



NO. A12-0327

State of Minnesota
In Court of Appeals

Marshall Helmberger,
and Timberjay Newspapers,

Appellants,

vs.

Johnson Controls, Incorporated, et al.

Respondents.

APPELLANTS' BRIEF, ADDENDUM, AND APPENDIX

Mark R. Anfinson (#2744)
Lake Calhoun Prof. Bldg.
3109 Hennepin Avenue South
Minneapolis, MN 55408
(612) 827-5611

Attorney for Appellants

David L. Lillehaug (#63186)
Fredrikson & Byron
200 S. Sixth Street, Suite 4000
Minneapolis, MN 55402
Attorneys for Johnson Controls, Inc.

Steven R. Lindemann
Leonard, Street & Deinard
150 S. Fifth Street, Suite 2300
Minneapolis, MN 55402
Attorneys for Architectural Resources

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF LEGAL ISSUE 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 7

 A. Introduction 7

 B. Standard of Review 8

 C. Johnson Controls, Inc. is Performing a Governmental Function in
 Providing I.S.D. No. 2142 with Planning, Design, and Construction
 Services Related to the School District’s Facilities Project, and is
 therefore Subject to §13.05, subd. 11 9

 1. The Minnesota Government Data Practices Act..... 9

 2. The Decision of the ALJ Conflicts with this Court’s
 Interpretation of §13.05, subd. 11 11

CONCLUSION 18

TABLE OF AUTHORITIES

COURT DECISIONS

<i>Demers v. City of Minneapolis</i> , 468 N.W.2d 71 (Minn. 1991)	11
<i>HealthPartners, Inc. v. Bernstein</i> , 655 N.W.2d 357 (Minn. App. 2003)	8
<i>In re Molnar</i> , 720 N.W.2d 604 (Minn. App. 2006)	9
<i>In re North Metro Harness, Inc.</i> , 711 N.W.2d 129 (Minn. App. 2006)	8
<i>Prairie Island v. Dept. of Public Safety</i> , 658 N.W.2d 876 (Minn. App. 2003) ...	11
<i>Rostamkhani v. City of St. Paul</i> , 645 N.W.2d 479 (Minn. App. 2002)	8
<i>Teachers' Local 59 v. School Dist. No. 1</i> , 512 N.W.2d 107 (Minn. App. 1994) ...	9
<i>WDSI, Inc. v. County of Steele</i> , 672 N.W.2d 617 (Minn. App. 2003)	<i>passim</i>
<i>Wiegel v. City of St. Paul</i> , 639 N.W.2d 378 (Minn. 2002)	9, 10

STATUTES

Minn. Stat. §13.01	9
Minn. Stat. §13.02	9, 10
Minn. Stat. §13.05, subd. 11	<i>passim</i>
Minn. Stat. § 13.37	18
Minn. Stat. §13.085	4, 6, 8

STATEMENT OF LEGAL ISSUE

Is Respondent Johnson Controls, Inc. (JCI) performing a “governmental function” within the meaning of Minn. Stat. §13.05, subd. 11 by providing project management, construction, and architectural services to Independent School District No. 2142, and thus subject to the public access requirements of the Minnesota Government Data Practices Act, Minn. Stat. chapter 13?

The administrative law judge below ruled that Johnson Controls is not performing a governmental function, and is therefore not subject to the Data Practices Act.

Most Apposite Authority

WDSI, Inc. v. County of Steele, 672 N.W.2d 617 (Minn. App. 2003)

Minn. Stat. §13.05, subd. 11

STATEMENT OF THE CASE AND FACTS

In February, 2010, Independent School District No. 2142 (St. Louis County) entered into a set of contracts with Johnson Controls, Inc. (JCI) for project management, construction, and architectural services relating to a \$78.8 million school facilities project authorized by the school board. Add.-2 (Findings of Fact, Conclusions of Law, and Order of Administrative Law Judge Eric L. Lipman, dated January 24, 2012). JCI is a private corporation. I.S.D. No. 2142 covers a substantial portion of rural St. Louis County. Appellant Timberjay Newspapers provides news coverage of the school district; Marshall Helmberger is publisher and managing editor of the Timberjay. *Id.*, 3.¹

Under the terms of the contracts, JCI was permitted to retain subcontractors to assist the company in providing the specified services. *Id.* JCI thereafter retained several subcontractors, including Architectural Resources, Inc. (ARI) to perform architectural services related to the project.

