

No. A12-0327

STATE OF MINNESOTA
IN COURT OF APPEALS

MARSHALL HELMBERGER AND
TIMBERJAY NEWSPAPERS

Appellants,

v.

JOHNSON CONTROLS, INC. AND
OFFICE OF ADMINISTRATIVE HEARINGS

Respondents,

and

ARCHITECTURAL RESOURCES, INC.,

Respondent in Intervention.

BRIEF OF RESPONDENT JOHNSON CONTROLS, INC.

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LEGAL ISSUES

- I. Did appellant establish in his case in chief that Johnson Controls, Inc. (“JCI”) agreed to be bound to the provisions of the Minnesota Government Data Practices Act (“Data Practices Act”)?

Answer: No; JCI’s contracts with Independent School District No. 2142 (the “District”) do not contain any of the terms required by Minn. Stat. § 13.05, subd. 11, which are required to give notice to a private party that it is subject to the requirements of the Data Practices Act. No terms should be inferred or read into the contracts.

Most Apposite Authority: Minn. Stat. § 13.05, subd. 11.

- II. Did appellant establish in his case in chief that JCI contracted to perform a “government function” within the meaning of Minn. Stat. § 13.05, subd. 11 by entering into an arms-length contract for architectural and construction management services for the District?

Answer: No; the District did not delegate any of its government powers or duties under statute by contracting with JCI for the provision of architectural and construction management services. Instead, the District expressly retained all of its decision-making authority, and JCI was required to obtain District approval at every stage. This contrasts with *WDSI, Inc. v. County of Steele*, 672 N.W.2d 617 (Minn. Ct. App. 2003), in which the county delegated power over public expenditures to its contractor.

Most Apposite Authority: Minn. Stat. § 13.05, subd. 11; *WDSI, Inc. v. County of Steele*, 672 N.W.2d 617 (Minn. Ct. App. 2003).

STATEMENT OF THE CASE

This is a review on certiorari from an Order of the Office of Administrative Hearings, Administrative Law Judge Eric L. Lipman presiding, dismissing Appellants' Complaint, pursuant to Minn. Stat. § 13.085. Findings of Fact, Conclusions and Order (Jan. 24, 2012) (Appellant's Addendum ("A. Add.") at p. Add-1). The Complaint alleged a violation of Minn. Stat. § 13.05, subd. 11 ("Subdivision 11"), relating to privatization of government functions. Expedited Data Practices Complaint Form of Marshall Helmberger (July 22, 2011) ("Complaint").¹

Respondent Johnson Controls, Inc. ("JCI"), a private entity, contracted to provide certain architectural and construction management services to Independent School District 2142, St. Louis County ("the District"). On March 4, 2011, Appellant Marshall Helmberger and his Timberjay Newspapers (collectively, "Helmberger") requested a copy of JCI's contract with its subconsultant, Architectural Resources, Inc. ("ARI"). *Id.*; Tr. at 97. JCI denied this request on the ground that the Data Practices Act does not apply to JCI. JCI did not contract to bound by the provisions of the Data Practices Act and the District did not privatize any "government function" under Subdivision 11. Exs. 105 and 106 (Respondent's Addendum) ("R. Add.") at pp. Add-1, Add.-8).

On March 28, 2011, Helmberger requested an advisory opinion from the Department of Administration. JCI objected to this request for several reasons, including on jurisdictional grounds. On May 26, 2011, the Department issued Advisory Opinion

¹ The document included in Appellant's Appendix as the "Complaint to OAH of Marshall Helmberger and Timberjay Newspapers" is incomplete and appears to be an earlier draft of "Attachment A" to the Expedited Data Practices Complaint Form.

11-005, which generally favored Helmberger. (Appellant's Appendix ("A. App.") at p. A-19).

On July 27, 2011, Helmberger filed a Complaint with the Office of Administrative Hearings ("OAH"). Upon JCI's Request for Dismissal, the OAH entered an Order of Dismissal on September 14, 2011. Request for Dismissal (Aug. 18, 2011); Order of Dismissal (Sept. 14, 2011) (A. App. at p. A-7). Helmberger responded with a Petition for Reconsideration. Petition for Reconsideration (Sept. 23, 2011). On October 4, 2011, Chief Administrative Law Judge Raymond R. Krause granted Helmberger's Petition and ordered the matter to be set for an evidentiary hearing. Order Granting Petition for Reconsideration (Oct. 4, 2011) (A. App. at p. A-1). Chief Judge Krause stated that an evidentiary hearing was necessary because "the record clearly indicates a fact issue exists as to the content and scope of the contracts at issue." Order Denying Renewed Request for Dismissal (Oct. 14, 2011).

