

Nos. A07-1388 and A07-1418

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State of Minnesota  
 In Supreme Court

International Brotherhood of Electrical Workers,  
 Local No. 292,

*Appellant,*

v.

City of St. Cloud,

*Respondent,*

and

Design Electric, Inc.,

*Respondent.*

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**APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**I. THE ACCESSIBILITY OF THE "PREVAILING WAGE" DATA IS MOOT**

**A. The Documents Have Been Disclosed**

Because the "prevailing wage" documents have been produced, the main issue in this case, the accessibility of the data, is moot.<sup>1</sup>

Appellant International Brotherhood of Electrical Workers, Local 292 ("IBEW") began this lawsuit in order to attain access to the "prevailing wage" records submitted by Design Electric, Inc., ("Design") to the City of St. Cloud. *A. App. 46.*<sup>2</sup>

The City agreed with IBEW's position from the outset that the documents are "public" and should be produced. It said so below in Answers to Interrogatories and in the Summary Judgment hearing in the Trial Court. *See Appellant's Brief*, pp. 8, 10. It reiterates that position now, disavowing Design's resistance and asserting that it does "not join in [the] argument" advanced by Design that the documents are barred from disclosure" under the provision of the Data Practice Act dealing with labor organizations, Minn. Stat. § 13.43, subd. 6. *City's Brief*, p. 5. That the City sides with the position advanced by IBEW

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<sup>1</sup> It is not necessary that a party raise the issue of mootness; appellate courts must address the issue because it is "a constitutional prerequisite to the exercise of jurisdiction." *Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. Ct. App. 2004) (quoting *In re Schmidt*, 443 N.W.2d 824, 826 (Minn.1989)).

regarding the accessibility of the documents is reflected in the City's Brief, where it proclaims that the Court of Appeals correctly interpreted the MGDPA (Data Practice Act) to require the release of names and wage information on Design Employees. *City's Brief*, p. 18.

Thus, IBEW, the City, the Trial Court, and the Appellate Court all view the prevailing wage documents as being "public" and accessible to IBEW under the Data Practices Act. Design stands alone in opposing disclosure.

But the issue is now moot because the City has produced the documents. *See City's Brief*, p. 10 and *R. App.*, p. 5.<sup>3</sup> Following the decision by the Court of Appeals affirming the Trial Court's ruling on the accessibility of the data, the City furnished the prevailing wage records to IBEW, redacting the Social Security numbers, child support information, and home addresses. Because the documents have been produced, the issue of their accessibility under the Data Practice Act is moot.

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<sup>2</sup> A. App. \_\_\_ refers to the appendix submitted by Appellant IBEW; "R. App. \_\_\_ refers to the appendix submitted by one of the Respondents, City of St. Cloud; Tr. \_\_\_ refers to the transcript of the Summary Judgment hearing of the Trial Court.

<sup>3</sup> The Trial Court had entered a Stay of its Order, which expired upon the ruling by the Court of Appeals. *R. App.*, p. 5. Neither Design, which obtained the Stay Order from the Trial Court, nor the City, sought to extend it, which permitted the City to produce the documents after the Appellate Court ruling.

## B. The Mootness Doctrine Applies

An issue becomes moot “if an event occurs that resolves the issue or renders it impossible to grant effective relief.” *Isaacs v. American Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. Ct. App. 2004), *rev. den’d*, (Minn. Apr. 4, 2005). The Minnesota Constitution, art. VI, § 3, requires that “the subject matter of the suit is a justiciable one and therefore within the competence of the district court to hear and determine.” *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. Ct. App. 2007) (quoting *Montgomery v. Minneapolis Fire Dep’t Relief Ass’n*, 218 Minn. 27, 29-30, 15 N.W.2d 122, 124 (1944)). “Because the nature of judicial decision-making is to resolve disputes, the ‘judicial function does not comprehend the giving of advisory opinions.’” *Sviggum*, 732 N.W.2d at 321 (quoting *Izaak Walton League of Am. Endowment, Inc. v. Minn. Dep’t of Natural Res.*, 312 Minn. 587, 589, 252 N.W.2d 852, 854 (1977)). Therefore, “if the court is unable to grant effectual relief, the issue raised is deemed to be moot.” *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989); *see also Sinn v. City of St. Cloud*, 295 Minn. 532, 533, 203 N.W.2d 365, 366 (1972) (“[t]his court does not issue advisory opinions or decide cases merely to make precedents”).

