

NO. A12-0327

State of Minnesota
In Court of Appeals

Marshall Helmberger,
and Timberjay Newspapers,

Appellants,

vs.

Johnson Controls, Inc. and
Office of Administrative Hearings,

Respondents,

and

Architectural Resources, Inc.,

Intervenor.

**BRIEF OF INTERVENOR
ARCHITECTURAL RESOURCES, INC.**

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STATEMENT OF THE LEGAL ISSUE

Did Administrative Law Judge Eric L. Lipman properly determine that Johnson Controls, Inc. (“JCI”) was not performing a governmental function under the Minnesota Government Data Practices Act (“MGDPA”) when it entered into a contract with Architectural Resources, Inc. (“ARI”)?

Judge Lipman ruled that JCI was not performing a governmental function when it entered into a contract with ARI, and therefore the JCI-ARI subcontract was not subject to disclosure under the MGDPA.

Most Apposite Authority

Minn. Stat. § 13.03, subd. 1

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

After requesting an evidentiary hearing that would involve “a factual examination of the nature of the relationship between” Independent School District 2142 (the “District”) and JCI, Appellants failed to present any evidence showing that JCI and ARI were performing a government function. (See Findings of Fact, Conclusions of Law and Order of Judge Eric L. Lipman (Jan. 24, 2012) (“ALJ Order”) at Findings of Fact ¶¶ 16, 25) (emphasis in original). Instead, Appellants indicated that their strategy was to cross-

examine JCI's and ARI's witnesses as part of Appellants' rebuttal. (*See* OAH Tr. Jan. 11, 2012 at 11:7-11; 12:7-13:3.) Judge Lipman explained that Appellants were to proceed first at the evidentiary hearing and that the purpose of the hearing was to supplement the record. (*Id.* at 11:12-21; 19:14-21:7.) Appellants proceeded to offer only brief testimony of Appellant Marshall Helmberger and two contracts between JCI and the District. (*See id.* at 101:20-109:11.) Appellants' entire case-in-chief, including cross-examination, covers only fifteen pages of transcript. (*See id.* at 101-115.)

At the close of Appellants' case-in-chief, JCI moved to dismiss the case. (*Id.* at 115:16-133:22.) ARI joined this motion. (*Id.* at 134:15-137:11.) After careful consideration of the evidence, Judge Lipman granted the motion, explaining that Appellants had not proven that the JCI-ARI subcontract involved performance of a governmental function, and thus the subcontract was not subject to public disclosure under the MGDPA. (*See generally* ALJ Order.)

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

I. Two Private Parties, JCI and ARI, Executed a Subcontract.

On February 25, 2010, the District and JCI entered into a contract, under which JCI agreed to perform project management, construction, and architectural services for schools in the District. (ALJ Order at Findings of Fact ¶ 1.) In contract documents, the District specifically declared that the District “does not represent that it is knowledgeable in architecture or other professional disciplines involving construction.” (*Id.* at Findings of Fact ¶ 2.) The contract permitted JCI to use subcontractors to perform various services, but the District retained the authority to establish the budget for the project, set the schedule, and determine the features of the schools that were to be constructed. (*Id.* at Findings of Fact ¶¶ 3-4.)

As permitted by its contract with the District, JCI entered into a subcontract with ARI. (*Id.* at Findings of Fact ¶ 7.) ARI and JCI are both private, non-governmental entities. The JCI-ARI subcontract concerned performance of architectural services and was never provided to the District. (*See id.*)

II. Appellants Claimed the JCI-ARI Subcontract is Subject to Public Disclosure.

On March 4, 2011, Appellants requested that JCI provide them with a copy of the JCI-ARI subcontract. (*Id.* at Findings of Fact ¶ 8.) JCI refused to produce the subcontract on the grounds that the subcontract was not public data under the MGDPA. (*Id.* at Findings of Fact ¶ 9.)