On October 14, 2011, ARI petitioned to intervene in the matter below in order to protect its interests in maintaining the confidentiality of certain information—including information on pricing, scope of work, manner of doing business, and other private or trade secret data—contained within the subcontract between JCI and ARI. Petition to Intervene of Architectural Resources, Inc. (Oct. 28, 2011). The Petition to Intervene was granted.

At the hearing below, Helmberger offered limited evidence, consisting solely of the contracts between JCI and the District and his own testimony. Exs. 105 and 106 (R. Add. at pp. Add-1, Add-8). At the close of Helmberger's case, the OAH held that the

evidence was insufficient to show that JCI had violated the Data Practices Act. The OAH thus granted the motion of JCI and ARI to dismiss Helmberger’s claim and issued its Findings of Fact, Conclusions and Order on January 24. (A. Add. at p. Add-1). This petition followed.

STATEMENT OF FACTS

I. THE DISTRICT CONTRACTED WITH JCI FOR ARCHITECTURAL AND CONSTRUCTION MANAGEMENT SERVICES, BUT RETAINED ITS DECISION-MAKING POWER.

JCI is a private contractor with the District. From 2008 through early 2010, JCI worked with the District to develop a Long-Range Facilities Plan (“Plan”). Tr. 107-08.

When the District decided to proceed with the Plan, on February 25, 2010, it entered into two contracts with JCI: The first was for the construction of two new PK-12 schools within the District—the “North School” (located near Alborn) and the “South School” (located between Cook and Orr). Ex. 105 (R. Add. at p. Add-1). The second was for the renovation of three existing schools—one PK-6 school (located in Tower) and two PK-12 schools (located in Babbitt-Embarrass and Cherry). Ex. 106 (R. Add. at p. Add-8). Both contracts were similar and were based on an AIA Document B102-2007 “Standard Form of Agreement between Owner and Architect Without a Predefined Scope of Architect’s Services” (the “Agreements”).

A. The Agreements Identified JCI as a Consultant with Expertise in Specialized Services.

The Agreements provided that “JCI..will provide design, engineering, commissioning and construction management services.” AIA Form B102, Exs. 105 and

106 (R. Add. at pp. Add-2, Add-9).² The District acknowledged in the Agreements that it does not have expertise in the specialized services required to design and construct a building:

It is expressly agreed and understood that the Owner does not represent that it is knowledgeable in architecture or other professional disciplines involving construction, and that the Owner is relying upon JCI to at all times perform its services to the highest degree of professional skill and care to comply with the requirements of this Agreement.

Id., § 1.2. The Agreements specifically provided that “JCI shall be entitled to use Subconsultants to assist JCI in performing the services.” *Id.*, § 1.1.

B. In the Agreements, the District Retained Full Decision-Making Power.

Under the Agreements, the District had the responsibility to set the budget, scheduling, and criteria for the Plan, and was responsible for making every substantive decision and approval concerning the Plan:

[T]he Owner shall provide information in a timely manner regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner’s objectives, schedule, constraints and criteria, including space requirements and relationships, flexibility, expandability, special equipment, systems and site requirements.

AIA Form B102, § 2.1 (R. Add. at pp. Add-3, Add-10). Further,

The Owner’s identified representative shall be authorized to act on the Owner’s behalf with respect to the Project. The Owner shall render decisions and approve JCI’s submittals in a timely manner.

Id., § 2.2.

² Because both Ex. 105 and Ex. 106 were based on the same forms, the references and quotations cited can be found at the indicated locations in both contracts.

Similarly, the Agreements required that JCI obtain the District's approval at every stage of the design and construction process. JCI was not allowed to proceed without such approval:

JCI shall submit the Schematic Design Documents to the Owner, and request the Owner's approval.

AIA Form B201, § 2.2.7 (R. Add. at pp. Add-5, Add-12).

