the project, and a second contract that is clearly labeled as the third phase of the project.... Both contracts clearly state that the contractor is obligated to comply with the Minnesota Government Data Practices Act....

It has been over six weeks since I have submitted my information requests to Mr. Krivit. He has failed to make any attempt to contact me or respond to my information request.

**Issue:**

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

Pursuant to Minnesota Statutes, Chapter 13, did Foth Infrastructure and Environment, LLC respond appropriately to a request for data related to Foth's contracts with the City of Bloomington to create and implement a solid waste management process?

**Discussion:**

Pursuant to Minnesota Statutes, section 13.03, when a government entity receives a data request from a requester who is not the subject of the data, the entity is required to respond in an appropriate and prompt manner and within a reasonable time. (See section 13.03, subdivision 2(a), and Minnesota Rules, section 1205.0300.) In responding, an entity must provide the data, advise that the data are classified such that the requester cannot have access, or inform the requester that the data do not exist.

When a private party enters into a contract with a government entity to perform any of its functions, the private party must comply with Minnesota Statutes, Chapter 13, in carrying out its duties related to the contract. Minnesota Statutes, section 13.05, subdivision 11, provides:

(a) If a government entity enters into a contract with a private person to perform any of its functions, 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 *the private person must comply with those requirements as if it were a government entity*. All contracts entered into by a government entity must include a notice that the requirements of this subdivision apply to the contract. Failure to include the notice in the contract does not invalidate the application of this subdivision. 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. [Emphasis added.]

Mr. Kysylyczyn submitted two contracts between Bloomington and Foth to the Commissioner. Both contracts include the following clause:

Minnesota Government Data Practices Act. The Contractor [Foth] will comply with all applicable provisions of the Minnesota Government Data Practices Act, Chapter 13 of the Minnesota Statutes, as amended.

Because Foth entered into a contract with the City of Bloomington to create and implement a solid waste management process, Foth must comply with Chapter 13 as though it is a government entity with regard to data that Foth creates, collects, receives, stores, uses, maintains, or disseminates related to its contractual duties. Responding to data requests is one of the requirements to comply with Chapter 13.

Mr. Kysylyczyn first requested the data at issue from the City of Bloomington. The City responded that it did not maintain the data and that Mr. Kysylyczyn should request it from Foth.

In *WDSI, INC. v. County of Steele*, 672 N.W.2d 617, 621-622 (Minn. Ct. App. 2003), the Court of Appeals held:

If a private party fails to comply with the MGDPA, the remedy is against the private party. The statute does not suggest that a governmental entity that does not possess the requested data must informally execute that remedy by obtaining the data from the private party. It appears undisputed that Steele County does not have the data; thus, KKE is the party against whom WDSI needs to seek its MGDPA remedy. [Citation omitted.]

Therefore, pursuant to *WDSI*, the City properly directed Mr. Kysylyczyn to request the data from Mr. Krivit. On February 23, 2015, Mr. Kysylyczyn sent a data request to Mr. Krivit for the following:

I would like to review all internal correspondence, documents, emails, etc, between employees or consultants of your firm, or others in relation to your work for the City of Bloomington, from the beginning of your work with them until the date of this letter.

I would also like to review your Excel spreadsheet with all of the citizen submitted haulers invoice data.

Mr. Kysylyczyn stated that he has not received a response from Foth. The Commissioner has issued a number of opinions stating that no response is not a proper response. (See Advisory Opinions 01-024, 04-008, and 09-027) Here, Chapter 13 requires Foth to respond to requests for public data from members of the public in an appropriate and prompt manner and within a reasonable time and Foth has not done so. Therefore, Foth has not complied.

While Mr. Krivit did not address the fact that Foth did not respond to Mr. Kysylyczyn's request, he did raise a number of issues related to the classification of the requested data and the Commissioner offers Foth the following guidance in fulfilling its duties under Chapter 13. Firstly, Mr. Krivit suggested that the data are confidential intellectual property, however, the Data Practices Act does not recognize a classification for "intellectual property" or "proprietary information." Secondly, Mr. Krivit asserted that some of the requested data might be classified as trade secret information, pursuant to Minnesota Statutes, section 13.37. The Commissioner notes that the threshold for classification of data as trade secret information under Chapter 13 is high. Before relying on that provision, the Commissioner encourages Foth to review both the

language of section 13.37 and the following Advisory Opinions: 02-041, 03-009, 03-017, 05-024, and 14-018. Given the breadth and nature of Mr. Kysylyczyn's request, it seems unlikely that all of the requested data, if any, would qualify for classification under section 13.37. Finally, Mr. Krivit argued that Minnesota Statutes, section 115A.94, subdivision 4d, which governs the process of organized collection by local governments, also classifies the data at issue. However, while that section provides that "meetings and negotiations shall occur exclusively between licensed collectors and the city" for a limited amount of time and under limited circumstances, it does not classify data.

**Opinion:**

Based on the facts and information provided, the Commissioner's opinion on the issue raised by Mr. Kysylyczyn is as follows:

Pursuant to Minnesota Statutes, Chapter 13, Foth Infrastructure and Environment, LLC did not comply with the requirement to respond to a request for data related to Foth's contracts with the City of Bloomington to create and implement a solid waste management process.



Matthew Massman  
Commissioner  
May 21, 2015