This case meets the mootness standard as to the main issue: the accessibility of the documents under the Data Practice Act. Because the documents have been produced, there is no longer any controversy concerning access by IBEW.

Coincidentally, this the second time the Mootness Doctrine has reared its head in connection with Design Electric's prevailing wage records. In prior litigation in 2001, IBEW sought and the City produced similar records, and Design then sued claiming that the data constituted "trade secrets" under Minn. Stat. § 13.37, subd. 1(b), a position it originally took, but then abandoned, in the current litigation. The Trial Court in 2001 rejected Design's argument, and the Appellate Court ruled that the issue was moot because the documents already had been produced. *Design Electric, Inc. v. City of St. Cloud*, No. C1-01-734, 2001 WL 1402763 (Minn. Ct. App. 2001); A. App. 86-89.

While there remains an issue concerning the redaction of the home addresses, the overreaching issue whether the documents are accessible under the Act has been answered by the Appellate Court's ruling and the City's furnishing of the documents pursuant to that ruling. There is no longer any case or controversy with respect to that issue. Because the issue is moot, it need not be addressed at the present time.

On rare occasions, a court may pass on a case that is moot if the issue raised "is capable of repetition yet evades review." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). See also *Roe v. Wade*, 410 U.S. 113, 125 (1973). That tenet is not applicable in this case because the issue raised by Design, the applicability of the "labor organization" provision of Minn. Stat. § 13.43, subd. 6, is not a recurring

issue; it has never been raised before, the Trial Court viewed it as "unreasonable," and yielding an "absurd result," A. App. 34-35, and the Appellate Court concurred. There is no indication that this bizarre claim is likely to arise again in the future and, if it does, it can be addressed at that time, when the issue is ripe and ready, not moot.

Because the issue of access to the "prevailing wage" data is moot, Design's appeal of that issue should be dismissed and that portion of the ruling below affirmed.

**II. THE RULING BELOW REGARDING ACCESSIBILITY OF THE DATA WAS CORRECT AND SHOULD BE AFFIRMED**

**A. The Data Is "Presumed" To Be Public**

Alternatively, if the issue of accessibility of the prevailing wage data is addressed, despite its mootness, the decision of the Court of Appeals should be affirmed.

As indicated, everyone — IBEW, the City, the Trial Court, and the Court of Appeals — except Design Electric, regards the records as "public" under the Data Practices Act. Although they reach that position for different reasons, they are uniform in their conclusion: the prevailing wage records constitute "public" data under the statute and, therefore, must be furnished to IBEW, as the City has done.

One reason that the documentation is public is because the Act creates a "presumption" of access. Minn. Stat. § 13.01, subd. 2. Indeed, the statute directs that all data received, created, maintained, transmitted, *or received* by a government entity "shall be public" unless specifically classified otherwise. Minn. Stat. § 13.03, subd. 1. Because there is no provision that specifically makes the prevailing wage data "private," it is accessible as a matter of law under the statute. This is the same analysis applied by the Department of Administration in addressing this issue. *See Opinion No. 98-028 and Opinion No. 96-057; Appellant's Brief, p. 19; A. App. 108-109 and A. App. 173-176.*

The Appellate Court reached the conclusion that the names and wage rates of Design Employees are "public" under the personnel data provision of the law, Minn. Stat. § 13.43, subd. 2, which states that names and wages of payees that perform services for the government, either as employees, volunteers, or independent contractors, are specifically deemed "public." *International Brotherhood of Electrical Workers, Local No. 292 v. City of St. Cloud*, 750 N.W.2d 307, 315-16 (Minn. Ct. App. 2008). The Court reasoned, as did the Trial Judge, that Subdivision 6, the labor organization provision, constitutes an "expansion" of the rights of labor organizations to carry out collective bargaining obligations. *Id.*