JCI shall submit the Design Development Documents to the Owner, advise the Owner of any adjustments to the estimate of the Cost of the Work, and request the Owner's approval.

Id., § 2.3.3.

JCI shall submit the Construction Documents to the Owner, advise the Owner of any adjustments to the estimate of the Cost of the Work, take any action required under Section 5.5, and request the Owner's approval.

Id., § 2.4.5. (R. Add. at pp. Add-6, Add-13).

C. The Agreements Did Not Extend the Data Practices Act to JCI's Documents.

There is no provision in the Agreements that gives notice to JCI that information it generates in connection with the contract, but does not furnish to the District, might be subject to the Data Practices Act. Specifically, there is no requirement that subcontracts JCI was "entitled" to enter into must be furnished to the District or disclosed to the public.

Indeed, the Data Practices Act is mentioned only once in the Agreements. That provision covers only data that, at one time or another, is or has been in the possession of the District. The Agreements impose an obligation on both JCI and the District to keep

that data confidential if it is designated as “confidential” or “business proprietary.” This obligation is “subject to” the requirements of the Data Practices Act:

Unless otherwise provided by Minnesota law, if JCI or Owner receives information specifically designated by the other party as “confidential” or “business proprietary,” the receiving party shall, subject to the Minnesota Government Data Practices Act, keep such information strictly confidential and shall not disclose it to any other person except to (1) its employees, (2) those who need to know the content of such information in order to perform services or construction solely and exclusively for the Project, or (3) its consultants and contractors whose contracts include similar restrictions on the use of confidential information.

AIA Form B102, § 7.8 (R. Add. at pp. Add-4, Add-11).

II. JCI ENTERED INTO A SUBCONTRACT WITH ARCHITECTURAL RESOURCES, INC.

As JCI was “entitled to” do by the Agreements, JCI entered into various subcontracts, as is typical in the construction industry. Among those subcontractors was ARI. JCI kept its subcontract with ARI confidential, and did not disclose or provide a copy of the ARI subcontract to the District.³ Tr. at 111-12.

III. HELMBERGER SUBMITTED A DATA PRACTICES REQUEST TO JCI, WHICH JCI DENIED.

On March 4, 2011, Helmberger submitted a Data Practices Request to JCI. Among the documents requested was a request for “[a] copy of the subcontract between JCI and ARI.”⁴ JCI denied this request on several grounds, including that the Data

³ Had JCI and ARI been required to put on their cases, they would have offered a confidentiality agreement between JCI and ARI to keep their subcontract confidential.

⁴ Helmberger’s March 4, 2011 request also requested information on certain annual operation costs projections. JCI informed Helmberger that these documents were in the possession of the District, and advised him to seek the documents from the District.

Practices Act does not apply to JCI, because it did not contract to bound by the provisions of the Data Practices Act and it did not contract to perform a “government function” as required by Subdivision 11.⁵

ARGUMENT

I. HELMBERGER DID NOT ESTABLISH THAT JCI CONTRACTED TO BE BOUND BY THE DATA PRACTICES ACT.

A. The Plain Words of the Act State that It Applies to Private Entities Only By Contract.

The Data Practices Act applies only to private entities that have received the required notice and have contracted to be subject to it. Minn. Stat. § 13.05, subd. 11(a), provides, in relevant part: “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.”

Helmberger introduced no contract or agreement by which JCI agreed that its own information, not already in the hands of the District, would be subject to the Act. The

Helmberger did so. Consequently, Helmberger’s request for “[a] copy of the subcontract between JCI and ARI” is the only request at issue in this matter.

⁵ JCI also denied this request on the grounds that (1) JCI is entitled to keep the subcontract confidential because it contains trade secret information and (2) that JCI was not paid for its costs in costs of searching for and retrieving data responsive to a previous Data Practices request by Helmberger. Because the OAH granted JCI’s and ARI’s motion to dismiss at the close of Helmberger’s case, these issues were not developed in the record of the proceeding below.

Agreements between the District and JCI do not contain the notice provision that the statute would require. Therefore, JCI was not required to “comply with those requirements as if it were a government entity,” because there was no such notice.