After several communications between Appellants and JCI did not resolve this dispute, Appellants filed a complaint with the OAH, seeking an order compelling JCI to

produce the JCI-ARI subcontract. (*See id.* at Findings of Fact ¶ 10.) Judge Lipman dismissed Appellants' complaint on September 14, 2011, finding that Appellants "had not presented sufficient facts to establish probable cause that a violation of the" MGDPA occurred. (*Id.* at Findings of Fact ¶ 13.) Appellants quickly sought reconsideration. They specifically requested an evidentiary hearing that would involve "a factual examination of the nature of the relationship between the government entity and the contractor." (*Id.* at Findings of Fact ¶¶ 14-16) (emphasis in original). On October 4, 2011, the Chief ALJ granted Appellants' Petition for Reconsideration, finding that the complaint should not have been dismissed at the probable cause stage, and ordered the matter to "proceed to an evidentiary hearing to be scheduled in the near future." (Order Granting Pet. for Recons. of Chief ALJ Raymond R. Krause (Oct. 4, 2011) p. 6.) In order to protect its significant interests in the confidential and proprietary information contained in the subcontract, ARI moved to intervene in this matter on October 28, 2011. (*See* ARI's Mem. in Supp. of its Mot. to Intervene (Mar. 15, 2012) pp. 2-3.) Judge Lipman granted ARI's motion on November 16, 2011. (*Id.*)

III. Appellants Presented Very Little Evidence at the Evidentiary Hearing.

Judge Lipman scheduled an evidentiary hearing for January 11, 2012. (See generally ALJ Order; OAH Tr. Jan. 11, 2012.) Despite their prior representations that an evidentiary hearing was needed in order to conduct "a factual examination" of the relationship between JCI and the District, Appellants filed neither a witness list nor an exhibit list in accordance with the Third Pre-Hearing Order. (ALJ Order Findings of Fact

¶¶ 16, 25.) Moreover, Appellants did not file a motion for summary disposition to assert that a factual determination was no longer needed. (*Id.* at Findings of Fact ¶ 24.)

At the evidentiary hearing, Appellants for the first time expressed a belief that the case involved only “a legal issue” and that it “could have been briefed and handled that way, and it would have saved all of us a couple of days of time.” (OAH Tr. Jan. 11, 2012 at 5:1; 5:12-14.) Judge Lipman made clear that he expected to hear evidence, noting, “the problematic posture is that I understood your motion for reconsideration to suggest that there were more facts needed to decide the legal issue, and so – I mean if it were purely a legal question, I’m not sure why it was taken up to the Chief Administrative Law Judge on the ground that the record wasn’t complete....” (*Id.* at 5:21-6:2.)¹

Appellant Marshall Helmberger testified briefly to describe his MGDPA request, the denial of his request, and his subsequent appeals. (*See id.* at 101:20-109:11.) Appellants called no other witnesses and presented only two exhibits: two contracts between JCI and the District, which were listed on JCI’s exhibit list. (*See id.*) Appellants’ case-in-chief did not include any evidence supporting the contention that architectural services are a governmental function. (*Id.*) At the close of Appellants’ case-in-chief, JCI moved for judgment as a matter of law. (ALJ Order Findings of Fact ¶ 31.)

¹ Judge Lipman reiterated the need for evidence to be presented at the evidentiary hearing several times. *E.g.*, “I understood the motion for reconsideration was you can’t get to that question unless we fill out the record a little bit, there were things missing in the record...” (*id.* at 19:19-22); “[y]ou can’t possibly do the legal calculation correctly if you don’t have the right record, and so that is why we came back” (*id.* at 20:12-15); “I am ready for an evidentiary hearing and to build the record so as to base a decision [on it].” (*id.* at 33:22-34:2).

IV. Judge Lipman Dismissed Appellants' Claims in a Thorough, Reasoned Opinion.

Judge Lipman dismissed Appellants' complaint after careful consideration of the scant evidence Appellants had submitted. He found that architectural services are not traditionally performed by school districts in Minnesota, that Appellants did not demonstrate that architectural services were traditionally performed by employees of the District, and that Appellant had not established that providing architectural services is a "governmental function" within the meaning of the MGDPA. (ALJ Order Conclusions ¶¶ 2-4.)