In February, 2011, Appellants submitted a public records request to Charles Rick, superintendent of schools for District No. 2142, seeking a copy of the contract between JCI and ARI. *Id.* The request was made

¹ In the original Complaint filed with the Office of Administrative Hearings, both Marshall Helmberger and Timberjay Newspapers are named as Complainants. See A-13.

pursuant to the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. chapter 13, which establishes a presumption that all government agency records are accessible to the public. Supt. Rick responded that the school district did not have a copy of the contract, and referred Appellants to JCI. *Id.*

Appellants contacted JCI in early March, 2011, asking for a copy of the contract and relying on Minn. Stat. §13.05, subd. 11, which is part of the MGDPA. *Id.* The company, through its attorney, refused the request, contending that as a private corporation, it was not subject to the MGDPA, and further that the contract with ARI constituted proprietary and/or trade secret information. *Id.*

Faced with JCI's refusal, Appellants asked for an advisory opinion from the Minnesota Department of Administration, as authorized under Minn. Stat. §13.072, seeking a determination concerning JCI's obligation to provide a copy of its contract with ARI. *Id.*, 11. On May 27, 2011, the Commissioner of Administration issued Advisory Opinion No. 11-005, holding that the contract with ARI was public data because JCI was performing a governmental function pursuant to its contracts with the school district, and that it must therefore provide Appellants with access to the contract in accordance with §13.05, subd. 11 (the Advisory Opinion appears at A-19).

Despite the advisory opinion, JCI still refused access. Appellants then filed a complaint with the Minnesota Office of Administrative Hearings, using the expedited data practices procedure recently established by the Minnesota Legislature for addressing disputes arising under the MGDPA. See Minn. Stat. §13.085. By Order dated September 14, 2011, Administrative Law Judge Eric Lipman dismissed the complaint, concluding that it failed to demonstrate probable cause that JCI had violated the MGDPA. A-7. According to the ALJ, the contract between JCI and the school district for planning, design, and construction of school buildings did not involve the performance of a governmental function within the meaning of §13.05, subd. 11. *Id.*

Appellants proceeded to file a Petition for Reconsideration with the Chief Judge of the Office of Administrative Hearings, pursuant to Minn. Stat., §13.085, subd. 3. On October 6, 2011, the Chief Judge granted the petition, ruling that there were “sufficient facts to establish a reasonable belief that Johnson Controls violated the Data Practices Act by refusing to disclose to Mr. Helmberger the requested subcontract.” A-6.

Following the remand, Judge Lipman conducted a scheduling conference. Among the issues discussed was the need for an evidentiary hearing. Appellants contended that there were few if any disputed issues of material fact, and that Appellants’ claims could be resolved primarily as a matter of law. See Add.-5. (Order of January 24, 2012). But JCI’s counsel

asked for a lengthy evidentiary hearing, which Judge Lipman ordered, setting the matter on for a three day hearing in January, 2012. *Id.*

Meanwhile, Architectural Resources, Inc. intervened as a party to the proceeding, without objection from Appellants.

At the commencement of the evidentiary hearing on January 11, 2012, Appellants reiterated their belief that, given the nature of their complaint and the undisputed facts, very limited additional evidence was required, and offered as exhibits only the contracts between the school district and JCI. Respondents then immediately moved for dismissal, offering no testimony or exhibits of their own. *Id.*, 6. Judge Lipman stated that he intended to grant Respondents' request, and in the Order of January 24, 2012, again dismissed Appellants' action. *Id.*

In the Order and accompanying Memorandum, Judge Lipman repeated his initial position that Appellants' access to the ARI contract hinged on whether JCI, in performing its contracts for the school project, was engaged in a governmental function. According to the ALJ, "Mr. Helmberger did not establish that when it was undertaking project management, construction, and architectural services relating to school buildings in New Independence Township and Field Township, Minnesota, Johnson Controls was performing a 'governmental function' as described in Minn. Stat. 13.05, subd. 11(a)." *Id.*

Appellants then filed and served a petition for writ of certiorari on February 23, 2012, pursuant to Minn. Stat. §13.085, subd. 5, requesting review by this Court.

ARGUMENT

A. Introduction

This appeal hinges exclusively on a straightforward legal issue: do the project management, construction, and architectural services that Johnson Controls, Inc. (JCI) agreed to perform under contracts with Independent School District No. 2142 constitute a governmental function within the meaning of Minn. Stat. §13.05, subd. 11? The decision of the administrative law judge, adopting arguments advanced by JCI, attempts to obscure the centrality of this legal issue by dwelling on peripheral factual and procedural matters.