The single reference to the Data Practices Act in the Agreements demonstrates that JCI did not contract to be bound. The reference appears in AIA Form B102 § 7.8 (R. Add. at pp. Add-4, Add-11). This Section requires that the District must keep confidential information that JCI has designated as “confidential” or “business proprietary” (and vice versa). This obligation to maintain confidentiality, however, is subject to the requirements of the Data Practices Act. In other words, the Section covers only information that has been, or is, in the hands of the District; it does not cover documents in JCI’s hands that have not been received from, or transmitted to, the District. This limitation, then, applies only to information provided by one party to the other and designated “confidential,” and does not indicate that the Data Practices Act is generally applicable to JCI’s internal information.

B. The Legislative History Shows that the Act Extends Only to Private Entities that Contract to be Bound.

The legislative history of Subdivision 11 indicates that the legislature did not intend to create any affirmative duty on the part of a private entity to provide data to the public, except to the extent a private entity specifically contracted to do so. Instead, the primary purpose of the law was to protect private data by providing a consequence for private entities that divulged private data received from a governmental entity.

Subdivision 11 was not intended to expose every contractor that furnishes goods and

services to a government entity to the requirements and obligations of the Data Practices Act.

The genesis of Subdivision 11 was the Report of the Information Policy Task Force to the Minnesota Legislature, dated January, 1999. The key legislative member of this Task Force was Senator Don Betzold, the chief author of the Data Practices Act amendments. In the aftermath of the Task Force report, Senator Betzold introduced Subdivision 11 to the Minnesota Senate as Senate File 1039, which contained language nearly identical to what eventually became the first sentence of 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 contractual 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.

Revisor of Statutes, Draft S. F. No 1039 (February 16, 1999).

Senator Betzold emphasized that the purpose of the provision was primarily to protect private data provided by the government to a private entity:

Because if [private entities] get private data that the government has maintained...and they were to release it, there are really no consequences against the private entities for doing so.

Audio Tape, Meeting of the Senate Judiciary Committee (March 8, 1999).

With respect to a private entity's duty to turn over documents to the public, Senator Betzold stated:

We're not creating any affirmative duty on the part of the private entity to actually release data. They are not going to become a field office for the government agency unless that's part of the contract.

Id. Senator Betzold further stated that the privatization provision was “just a notice issue” and would “not creat[e] any affirmative duties that they have to act as government entities.” *Id.*

At the same time he introduced SF 1039, Senator Betzold also introduced Amendment A-1 to SF 1039, which read as follows:

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, *or to make data available to the public or the government entity in a particular format*, except as required by the terms of the contract.

Revisor of Statutes, Draft SCS1039A-1 (March 3, 1999) (emphasis added). With the exception of the language in italics, this amendment was codified as Subdivision 11(b).

Senator Betzold stated that the purpose of Amendment A-1 was to avoid creating a duty on the part of government contractors to disseminate data unless the contract specifically created that duty. Senator Betzold advised that “there was a matter that was brought to my attention, as I say, that there was some concern about creating a duty about dissemination of data and I believe the A-1 Amendment will mollify those concerns.” Audio Tape, Meeting of the Senate Subcommittee on Data Privacy in Information Policy (March 3, 1999). Sen. Betzold further stated:

There were concerns that, the entities were saying “well, we don’t want to have to be in a position that we are the ones, that we now become the government agency that the public is going to come to, that we have to be the ones to start disseminating information when that was never our role in the first place.” And that may very well be true and the A-1 Amendment does correct that. It could very well be that the government agency contracts with the private entity and part of the contract is that you will disseminate information to the public, but that would be part of the contract and unless it is part of the contract, we’re not creating any duty for these private entities.

Id.

This interpretation was further supported by the testimony of David Feinwachs, then General Counsel for the Minnesota Hospital and Healthcare Partnership, who stated that his organization had raised its concerns with Senator Betzold, leading directly to the introduction of Amendment A-1. Mr. Feinwachs testified that the “primary purpose of the legislation is to protect the confidentiality of data in the hands of contracting entities so that they don’t disclose it to people who shouldn’t have it.” *Id.* Mr. Feinwachs’ concern was that health organizations would be forced to become a “field office” for state agencies because “easier for the agency to say, you know, go to these guys who produced it than come to us.” *Id.* He also noted that health organizations, after fulfilling the terms of a government contract, “will take the data and analyze it further or do novel things with it.” Mr. Feinwachs did not want such data to become “hijacked” under the proposed revisions to the Data Practices Act. *Id.*

In sum, the legislative history of Subdivision 11 confirms that it was not intended to create any obligation on a private entity to provide information to the public unless there was a specific contractual obligation. There is no such obligation here.