In reaching his conclusions, Judge Lipman considered the text and legislative history of the MGDPA's privatization provision. The pertinent statutory language provides:

Privatization. (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. ...

(*Id.*) (citing Minn. Stat. § 13.05, subd. 11). Judge Lipman reviewed the legislative history behind this provision and noted that the policy purposes underlying the provision had been fulfilled in this case because the contract between JCI and the District required JCI to keep District information confidential, subject to the terms of the MGDPA. (ALJ Order at Memorandum pp. 9-10.) Judge Lipman also noted that the MGDPA does not

define “governmental function,” and looked to other authorities regarding the meaning of the term. (*Id.* at Memorandum pp. 10-11.)

Judge Lipman gave Appellants numerous opportunities to present evidence regarding JCI’s and ARI’s alleged performance of a governmental function. He even provided helpful comments to Appellant Marshall Helmberger explaining how he could present his case effectively. (*E.g.*, OAH Tr. Jan. 11, 2012 at 100:17-101:4 (“We find it most helpful if people go through the exhibits that they are going to offer just so that people don’t forget key parts of their story...”).) Judge Lipman found that Appellants did not meet their burden of proof. (ALJ Order at Conclusions ¶¶ 2-4.) He cited Minnesota Statutes Section 123B, entitled “School District Powers and Duties,” and found that “the Legislature has not directed School Districts to undertake the kind of architectural services that are contemplated by the [JCI-ARI] subcontract.” (*Id.* at Memorandum p. 11.) Judge Lipman also found that the District had not conferred to JCI “general charge” of the District’s business, the school houses, or the interests of the schools; rather, “[t]hese powers and duties remain with the” District. (*Id.*)

Based on these determinations, Judge Lipman ruled that the JCI-ARI subcontract did not involve performance of a governmental function within the meaning MGDPA, and thus the subcontract was not subject to public disclosure. Because Appellants failed to establish a violation of the MGDPA, Judge Lipman dismissed their complaint. (ALJ Order at Memorandum p. 13.)

ARGUMENT

Appellants utterly failed to meet their burden of proving that the JCI-ARI subcontract is subject to public disclosure under the MGDPA. Despite ample opportunity to do so, Appellants presented very little evidence at the evidentiary hearing they had requested. After conducting a detailed review of the facts and the law, Judge Lipman rightly concluded that Appellants had not proven that the JCI-ARI subcontract involved performance of a governmental function, and thus the subcontract did not fall within the purview of the MGDPA. Judge Lipman acted well within his discretion, and his decision should be affirmed because it is consistent with the language and purpose of the MGDPA, legal precedent, and public policy.

I. This Court Must Review Judge Lipman's Decision Under an Abuse of Discretion Standard.

On appeal, "a trial court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (citing Minn. R. Civ. P. 52.01). Findings of fact are clearly erroneous only when the appellate court is "left with the definite and firm conviction that a mistake has been made." *Fletcher*, 589 N.W.2d at 101 (citations omitted). Similarly, when reviewing mixed questions of fact and law, the appellate court affords discretion to the district court's ultimate conclusions, and "review[s] such conclusions under an abuse of discretion standard." *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. Ct. App. 2002) (citations omitted). Only pure questions of law are reviewed de novo. *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008).

Despite Appellants' protests to the contrary, this case does involve factual findings to which this Court must afford deference. Indeed, Appellants have phrased the "Statement of Legal Issue" in their brief as whether JCI was "performing a 'governmental function' within the meaning of" the MGDPA. (*Id.* at p. 1.) Answering this question necessarily involves factual analysis of the duties JCI and ARI were performing. Appellants failed to present persuasive evidence on this issue. Judge Lipman made specific findings about what these contractual functions entailed (architectural work) and what they did not entail ("general charge" of the District's business, school houses, or interests of the schools). (*See* ALJ Order at Memorandum p. 11.) Therefore, the Court must defer to Judge Lipman's decision unless Appellants can show an abuse of discretion.

II. Appellants Failed to Carry Their Burden of Proving that the JCI-ARI Subcontract Involved Performance of a Governmental Function.