However, the only facts relevant to the claim made in Appellants' Complaint are undisputed—the nature of the particular services to be performed by JCI for the school district. These are specifically described in the ALJ's Findings of Fact, and in the contracts with the school district, which are part of the record. Indeed, in the memorandum accompanying his Order, the ALJ states expressly that “this case turns upon a key question of law—namely: When Johnson Controls entered into a contract to build facilities for the School District was is undertaking a ‘government function’ as those terms are used in Minn. Stat. §13.05, subdivision 11(a)?” (emphasis added). Add.-9.

Because the case does turn on that question of law, it is governed by a prior decision of this Court, *WDSI, Inc. v. County of Steele*, 672 N.W.2d

617 (Minn. App. 2003), which authoritatively construed the statute. That decision leaves no doubt that the ALJ erred when he concluded that JCI is not performing a governmental function under its contracts with the school district.

B. Standard of Review

On certiorari review, the Court of Appeals will inspect the record and determine questions of jurisdiction of the tribunal, the regularity of the proceedings, and whether an order in a particular case is arbitrary, oppressive, unreasonable, fraudulent, made under an erroneous theory of law, or without evidentiary support. *Rostamkhani v. City of St. Paul*, 645 N.W.2d 479 (Minn. App. 2002). While the reviewing court defers to the agency's fact-finding, *In re North Metro Harness, Inc.*, 711 N.W.2d 129 (Minn. App. 2006), and to the interpretation of statutes that an agency is charged with administering, *HealthPartners, Inc. v. Bernstein*, 655 N.W.2d 357 (Minn. App. 2003), neither of those contexts is before the Court on this appeal.

Rather, Appellants' argument is that the ALJ's Order is grounded on an erroneous interpretation of §13.05, subd. 11. There is no issue related to fact finding because the only material facts are undisputed. The OAH is not charged with administering the statute in question--in the expedited data practices procedure established under §13.085, the OAH simply functions as the district court would.

Appellate courts retain the authority to review de novo an agency's determination of the meaning of words in a statute. *In re Molnar*, 720 N.W.2d 604 (Minn. App. 2006). That is because statutory interpretation is quintessentially a question of law subject to de novo review. *WDSI, supra*, 672 N.W.2d at 620.

C. Johnson Controls, Inc. is Performing a Governmental Function in Providing I.S.D. No. 2142 with Planning, Design, and Construction Services Related to the School District's Facilities Project, and is therefore Subject to §13.05, subd. 11.

1. The Minnesota Government Data Practices Act.

This appeal involves the interpretation and application of the Minnesota Government Data Practices Act, Minn. Stat., Chapter 13 (MGDPA), which “regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities.” *Wiegel v. City of St. Paul*, 639 N.W.2d 378 (Minn. 2002), quoting Minn. Stat. §13.01, subd. 3. The Act prescribes that “[a]ll government entities shall be governed by this chapter,” §13.01, subd. 1; school districts are included in the definition of “government entity.” §13.02, subd. 11.

The Act is grounded on a strong presumption that records maintained by governmental agencies are open and accessible to the public. “The core of the Data Practices Act is the provision that all ‘government data’ shall be public unless otherwise classified by statute or other law.” *Teachers’ Local 59 v. Special School District No. 1*, 512 N.W.2d 107, 111

(Minn. App. 1994) (citations omitted). “The Act operates through a system of classification and how the data are classified ultimately determines who has access to the data.” *Wiegel*, 639 N.W.2d at 382.

“Government data” subject to the Act and its presumption of public access is defined broadly. It includes “*all* data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media, or conditions of use.” §13.02, subd. 7 (emphasis added). Furthermore, in cases where §13.05, subd. 11 applies, certain records maintained by private entities contracting with government agencies come within the scope of government data and are subject to the MGDPA. According to §13.05, subd. 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 scope and subject matter of the Data Practices Act combined with the limitations of the English language produce frequent uncertainties about its meaning and application. The Courts have concluded that for reasons of public policy, the interpretive dilemmas prompted by the Act must be resolved in favor of the public’s right to know: “This law, together with statutes such as the Open Meeting Laws [], the campaign finance and

public disclosure laws [], and public proceedings of the judiciary, are part of a fundamental commitment to making the operations of our public institutions open to the public. In recognition of this policy, the courts construe such laws in favor of public access.” *Prairie Island v. Dept. of Public Safety*, 658 N.W.2d 876, 883-84 (Minn. App. 2003), citing *Demers v. City of Minneapolis*, 468 N.W.2d 71 (Minn. 1991).