C. The *WDSI* Case Does Not Require a Contrary Result.

The only Minnesota case to touch on this issue is *WDSI, Inc. v. County of Steele*, 672 N.W.2d 617 (Minn. Ct. App. 2003). *WDSI* is distinguishable from the present case, as discussed in detail in Section II, *infra*. Nevertheless, *WDSI* held that a county did not have an obligation under the Data Practices Act to collect and produce data possessed solely by the county's private contractor. Instead, the Court suggested that the requestor seek the data directly from the contractor, even though the contract between the county and the contractor did not contain the notice provision required by Subdivision 11(a). The Court inferred that a notice provision should be read into the contract between the county and the contractor.

WDSI does not control here, for three reasons. First, the private contractor was not even a party in the case, and did not have the opportunity to make the plain language argument and identify the legislative history that JCI provides here.

Second, the suggestion that the Data Practices Act notice provision should be read into the contract is merely dictum.

Third, the suggestion was premised on the conclusion (again, without the private contractor as a party) that the contractor was performing a government function on behalf of the county. As discussed below, JCI was not performing a government function in this case.

II. HELMBERGER DID NOT ESTABLISH THAT JCI CONTRACTED TO PERFORM A GOVERNMENT FUNCTION.

A. Subdivision 11 Does Not Apply to All Public Contracts, But Only to Those That Privatize Government Functions.

Subdivision 11, aptly captioned “Privatization,” is triggered only if “a government entity enters into a contract with a private person to perform any of its functions.”

Merely because a contractor enters into a contract with a government entity does not automatically mean that the contractor is performing a government function. As indicated by the caption of the statute, the statute’s purpose is to extend the Data Practices Act to respond to the “privatization” of government services. According to Merriam-Webster, “*privatize*” means “to make private; especially: to change (as a business or industry) from public to private control or ownership.” An example: “The city decided to *privatize* the municipal power company.”

“Privatization refers to the shift from government provision of functions and services to provision by the private sector.” G. Priest, *Introduction: The Aims of Privatization*, 6 Yale L. & Pol’y Rev. 1 (1988).⁶ While there is no Minnesota appellate case law defining privatization, statutes are consistent with the idea that privatization

⁶ According to one leading advocate of privatization, there are three types: “The term has most commonly been applied to the divestiture, by sale or long-term lease, of a state-owned enterprise to private investors. But another major form of privatization is the granting of a long-term franchise or concession under which the private sector finances, builds, and operates a major infrastructure project. A third type of privatization involves government selecting a private entity to deliver a public service that had previously been produced in-house by public employees.” R. Poole, “Privatization,” *The Concise Encyclopedia of Economics*, found at www.econlib.org/library/Enc/Privatization.html.

means a change from government control of a traditional function to private control. *See* Minn. Stat. § 160.98 (prohibiting road and bridge privatization); Minn. Stat. § 471A.01 (allowing privatization of wastewater treatment facilities).

B. The Agreements Did Not Privatize Any of The District’s Functions.

The District’s governmental function always has been, and remains, the education of district residents, primarily children. The education function is established by the Minnesota Constitution, Article XIII, Section 1, which states: “The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools.” The education function is described in the Education Code, designated as Chapters 120A to 129 of the Minnesota Statutes.

Under the Education Code, with extremely limited exceptions, a school board cannot lawfully delegate or privatize its function. Under Minn. Stat. § 123B.09, “[t]he care, management, and control of independent districts is vested in a board of directors, to be known as the school board.” Minn. Stat. § 123B.02, subd. 1, commands that the school board “must have the general charge of the business of the district, the school houses, and of the interests of the schools thereof.” The board must “govern, manage, and control the district” In this case, the District has not privatized the education function, whether by delegation to JCI or otherwise.

Merely contracting for services is not privatization. As Minn. Stat. § 123B.02, subd. 14, recognizes, school districts employ “necessary” employees but contract for other services.