The MGDPA provides that all "government data collected, received, reviewed, maintained or disseminated by a government entity shall be public unless" certain exceptions apply. Minn. Stat. § 13.03, subd. 1. It is undisputed that JCI and ARI are not "government entities,"² nor can it be disputed that the JCI-ARI subcontract fails to meet the definition of "government data."³ As private, non-government entities, JCI and ARI

² The MGDPA defines "government entity" as "a state agency, statewide system, or political subdivision." Minn. Stat. § 13.02, subd. 7a.

³ The MGDPA defines "government data" as "all data collected, created, received, maintained or disseminated by a government entity regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7. Because JCI and ARI are not government entities, and because the District did not collect, create, receive, maintain, or disseminate the JCI-ARI subcontract, the subcontract does not meet the above definition.

are not typically subject to the MGDPA. In order for the MGDPA to apply to the JCI-ARI subcontract, the duties required by the subcontract must constitute a governmental function under the MGDPA's privatization provision. *See* Minn. Stat. § 13.05, subd. 11.

Under the OAH Contested Case Hearing Rules, "the party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard." Minn. R. 1400.7300, subp. 5. Nothing in the MGDPA provides a different burden or standard, and Appellants do not appear to dispute that they were required to carry the burden of proof in this case. Appellants clearly proposed that certain action be taken: that JCI be compelled to publicly disclose its subcontract with ARI. As a result, Appellants bore the burden of proving that the JCI-ARI subcontract entailed performance of a governmental function.

Judge Lipman correctly determined that Appellants did not meet their burden. Appellants' case-in-chief did not include presentation of any evidence to establish the scope of ARI's services or to support Appellants' contention that ARI's work constituted assumption of a governmental function. Instead, Appellants' evidence consisted solely of Appellant Marshall Helmberger testifying that he made a request for the JCI-ARI subcontract, that the request was denied, that he believed *WDSI* supported his arguments, and that he has never encountered "the slightest problem" in getting "copies of contracts related to" construction projects before. (*See* OAH Tr. Jan. 11, 2012 at 101:20-109:11.) Appellants' failure to present evidence was not due to any excusable neglect, but was in fact a conscious strategy decision that failed to impress the judge. (*Id.* at 11:7-11; 12:7-13:3.) As Judge Lipman explained, "What I don't know from this record is whether the

provision of architectural services is a governmental function traditionally undertaken by school districts, and I think there is good reason to doubt” that it is a governmental function. (*Id.* at 173:9-19.) As explained below, Judge Lipman acted well within his discretion in making this determination.

III. Judge Lipman Properly Exercised His Discretion to Determine that the JCI-ARI Subcontract Was Not a Contract for a “Governmental Function.”

A. Judge Lipman’s decision is consistent with the plain language and purpose of the MGDPA and with this Court’s decision in *WDSI*.

“The purpose of the Data Practices Act is to balance the rights of individuals ... to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing.” *See Demers v. City of Minneapolis*, 468 N.W.2d 71, 72 (Minn. 1991).. The public classification of data from a private entity performing a governmental function is an exception to the general rule that the MGDPA applies not to private businesses, but to government entities. *Cf.* Minn. Stat. § 13.03, subd. 1. While the MGDPA does not define “governmental function,” the plain language of the statute, legislative history of the privatization provision, and the purpose and context of the MGDPA as a whole all support Judge Lipman’s decision that the JCI-ARI subcontract did not encompass a governmental function.

“[A] function is governmental where it involves the exercise of power conferred by statute upon local agencies in administering the affairs of the state and the promotion of the general public welfare.” *Mace v. Ramsey Cnty.*, 42 N.W.2d 567, 569 (Minn. 1950). *See also* Black’s Law Dictionary 1817 (9th ed. 2009) (defining “governmental function” as “a government agency’s conduct that is expressly or impliedly authorized by