2. The Decision of the ALJ Conflicts with this Court’s Interpretation of §13.05, subd. 11.

This Court has authoritatively construed §13.05, subd. 11. In *WDSI, Inc. v. County of Steele, supra*, the Court held that under the statute, “a political subdivision may contract with a private party to perform any of its governmental functions,” and that the “private party then acts as a governmental entity, must comply with the requirements of the MGDPA, and is held liable for MGDPA violations.” As the Court recognized, the application of §13.05, subd. 11 turns mainly on whether a contract with a private party calls for that party to perform “any” of the agency’s “governmental functions.”

A remarkable feature of the ALJ’s Order dismissing Appellants’ complaint is that despite the obvious precedential significance of *WDSI* in the context of this proceeding, the Order hardly discusses the Court’s opinion at all, making no effort whatsoever to apply its reasoning to the present action. Yet the facts at issue in *WDSI* are so similar to those before

the Court now that if *WDSI* does not control here, it is hard to imagine what function the ruling would ever have as precedent.

As with this case, the *WDSI* litigation was prompted by a request for access to information pursuant to §13.05, subd. 11. After developing concerns about prequalification bid requirements imposed in connection with the construction of a new Steele County detention center, *WDSI* (a private contractor) sought certain data from the County about the bidding process. 672 N.W. 2d at 619. Steele County responded that it did not have the data, and referred *WDSI* to Korsunsky Krank Erickson Architects (KKE), a firm the County had contracted with “to provide architectural services” for the detention center construction project, and which held the data sought by *WDSI*. *Id.* KKE, however, denied *WDSI*’s request, acknowledging its contract with the County, but stating that the “contract does not convert KKE’s files into government data.” *Id.*

WDSI then filed an action in district court under the MGDPA for an order requiring access to the requested data pursuant to §13.05, subd. 11. Though agreeing that *WDSI* had a right to obtain the data pursuant to that statute, the district court ordered the County to first retrieve the information from KKE, and to then make it available to *WDSI*. *Id.*

On appeal, this Court concluded that a plain reading of the statute supported the position originally taken by the County, namely that the County had no obligation to furnish data not in its possession, and that

instead, KKE itself was required to provide access, because it had a contract with the County and was performing a governmental function within the meaning of §13.05, subd. 11:

“The MGDPA provides that a private party who has contracted with a governmental entity to perform a governmental function has a duty to provide the public with governmental data unless the governmental entity has the data. *Id.*, 621. If a private party fails to comply with the MGDPA, the remedy is against the private party.” *Id.*

The factual parallels between *WDSI* and the present action are evident, and Appellants relied on that decision in making their request to JCI for information about the subcontract with ARI. Nonetheless, the ALJ concluded that JCI was not performing any governmental function in carrying out its contracts with District No. 2142. In the ALJ’s view, ‘the Legislature has not directed School Districts to undertake the kind of architectural services that are contemplated by the Johnson Controls--ARI subcontract. Because subcontracts for architectural services do not involve the ‘exercise of power conferred by statute,’ they are not a ‘governmental function’ as state courts have defined this term.” Add.-11.

Appellants believe that the ALJ’s conclusion fundamentally conflicts with the interpretation of the statute adopted by this Court in *WDSI*. The ALJ’s claim that integral components of a school construction project--such as project planning, architectural design, and construction management--do

not constitute governmental functions simply cannot be harmonized with the decision in *WDSI*. The only distinction between the facts at issue in *WDSI* and those of the present case is that the former involved the construction of a public jail, while the present case involves the construction of public schools—both important and long-standing government functions. In *WDSI*, this Court expressly held that certain pre-construction services integrally related to the project, such as “planning, designing, and obtaining qualified builders,” *id.*, at 621, did constitute governmental functions. The ALJ’s decision offers no explanation as to how the services provided by JCI could be credibly distinguished from the services described in *WDSI*. If Korsunsky, Krank, Erickson Architects (KKE), the firm retained by Steele County to provide architectural services for construction of the new county detention center, was performing a governmental function, then JCI was certainly doing as much in fulfilling its contracts with I.S.D. No. 2142.

The Court in *WDSI* squarely addressed and expressly rejected the argument that pre-construction activities which are essential parts of a major construction project can be segregated and distinguished in terms of what is a governmental function:

The construction of an adequate jail entails planning, designing, and obtaining qualified builders. It would be a curious and artificial distinction to suggest that only the end product, or only the maintenance and operation of the end product, would satisfy

the requirement of “governmental function,” because all segments of the process are necessarily interrelated.”

Id. Yet despite this emphatic statement of the law, the ALJ’s ruling rests on exactly such a “curious and artificial distinction.”