In this case, none of the Agreements between JCI and the District state or even imply that the District is contracting a government function. On the contrary, the contracts expressly acknowledge that neither JCI nor the District has expertise in the other party's area of responsibility. The District acknowledges that it is not "knowledgeable in architecture or other professional disciplines involving construction." AIA Form B102, § 1.2 (R. Add. at pp. Add-2, Add-9). JCI, therefore, is charged with the responsibility of providing specialized services for design, construction management and commissioning through the use of licensed architects, engineers, and other professionals. The District, however, maintains its traditional function and authority to make all of the decisions: to approve documents, set the schedule and the budget, and define the scope of the project. JCI's only role is to make recommendations.

JCI thus contracted with the District to provide traditionally contracted-for services. The District defined the project requirements and charged JCI with carrying out the District's instructions, using JCI's own and subcontractors' expertise in specialized services, but all subject to the District's approval. Accordingly, JCI has not contracted to perform the District's governmental function, and it had no notice that it was to perform any such function.

C. Helmberger Did Not Present Any Evidence That The District Delegated a Government Function.

In order to defeat JCI's and ARI's motion to dismiss at the close of his case, Helmberger would have had to introduce evidence into the record to show that architectural services are traditionally performed by government entities such as the

District, and that here the District privatized such services as part of the trend towards “privatization” at which Subdivision 11 is aimed. Helmberger presented no such evidence at the hearing below, and relied instead solely on the Agreements. As discussed above, the Agreements do not support such a conclusion.⁷

D. *WDSI* is Distinguishable From The Present Case.

1. The District Did Not Delegate Any Decision-Making Authority to JCI.

Ignoring the specific terms of the Agreements that control this particular case, Helmberger relies exclusively on *WDSI* to support his contention that JCI was performing a government function. In making this argument, Helmberger focuses narrowly on the end product of the contracts — arguing that the jail in *WDSI*, like the schools in this case, serves a public function. This ignores the crucial distinction between *WDSI* and the present case: In *WDSI*, the government contractor was given free rein to develop bidding qualifications for a public project. The county therefore granted discretionary authority over its pursestrings to a private entity. No such delegation of authority occurred here.

In *WDSI*, Steele County contracted with Korsunsky Krank Erickson Architects, Inc. (“KKE”) to provide architectural services for the construction of the new Steele County Detention Center. 672 N.W.2d at 619. As part of that agreement, the County delegated to KKE the power to set prequalification standards for contractors bidding on

⁷ Had JCI and ARI been required to put on their cases, they would have offered evidence (including expert testimony) that, for many years, school districts in Minnesota have normally and traditionally purchased design and construction services through contracts with private entities, and that such architectural and construction management services are not a traditional government function.

the construction of the Detention Center. *Id.* at 619, 621. Those prequalification standards, and how they were relevant to quality assurance, were not shared with the County. *Id.* at 619. KKE was therefore delegated the authority to set the criteria by which the County would accept or reject bidders for a public project.

WDSI, a contractor that wished to contract with the County, was excluded by KKE's prequalification bid requirements. *Id.* WDSI requested information concerning the prequalification standards from the County; when the County refused (because it did not have the information), WDSI brought suit. *Id.* Importantly, KKE was not a party.

The Court held that "developing qualifications and requirements for the bidding process are governmental functions because they are conferred by statute upon local agencies and promote general public welfare." *Id.* at 621. The Court thus reversed the summary judgment order of the lower court requiring the County to obtain the requested data from KKE and suggested instead the WDSI seek the requested data from KKE directly. *Id.* at 623.

This case is easily distinguishable from *WDSI*. Unlike in *WDSI*, the Agreements between JCI and the District preserve the District's traditional government authority. For example, JCI must prepare bidding documents, but only for the District's approval. AIA Form B201, § 2.4.3 (R. Add. at pp. Add-6, Add-13). JCI has no role in the bidding process except that "requested" and "directed" by the District. *Id.* § 2.5.2.2.

The clear non-delegation of authority by the District is found throughout the Agreements. At no place in the Agreements is JCI granted any discretion or authority to perform any of the District's statutory functions. JCI is instead required by contract to

request the District's approval at each stage of the design and construction process. The District is free to accept, reject, or modify JCI's recommendations. Until JCI receives approval from the District, it is not permitted to proceed with the next step in the process.