This conclusion flows not only from the language of the statute, but the views of authorities who have examined the history of the statute in general and the labor organization provision in particular. *Id.* (citing Donald A. Gemberling & Gary A. Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act- From "A" to "Z,"* 8 Wm. Mitchell L. Rev. 573, 645 (1982). As the Appellate Court noted, the Data Practices Act was amended in 1981 to expand the rights of labor unions under the statute to address a "series of conflicts between labor unions citing their rights under the Public Employment Labor Relations Act (PELRA), and employers asserting their rights to keep personnel data private. . . ." *International Brotherhood of Electrical Workers, Local No. 292*, 750 N.W.2d at 315 (citing Gemberling & Weissman, *supra*, at 645.) As the Appellate Court concluded, "[r]ead in context of the rest of Minn. Stat. § 13.43, subdivision 6 acts as an expansion of a labor union's ability to access personnel data, not a limitation as Design suggests." *Id.*

The City agrees, asserting that:

The court of appeals correctly held that Minn. Stat. § 13.43, subd. 6, acts as an expansion of a labor union's right of access to personnel data maintained by government employer.... *The City agrees that this is a correct application*

*of the statute to the facts of this case, and the court of appeals' decision should be affirmed.*

*City's Brief*, p. 18. (emphasis supplied)<sup>4</sup>

### **B. Design Stands Alone**

Standing alone, Design's argument that the labor organization provision, §13.43, subd. 6, bars accessibility to the prevailing wage data is wrong. It starts its argument by making unwarranted and unsubstantiated character assaults on the union, accusing IBEW of "stalking" its employees and seeking to use the "prevailing wage" data to "harass" them. *Design's Brief*, pp. 4-5. These baseless

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<sup>4</sup> The City purports to have to take this pro-access position from the outset of the litigation and maintains that it resisted production of the data until after the Appellate Court decision only because it was in a "difficult spot" for fear that a lawsuit might be brought by Design if the documents were furnished. This does not constitute a valid excuse, or justification, for withholding the documents for more than 1-1/2 years, necessitating such prolonged and costly litigation. If the City had produced the documents when first requested, on three occasions in late 2006, this whole situation may have been averted, saving the parties and the Court significant time and expense and comporting with the underlying purpose of the Data Practice Act in allowing efficient, inexpensive access to "public data" by Minnesota citizens. That the city claims to have been in a tight "spot" because of conflicting demands is hardly unique. On many occasions, Data Practice issues yield conflicting claims by those seeking access and those resisting it. It's the City's obligation, as the "Responsible Authority" under Minn. Stat. § 13.05, to make those decisions, albeit sometimes "difficult," rather than responding like a deer looking in headlights, as the City did here. In effect, the City agreed with the argument of IBEW, seeking access, but sided with Design, in resisting access, by refusing to produce the documents. This reflected an abdication of responsibility that imposed a long-standing cloud over this "sunshine" law.

assertions, stem from a self-serving Affidavit by Design's owner, consisting of hearsay statements of Design's employees without any evidentiary support. Even if supportable, the negative attacks are not relevant to the strictly legal issue posed in this case. Minn. R. Civ. P. 56.05; *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (Minn. 1976) (hearsay evidence is not admissible at trial, and therefore, "must be disregarded on a motion for summary judgment").<sup>6</sup>

Design's assertion that the information contained in the prevailing wage records constitutes "personnel data on individuals" under § 13.43 is based on flawed reasoning. Design uses an ill-fitting analogy to tort law, referring to the principle of *respondeat superior*, which imposes vicarious liability upon employers on some occasions, for misdeeds of its employees. *Design's Brief*, p. 15-16. But the issue of vicarious liability has no bearing upon this case, which involves interpretation of public access to government information, not tort law. Minn. Stat. § 13.43, subd. 1 defines "personnel data" as data on "individuals" who are employees, or applicants for employment, volunteers, or independent contractors

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<sup>6</sup> Design similarly offers inadmissible remarks about settlement negotiations, which are not only irrelevant, but legally inadmissible. See Minn. R. Evid. 408 (settlement negotiations are "not admissible to prove liability for or invalidity of the claim or its amount").

with a government entity. The workers listed on Designs' payroll records were not employees (or job applicants) of the City, volunteers, or independent contractors, they worked for an outside contractor. Nor was Design covered by §13.43, which is limited to "individuals," defined by the statute as a "natural person." Minn. Stat. §13.02, subd. 8. Therefore, the classification of "data on individuals" under the personnel data provision, § 13.43, may not be applicable here.