constitution, statute, or other law and that is carried out for the benefit of the general public”). Judge Lipman found that the JCI-ARI contract involved performance of architectural services. (ALJ Order at Memorandum p. 11.) In order for the architectural services function to be governmental, government entities must be authorized by law to perform this function. There is no statute authorizing school districts to perform architectural services. (*Id.*) *Cf.* Minn. Stat. § 123B, *et seq.* (laying out the functions the school districts may perform). In fact, to perform architectural services in Minnesota, one must be properly licensed. Minn. Stat. § 326.02. Appellants did not present any evidence indicating that any of the District’s employees were licensed to perform architectural services. (*See* ALJ Order at Conclusions of Law ¶ 3.) Moreover, Appellants did not demonstrate that architectural services were traditionally a function performed by the District or school districts generally. (*Id.* at Conclusions of Law ¶¶ 2, 4.) Because the District is not authorized by law to perform architectural services, performance of those services cannot be a governmental function under the plain meaning of the term.

This Court’s holding in *WDSI, Inc. v. County of Steele*, 672 N.W.2d 617 (Minn. Ct. App. 2003), is consistent with Judge Lipman’s decision. Appellants would have the Court believe that the “only distinction between the facts at issue in *WDSI* and those of the present case is that the former involved construction of a public jail, while the present case involves the construction of public schools...” (Appellants’ Br. at p. 14.) Appellants’ superficial treatment of *WDSI* misses several important distinctions.

First, *WDSI* arose out of a contract made directly between a private party (KKE Architects) and the government entity (Steele County). *WDSI*, 672 N.W.2d at 619. Here, Appellants are seeking access to a contract between two private parties. The District is not a party to the subcontract and has never possessed a copy of the subcontract. (ALJ Order at Findings of Fact ¶ 7.) The contract that is analogous to the relationship in *WDSI* is not the JCI-ARI subcontract, but the contracts between JCI and the District. The contracts between JCI and the District are public and, indeed, have been provided to Appellants and were entered as exhibits at the OAH hearing. (See OAH Tr. Jan. 11, 2012 at 101:20-109:11.)

Second, in *WDSI*, the county delegated to its architect sole responsibility for creating, maintaining, and applying the criteria used to determine whether a bidding contractor was qualified to be awarded a construction contract. *WDSI*, 672 N.W.2d at 619-21. The *WDSI* Court specifically noted that KKE's contract involved "developing qualifications and requirements for the bidding process" that are "conferred by statute upon local agencies." *Id.* at 621. This level of authority is quintessentially a government function. The architect in *WDSI* had "general charge" of the bidding process and had been delegated the government's role of determining who was eligible to bid on a contract to build the jail. By contrast, there is no evidence in the record that JCI or ARI possessed or exercised any such authority.

To the contrary, Judge Lipman specifically found that under the contracts between JCI and the District, JCI "does not exercise any powers that are conferred by statute upon the District." (ALJ Order at Memorandum p. 11.) While the District is authorized by

law to take “general charge of the business of the district, the school houses, and the interests of the schools,” it is not authorized to perform architectural services and in fact cannot do so without a license. Minn. Stat. § 123B.02, subd. 1; *Id.* at § 326.02. Because the District retained general charge over the construction process in this case, and only delegated to JCI specialized functions that the District does not perform, the District did not delegate any governmental functions.

Additionally, contrary to Appellants’ assertions, Judge Lipman carefully considered *WDSI* in reaching his conclusion. (ALJ Order at Memorandum pp. 10-11.) The facts of *WDSI* differ materially from the facts of this case. If a contractor in a position similar to the disappointed bidder in *WDSI* is not able to obtain access to the criteria that were used to exclude it, then, even if the contractor were improperly excluded from consideration, the contractor would have no recourse. The government entity could inappropriately play favorites and cloak its true motivations in secrecy by delegating to a third party creation and application of selection criteria designed to skew the process toward a favored bidder. Through this sleight of hand the government could insulate itself against a lawsuit challenging the bid process. There is no evidence that the District delegated any such authority to JCI or ARI. Judge Lipman’s decision is completely consistent with *WDSI*.⁴

⁴ It should also be noted that *WDSI* affirmed dismissal of the complaint against Steele County because the County did not possess the requested information, and the entity who had it, KKE, had not been made a party in the case. Everything else in the *WDSI* opinion is dicta and need not be followed. *Foster v. Naftalin*, N.W.2d 249, 266 (Minn. 1956); *Russell’s AmericInn, LLC v. Eagle Gen. Contractors*, 772 N.W.2d 81, 85 (Minn. Ct. App. 2009).