WDSI involved a particular and unusual delegation of government authority over bidding to a private contractor. There is no such delegation of authority here. *WDSI* is distinguishable from the present case.

2. *The tort definition of "government function" should not be read into the Data Practices Act.*

Helmberger also relies on *WDSI* to argue that a "government function" may be broadly defined as any "act [which] is for the common good of all without the element of special corporate benefit or pecuniary profit." Helmberger reads this standard to mean that the Data Practices Act is triggered whenever any public entity enters into a contract with a private corporation for the public good. Under this standard, any contract with a government for public goods or services would expose the private entity contractor to his and every other person's Data Practices requests.

It is true that, when discussing the meaning of "government function," the *WDSI* court referenced cases relating to tort liability. 672 N.W.2d at 620-21. The *WDSI* panel examined two such cases. In *Papenhausen v. Schoen*, 268 N.W.2d 565 (Minn. 1978), which involved a tort against the State of Minnesota for negligent supervision of an escaped inmate at a state mental hospital, the Supreme Court held that the operation of a state mental hospital was a "governmental" function. The Court contrasted *Papenhausen* with *Heitman v. Lake City*, 30 N.W.2d 18 (Minn. 1947), which involved a tort claim

against Lake City for a drowning at a city-operated boat harbor, the operation of which was found to be a “proprietary” function.

Given the abolition of sovereign immunity, the governmental/proprietary distinction is outmoded. In any event, this is not a tort case, and old tort cases do not translate easily or well to the converse problem of determining when the internal documents of a private entity are exposed to the Data Practices Act by virtue of undertaking a government function.

If a private party, through a contract with the government for goods or services, can thereby be said to perform a function “for the common good of all without the element of special corporate benefit or pecuniary profit,” then every government contract would trigger the Data Practices Act. For instance, the District is obligated by statute to furnish “free textbooks for the pupils of the district.” Minn. Stat. § 123B.02. Although school districts do not typically produce their own textbooks, a publisher contracting with the District to provide textbooks would perform a government function (under the broad definition proposed by Helmberger), and thus could be required to disgorge all of its internal documents regarding that textbook, such as its contract and correspondence with the author. Similarly, a company selling computers to a school district could be required to produce all of its internal documents regarding its marketing, its relationship with the computer manufacturer, and its contract finances and profits. Both the plain words of Subdivision 11 and its legislative history are clear that such extraordinary intrusion into the affairs of private enterprise is not what the legislature contemplated when it extended the Data Practices Act to respond to privatization.

The correct test for determining whether a private entity has contracted to perform a government function is whether the contract transfers to the private entity government powers conferred by statute. Despite its confusing discussion of sovereign immunity cases, *WDSI* itself seems to recognize this. See *WDSI*, 672 N.W.2d at 621 (“a function is governmental where it involves the exercise of power conferred by statute”) (citing *Mace v. Ramsey County*, 42 N.W.2d 567, 569 (Minn. 1950)). In *WDSI*, the exercise of statutory power was delegated when the County gave authority over the bidding procedure to KKE. In the present case, authority for the design and construction was retained in whole by the District.

III. THE COURT SHOULD NOT DEFER TO DEPARTMENT OF ADMINISTRATION ADVISORY OPINION 11-005.

Prior to commencing this litigation, Helmberger sought and obtained an advisory opinion from the Department of Administration. This Court should give no weight to this opinion.

A. Because The Commissioner Had No Jurisdiction Over JCI, Advisory Opinion 11-005 Is Entitled To No Weight.

Helmberger claims that Advisory Opinion 11-005 by the Department of Administration is entitled to deference in this case. At the threshold, however, the Commissioner had no jurisdiction to issue an advisory opinion regarding JCI, because Minn. Stat. § 13.072 plainly authorizes the Commissioner to issue advisory opinions only with respect to “government entities.” The Commissioner’s jurisdiction does not extend to private entities. As such, the Commissioner’s opinion is entitled to no weight.

It is black-letter law that an agency decision is not entitled to deference if the agency exceeded its statutory authority. *Matter of Resolution of the City of Austin*, 567 N.W.2d 529, 534 (Minn. Ct. App. 1997). Whether an agency exceeded its statutory authority is a question of law, to which the reviewing court should apply a de novo standard of review. *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005).