The assertions by Design (and the City, too) that "data on individuals" under § 13.43, subd. 2, covers any data from which individuals could be identified, pursuant to Minn. Stat. § 13.43, subd. 4, is misleading. The term is specifically used in the personnel data provision to mean those employed by a government entity, not private subcontractors. Design's concern that this interpretation creates a dichotomy based on whether an employee is on a government payroll or is employed by a private contractor doing business with the government may be so, but it is what the legislature has chosen to do. Any desired change in the statutory language should be addressed to that body, which writes laws, not this Court, which interprets them.

Design's unsubstantiated argument that § 13.43, subd. 6, the labor organization clause, manifests a legislative intent "to restrict labor organizations' access to all personnel data, not just private data," is palpably incorrect. *Design's Brief*, p. 19. There is no basis for its assertion that the measure was enacted to give

labor organizations *less* rights than any other individual or entity, particularly in light of the statutory definition of a "person" entitled to access as any "association" or "organization," Minn. Stat. § 13.02, subd. 10, and this Court has specifically held that labor organizations are covered by the statute. *Wiegel v. City of St. Paul*, 639 N.W.2d 378 (Minn. 2002); *see also Minneapolis Federation of Teachers, AFL-CIO, Local 59 v. Minneapolis Public Schools, Special School District No. 1*, 512 N.W.2d 107 (Minn. Ct. App. 1994), *rev. den'd* (March 31, 1994).

Rather than constrictive, Subdivision 6 is expansive, giving labor unions certain rights to non-public data when needed for collective bargaining purposes without in any way, explicitly or implicitly, limiting their right to the same "public" data as everyone else is entitled to receive. This broadening intent is reflected in the legislative history, which led to enactment of the measure in order to overcome concerns of employers, regarding furnishing information that may fall within the "private classification of some personnel data." *Gemberling & Weissman, supra*, at 645. Accordingly, Subdivision 6 was adopted for the limited purpose of allowing disclosure to unions of "private" data for collective bargaining purposes, not to restrict unions from seeking any "public" data. *Id.*

Design's reference to other provisions in the Act that limit access, such as Subdivision 8 which restricts public data in certain circumstances, is not germane here. *Design's Brief*, p. 19. Minn. Stat. § 13.43, subd. 8, limits disclosure of data

that is otherwise public if producing it would threaten the "safety" of claimants or witnesses. That represents an express restriction for a specific purpose. The labor organization provision, Subdivision 6, contains no such explicit (or implicit) restriction of that type.

The Trial Court reasoned that the labor organization provision, which makes certain data that would otherwise not be "public" accessible if needed for collective bargaining purposes, is not a restriction on a labor organization's general right to "public" documents, but supplements its right to carry out its collective bargaining responsibilities. Viewing it as a restriction on the rights of a union, giving unions fewer rights than any other individual or organization, is "unreasonable" and would "produce an absurd result," as explained by the Trial Court and concurred in by the Appellate Court. *See Appellant's Brief*, p. 11 and *A. App.* 34-35.

Design's argument that the labor organization provision, Minn. Stat. § 13.43, subd. 6, conflicts with the personnel data provision, § 13.43, subd. 2, breeds a faulty syllogism. *Design's Brief*, p. 21. It contends that Subdivision 2 is a general provision; Subdivision 6 is a more specific provision, therefore, the specific (Subdivision 6) trumps the general (Subdivision 2).