Judge Lipman also relied on the legislative history of the privatization provision to support his decision. The privatization provision was enacted in order to safeguard private government data in the event that such data was disclosed to private contractors. (See ALJ Order at Memorandum p. 9.) This purpose is not implicated in the present case because no government entity transferred any data in connection with the JCI-ARI subcontract. Rather, the private information at issue is confidential and proprietary to JCI and ARI, which are purely private entities.

The privatization provision should be construed in conjunction with another MGDPA provision concerning private entities—the business vendor provision. The MGDPA recognizes that when a private organization bids for government work, responses to requests for bids must remain private or nonpublic until the bids are opened. Minn. Stat. § 13.591, subd. 3(a). Once the bids are opened, only the name of the bidder and the dollar amount specified in the bid become public. *Id.* The business vendor provision thus recognizes that some business data has a competitive value, and that only certain information from bidders should be public—not all of their quantity takeoffs, bid estimates, subcontractor price quotations, communications, or other minutia.

By submitting a proposal and by entering into a contract with the District, JCI did not open all of its business operations to public inspection. The District is not a party to the JCI-ARI subcontract, nor has the proprietary information contained in the JCI-ARI subcontract been collected by, reviewed by, or even provided to the District. (ALJ Order at Findings of Fact ¶ 7.) A subcontract between two private entities which concerns the performance of functions that the government is not authorized to provide cannot

reasonably be construed as information about “what the government is doing.” *See Demers*, 468 N.W.2d at 72. Thus, Judge Lipman’s decision that the JCI-ARI subcontract did not involve performance of a government function was not an abuse of discretion and should be affirmed.

B. Because Appellants have not proven that the JCI-ARI subcontract concerned performance of a governmental function, there is no “presumption” that the subcontract is public.

Appellants spend a significant portion of their brief arguing that the subcontract at issue is subject to a presumption in favor of disclosure. Not so. While the MGDPA establishes a presumption that government data should be accessible to the public, that presumption has no application to this case.

Under the plain language of the MGDPA, the presumption of accessibility is only created for government data. Minn. Stat. § 13.03, subd. 1. In this case, the JCI-ARI subcontract cannot be government data because it was not data “collected, created, received, maintained, or disseminated by any government entity.” *See* Minn. Stat. § 13.02, subd. 7. The presumption in favor of disclosure does not say that, when in doubt, non-government data should be presumed to be government data; it only establishes a presumption of access when the data in question already is government data. By invoking a presumption that applies to government data in an attempt to prove that information is government data, Appellants misconstrue the statute.

C. This Court should not defer to the Minnesota Department of Administration's advisory opinion.

The Court need not and should not be swayed by Minnesota Department of Administration Advisory Opinion 11-005 (“Advisory Opinion 11-005”), as referenced in Appellants’ brief. (Appellants’ Br. at p. 3.) While an advisory opinion is entitled to consideration, it is not binding on the court. *See Zangs v. City of St. Paul*, No. A07-1862, 2008 WL 4300405, at *4 (Minn. Ct. App. Dec. 16, 2008) (unpublished) (rejecting appellant’s argument that the district court should have given greater deference to a MGDPA advisory opinion and holding instead that the advisory opinion received “adequate consideration”).

In this case, Judge Lipman referred to Advisory Opinion 11-005 and explained how his reasoning differed from that opinion. (ALJ Order at Memorandum pp. 11-12.) Specifically, he noted that “Advisory Opinion 11-005 does not reference legislative history that would indicate a very broad application of Minn. Stat. § 13.05, subd. 11 was intended by the Legislature, nor does the Commissioner detail the Department of Administration’s own role in the development of this statutory provision.” (*Id.* at p. 12.) Judge Lipman also cited several cases indicating that agency opinions are not binding. (*Id.*) Judge Lipman thus gave adequate consideration to Advisory Opinion 11-005, and any arguments to the contrary should be rejected. Moreover, as explained above, the reasoning behind Advisory Opinion 11-005 is unpersuasive and need not be given any deference.