The jurisdiction of the Commissioner to issue advisory opinions regarding the Data Practices Act is found at Minn. Stat. § 13.072, subd. 1(a). The first sentence relates to requests by government entities, which is not applicable here because Helmberger is not a governmental entity. The second sentence of Subdivision 1(a) provides: “Upon request of any person who disagrees with a determination regarding data practices *made by a government entity*, the commissioner may give a written opinion regarding the person’s rights as a subject of government data or right to have access to government data.” (Emphasis added.)

“Government entity” is defined in the Data Practices Act at Minn. Stat. § 13.02, subd. 7, as: “a state agency, statewide system, or political subdivision.” As a private contractor, JCI is not a government entity.

Subdivision 11, which creates a right to data from certain private persons, does not bestow jurisdiction on the Commissioner to issue advisory opinions in disputes between a requestor and a private person. 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 Section 13.08, and makes no mention whatsoever of Section 13.072 or advisory opinions.

The Commissioner thus exceeded his authority by issuing Advisory Opinion 11-005, and the opinion is therefore entitled to no deference.

B. Even If The Commissioner Had Jurisdiction, The Commissioner Is Not Entitled To Deference In This Case.

The issue here is not one purely of statutory interpretation. The Administrative Law Judge was required to hear Helmberger's case, consider the facts, and rule whether he had made a prima facie case. The ALJ did so and issued Findings of Fact. The ALJ determined that Helmberger failed to meet his burden. By contrast, the Commissioner did not – and could not – engage in any fact-finding, so his opinion is not entitled to any deference.

Alternatively, even if the issue here were purely a matter of law, deference is not appropriate. An advisory opinion is not binding on the issues of law. *See, e.g., In re Admonition Issued In Panel File No. 99-42*, 621 N.W.2d 240, 244-45 (Minn. 2001). When statutory interpretation is at issue, this Court is not bound by an agency's determination. *Johnson v. County of Anoka*, 536 N.W.2d 336, 338 (Minn. Ct. App. 1995). This Court is not bound by the agency's decisions on questions of law and need not defer to the agency's expertise. *Matter of Quantification of Environmental Costs*, 578 N.W.2d 794, 799 (Minn. Ct. App. 1998).

Further, the few Data Practices requests before the Commissioner that involved both a request for information directed to a private party and that construed the scope of

“government function” are distinguishable. None have involved school districts. Each involved delegation to a private party of primary responsibility for a traditional municipal power. *See, e.g.*, Advisory Opinion 09-014 (June 30, 2009) (private nonprofit performed a government function when municipalities delegated the operation of municipal utilities to the Association); Advisory Opinion 05-034 (Nov. 9, 2005) (private organization with “primary responsib[ility]” for operating a city aquarium was subject to the Data Practices Act); Advisory Opinion 01-092 (Nov. 26, 2001) (private entity that contracted with the Minneapolis Community Development Agency to “develop[] program guidelines,” “supervis[e] program implementation,” and “verify[.]...applicants are eligible” for Homebuyers Assistance Program was performing government functions).

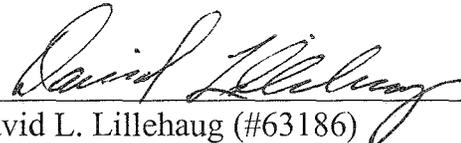
Accordingly, the delegations of authority considered by the Commissioner in other opinions are distinct from the facts of this case.

CONCLUSION

For all of these reasons, the January 24, 2012 Findings of Fact, Conclusions and Order of the Office of Administrative Hearings should be AFFIRMED.

Respectfully submitted,

Dated: April 27, 2012



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No. A12-0327

STATE OF MINNESOTA
IN COURT OF APPEALS

MARSHALL HELMBERGER AND
TIMBERJAY NEWSPAPERS

Appellants,

v.

JOHNSON CONTROLS, INC. AND
OFFICE OF ADMINISTRATIVE HEARINGS

Respondents,

and

ARCHITECTURAL RESOURCES, INC.,

Respondent in Intervention.

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3 for a brief produced with proportional font. The length of this brief is 6,368 words. This brief was prepared using Microsoft Word 2003 and the word processing program has been applied specifically to include all text, including headings, footnotes, and quotations for word count purposes.

Respectfully submitted,

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