That argument makes two erroneous presumptions. The first flaw is that the two conflict, when they do not. Subdivision 6 supplements and expands the rights of labor unions to certain data, but does not clash with Subdivision 2. Moreover,

Subdivision 6 contains no specific restrictions, but enlarges the ability of labor unions to obtain non-public or "private" data for collective bargaining purposes.

Not only is Design's syllogism silly, but its solution to its self-created conundrum is equally specious: that government entities "provide a disclaimer" on all data that labor unions cannot get certain information except for collective bargaining purposes. *Design's Brief*, p. 20. The legislature has not directed that any such "disclaimer" be provided, and Design's invitation for this Court to write a "disclaimer" provision into the statute should not be accepted. In addition to conflicting with the expansive purpose of Subdivision 6, Design's contention clashes with the statutory "presumption" of openness under Minn. Stat. § 13.01, subd. 3, the concomitant "fundamental commitment to making the operations of our public institutions open to the public," *Prairie Island Indian Community v. Minn. Dept. of Public Safety*, 658 N.W.2d 876, 884 (Minn. Ct. App. 2003), and the well-established policy of "construing the law in favor of public access." *Id.* (citing *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991)).

The ill-advised invitation by Design to incorporate a "disclaimer" procedure to limit the rights of labor unions also conflicts with another provision of the statutes. Under § 13.05, subd. 12, officials are barred from requiring those seeking data to "state a reason for, or justify the request...." Design would have this Court amend that provision, or effectively repeal it, by requiring all applicants for access

to personnel data, especially labor unions, to give reasons for, or "justify," their requests, an inquiry the legislature has rightly deemed to be antithetical to public access and openness regarding government operations in general, and particularly how the government uses public funds, as in this case. It would create a cloud to shroud the "sunshine" law.

Therefore, the issue of accessibility under § 13.43 has been made moot by the City's disclosure of the documents this summer. Even if the Mootness Doctrine were not applicable, which it is, Design's position lacks merit, and the ruling below should be affirmed as to the accessibility of the prevailing wage data to IBEW.

### **III. THE ADDRESSES ARE ACCESSIBLE, TOO**

#### **A. The Addresses Are Not Restricted Under § 13.43**

The other, lesser issue in this case, the accessibility of addresses, should be resolved consistent with the statutorily-declared "presumption" of disclosure and the judicially-endorsed "commitment" to openness.

The Appellate Court's reasoning that the addresses are off-limits stems from its view that § 13.43, subd. 4, makes them non-public. That conclusion erroneously arises from the premise that home addresses are not listed as "public" in the personnel data provision of the statute, § 13.43, subd. 2, and, therefore, falls under the provision that "all other personnel data is private data on individuals"

under subd. 4. But that reasoning would make the specific exclusion for home addresses of certain law enforcement personnel under subd. 5a superfluous.

Moreover, the exclusion under subd. 4 only applies to personnel data under § 13.43, subd. 2. However, § 13.43 does not apply to the names listed on Design's payroll records, which applies only to employees, volunteers, or independent contractors of the City, and the Design workers were none of these. See *supra* pp. 9-10.

The claim that the documentation is governed by § 13.43, the personnel data provision, based on *City Pages v. State*, 655 N.W.2d 839 (Minn. Ct. App. 2003) is wrong. Ironically, that case held in favor of full disclosure of the "public documents" sought, after redaction of material protected by the work product doctrine and attorney client privilege. The court never reached the issue of whether the names of the law firm employees who provided legal services jointly to the state and a private health care insurer client were private data under Minn. Stat. § 13.43, holding that the client lacked standing to raise the issue.

At any rate, Design has waived any such argument. Its attorney took the pro-disclosure position before the Trial Court at the hearing on Summary Judgment: "[T]he rate of pay, the names, we don't have an issue with that, and we have suggested that we would be willing to turn that over." *Appellant's Brief*, p. 10; Tr. 28. While Design's attorney did preserve its position that the addresses are

not "public," an issue addressed below, the company clearly asserted that it agreed with IBEW and the City that the balance of the payroll records, consisting of the rate of pay, the names" are public and should be produced. Design cannot now argue that the data already produced by the City should not have been delivered when it earlier stated that "we don't have an issue with that ... and would be willing to turn that over." *Tr.* 28. The only thing that Design has "turned over" is its position: now opposing production of the names and wage rates that it earlier condoned and encouraged the City to do, and the City has now done.