IV. Compelling Disclosure of the JCI-ARI Subcontract Would Create Serious Public Policy Concerns.

Judge Lipman's decision is also supported by important public policy concerns. Specifically, mandatory disclosure of information such as the subcontract at issue in this case would impermissibly compel private businesses to reveal proprietary information and would create unreasonable administrative burdens for them.

A. Mandatory disclosure of private and sensitive competitive information would discourage firms from bidding on government work.

The purpose of the MGDPA is to promote openness in government. It is not intended to mandate disclosure of private information from organizations that contract with the government. Subjecting companies like ARI to public disclosure of the details of their working relationships with other private companies would strongly discourage these companies from providing their services on government projects. The information at issue in this case, and the other types of information that would be deemed public under Appellants' reasoning, are simply not the type of information that the MGDPA seeks to disclose. *See Demers*, 468 N.W.2d at 72 ("The purpose of the Data Practices Act is to balance the rights of individuals ... to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing.") (emphasis added). Information about an architectural firm's agreement with a prime contractor cannot be construed as "what the government is doing," especially when requiring public disclosure of such data would surely chill private businesses from offering their services to prime contractors for the benefit of the government.

A private organization's ability to bid successfully on public projects depends heavily on its ability to keep secret its pricing and other business strategies. If the MGDPA were interpreted to require disclosure of subcontracts, such as ARI's, there is no logical stopping point. Each tier of subcontractors would find their bids, contracts, and estimates subject to public disclosure. Having to expose their pricing and other sensitive information to their competitors would strongly discourage them from submitting proposals at all. With fewer consultants and contractors available as potential subcontractors for government work, the government likely would be compelled to accept higher prices or less qualified project team members.

B. Subjecting private firms to a duty of disclosure under MGDPA would impose undue administrative burdens and would further discourage bids on government work.

Appellants' arguments in favor of disclosure in this matter would have far-reaching implications. Under the reasoning advanced by Appellants, even a subcontractor's subcontract with a third private business could be subject to disclosure. In fact, anything in a chain that could be traced back to a government contract would theoretically be subject to public disclosure. If a subcontract in this type of case were deemed to be public information, nothing appears to prevent disclosure of the subcontractor's costs, rate structure, and components of the design process, including studies, sketches, notes, drawings, and preliminary architectural plans. The potential for competitors and the public at large to have access to this highly sensitive and proprietary information would further deter firms like ARI from assisting with important government projects.

Such a broad interpretation of the MGDPA would impose a heavy administrative burden on any contractor or design professional working on public projects because an overly broad class of information would be available to any members of the public who might be curious about the contents of those companies' files. Further, opportunistic competitors may attempt to gain access to proprietary information that could help them win business. This likely would result in more requests for information, more disputes, and more cases for OAH to hear. All of this would multiply the burdens on the OAH.

The clearest and most sensible line for this Court to draw is that only contracts directly delegating performance of a governmental function can create a duty to comply with MGDPA requirements. For example, a contract between a school district and a private organization that requires the private firm to provide instruction in a subject area that is too difficult or expensive for the school district to provide through its own teachers should also require compliance with the MGDPA. The records associated with such privatization of a school district's duties should be subject to the same rules as records kept in the files of the school district itself. A contract for services that the school district itself cannot provide, such as architectural services, should not carry the same MGDPA duties unless the contract explicitly requires it. JCI's contracts with the District, on their face, did not impose such duties, and this Court should not graft them onto a contract where they were never intended.

CONCLUSION

Judge Lipman properly exercised his discretion in determining that Appellant failed to prove the JCI-ARI subcontract involved performance of a governmental function. Judge Lipman's reasoning is supported by the plain language and legislative history of the MGDPA, conforms with the purpose of the MGDPA, is consistent with precedent, and best serves public policy goals. ARI thus respectfully requests that the decision below be affirmed.

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