The ALJ’s Order also suggests that the decision is based on the fact that Appellants “did not establish that architectural services are traditionally performed by school districts in Minnesota,” and “did not establish that prior to the award of the contract to Johnson Controls . . . architectural services were traditionally performed by the employees of Independent School District 2142.” Add.-7. (Order of January 24, 2012, Conclusions 2 and 3). There is, however, no explanation provided in the Order as to why these considerations have any relevance to the legal issue at hand. Certainly nothing in the statutory language refers to such considerations, nor is there anything in this Court’s *WDSI* analysis of the statute that mentions them.

It is extremely unlikely that one could find an instance anywhere in the state where a school district has undertaken, entirely on its own, the planning, design, and construction or major renovation of schools without the use of private professional architects or construction management services. The same observation would apply to myriad projects undertaken by other public bodies, including the construction of the county detention center at issue in *WDSI*.

Yet under the ALJ's reasoning, unless it could be demonstrated that the public body had, until recently, provided these sorts of professional services using its own staff, the private contracting party would not be performing a governmental function, and consequently any records maintained or developed by the private contractor related to the government project would be unavailable for public inspection.

Finally, the ALJ seems to find significance in the fact that "Under the contracts between the School District and Johnson Controls, Johnson Controls does not exercise any powers that are conferred by statute upon the District. Johnson Controls does not assume 'general charge' of 'the business of the district', 'the school houses,' or 'the interests of the schools.' These powers and duties remain with the School District." Add.-11. Again, however, the ALJ's Order cites nothing in either the language of the statute nor in this Court's *WDSI* opinion that would justify relying on such criteria. Indeed, using them conflicts with the reasoning found in *WDSI*. Nowhere in its opinion does this Court indicate that the Steele County Board had ceded its general authority to operate the jail, that it had granted to architect KKE "general charge of the business of" the county, or that this Court found that such considerations were relevant in reaching its decision. The ALJ's suggestion that a public body must cede all or most of its general decision making authority to a private party in order for that party to come within the purview of §13.05, subd. 11 is pure invention, and

ultimately reflects the extent to which the ALJ seeks to evade the precedent represented by *WDSI*.²

In sum, the facts at issue in *WDSI* show that KKE was retained by the county board to provide planning and design services related to the construction of a county jail, which caused this Court to conclude that KKE was engaged in a governmental function and was subject to §13.05, subd. 11. In the present case, JCI was retained by the school district to undertake almost the same services relating to the district's public schools—if anything, JCI's duties are broader in scope, because it is responsible for more than just architectural services. Under the legal framework adopted in *WDSI*, JCI is therefore engaged in a governmental function and thus subject to the MGDPA with respect to records it maintains that are related to performing that function.

If accepted, the ALJ's interpretation of §13.05, subd. 11 would dramatically diminish the public's ability to gain access to information

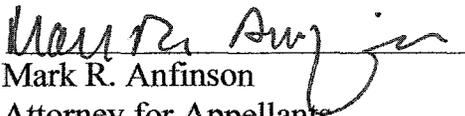
²As noted earlier, the MGDPA (in §13.072) authorizes the Commissioner of Administration to issue advisory opinions providing guidance on the meaning and application of the Act, and before Appellants commenced their action with the OAH, they had obtained Advisory Opinion No. 11-005, which held that JCI was performing a governmental function under its contracts with I.S.D. No. 2142. Appellants would further observe that since §13.05, subd. 11 was added to the MGDPA, the Commissioner has issued several other advisory opinions addressing the statute, and has consistently read it in the same way that this Court did in *WDSI*. The ALJ's decision runs directly counter to those opinions as well.

pertaining to major governmental projects. Nothing in the legal analysis employed by the ALJ comes anywhere close to justifying such a result.³

CONCLUSION

For the reasons described, Appellants request that the decision of the Office of Administrative Hearings be reversed.

DATED: March 26, 2012


Mark R. Anfinson
Attorney for Appellants
Lake Calhoun Prof. Building
3109 Hennepin Avenue South
Minneapolis, MN 554008
Phone: 612-827-5611
Atty. Reg. No. 2744

³ JCI (and ARI) have also objected that the subcontract between them consists, at least in part, of trade secret data and/or proprietary information. That issue was not reached by the ALJ below. It should be noted, however, that if JCI is subject to §13.05, subd. 11 and its construction project records thus covered by the MGDPA, §13.37 of the Act recognizes an exception to public access for trade secret data, an exception that JCI and ARI could invoke in appropriate cases.