If § 13.43, the personnel data provision does not apply, then the general statutory "presumption" of openness does. Minn. Stat. § 13.01, subd. 3. Therefore, the addresses are "public" and should be produced.

Design's contention that other data on the payroll records are "private," such as marital status, is too late. The documents have already been produced, with redactions for Social Security numbers and child support obligations, which are statutorily non-public. See Minn. Stat. §§ 13.355, subd. 1; 518A.47, subd. 1(c). The issue of other "private" features in the documents was not raised below, and it is untimely to do so now. See *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (1988).

#### **B. The Federal Cases Are Inapposite**

Design's string citation of numerous cases decided by courts in other jurisdictions, primarily under the Federal Freedom of Information Act (FOIA), is

unavailing. *See Design's Brief*, p. 26, n. 3. Those cases involve different statutes, with different terminology, history, and specific inclusions and exclusions. Some of them, for instance, even held that the "names" of individuals are not accessible. *E.g., Sheet Metal Workers International Association, Local Union No. 19 v. U.S. Dept. of Veteran Affairs*, 135 F.3d 891 (3d Cir. 1990); *Fed. Labor Relations Authority v. U.S. Department of Navy*, 975 F.2d 348 (7th Cir. 1992). None of those cases involved the Data Practices Act, which was intended by the legislature to provide broad public accessibility and construed by this Court and the Court of Appeals to enhance, rather than detract, from public accessibility to information, particularly in a case like this one, involving public funding. *See, e.g., Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274, 286 (Minn. 2004); *Demers*, 468 N.W.2d at 73.

Reliance on the FOIA cases is misplaced for another reason. The Federal statute explicitly contains a balancing test for personnel information of federal employees, which the Data Practice Act lacks. 5 U.S.C. § 552(b)(6). Referred to in the case law as Exemption 6, FOIA provides: "This section does not apply to matters that are ... (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. ..." It is under this balancing provision that Federal courts in a number of cases have held

that the home addresses (and sometimes even names) of federal employees or others may not be disclosed by federal agencies.

But the Data Practices Act does not embrace this type of balancing test. In *Shakopee Mdewakanton Sioux Community v. Hatch*, 2002 WL 1364113 (D. Minn. 2002), the Federal Court held that the Act is not preempted by FOIA. *Supp. App.* 6. As a result, the Court held that copies of tribal gaming audits that had been provided to the state were public information under state law, even though they were not public under the FOIA. *Id.* The court explained that the Federal law does not "prohibit application of the MGDPA [Data Practices Act] to the audits because the federal classification applies only to data in the possession of the federal government, while the MGDPA governs data in the hands of any state agency." *Id.* at \*6 (*citing* Minn. Stat. § 13.02, subd. 7). The Minnesota Court of Appeals reached the same conclusion in *Prairie Island Community v. Minnesota Department of Public Safety*, 658 N.W.2d 876, 882-88 (Minn. Ct. App. 2002).

The legislative-intended broad reach of the Data Practices Act to carry out a "fundamental commitment" to openness in Minnesota should not be compromised by a restrictive reading of different, more narrow statutes, such as the FOIA, with different language and history in other jurisdictions. Addresses of employees working on "prevailing wage projects" have been freely produced, without objection, by other government entities in Minnesota, which indicates the

generally-accepted understanding of the Data Practices law and reflects that no harm has, or would, befall if the addresses are disclosed here. *See Appellant's Brief*, p. 27, n. 13. *See also A. App.* 111-112, 129, 151-153.

#### IV. CONCLUSION

For the above reasons, the decision of the Court of Appeals should be affirmed, relative to the accessibility of the "prevailing wage" data that already has been disclosed and is now moot, and should be reversed with respect to the refusal to disclose the addresses contained in those records.

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