



Legal Corner

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"SJC AFFIRMS ATTORNEY/CLIENT PRIVILEGE FOR PUBLIC ENTITIES"

On Friday, July 13th, the Supreme Judicial Court of Massachusetts issued a widely anticipated decision as to the existence of the attorney/client privilege for public entities.

The issue originated in a construction case which was being prosecuted in Superior Court. It involved renovations to the Suffolk Superior Courthouse and claims by the general contractor for additional compensation.

Prior to the litigation, the general contractor had made several requests for public records to which DCAM, the defendant, had produced thousands of documents. However, DCAM withheld certain documents on the basis that they were not subject to disclosure due to the existence of an attorney/client privilege.

The contractor challenged this assertion that such a privilege was applicable to a public entity and filed a legal action. The Superior Court judge reported the question to the Supreme Judicial Court to make a decision.

Public Records Statute

This underlying genesis of the issue concerns whether the Public Records Statute abrogated or eliminated any claims by public entities to an attorney/client privilege with respect to any documents which may have been generated by, or sent to, their legal counsel. The Court's analysis noted how the public records law was intended to and does make many records available to the public. The Court pointed out, however, that not every record or document is a "public record". The statute lists 15 categories of materials or information that fall outside the definition of a public record, either permanently or for a specified duration.

In a case interpreting the scope of the public re-

ords law in 1999, the SJC had issued a decision that the Public Records statute did indicate the legislature's intent to "abrogate the broad attorney work-product privilege, and instead provide to an attorney work-product that was time limited protection under what is known as *deliberative process*".

Work-Product

Work-product is a document or information prepared by, or for, an attorney for use in legal matters, but would not generally involve communications between the attorney and client.

In the present matter, the Court refused to accept the contractor's contention that under this earlier decision, the limitations placed on work-product thus mandated that the Court acknowledge that the attorney/client privilege was also extinguished by the enactment of the Public Records statute. The Court would not accept this premise and wrote that the attorney/client privilege has "deep roots in the common law and firmly establishes a critical component of the rule of law in our democratic society".

Attorney/Client Privilege

It distinguished between work-product which they claimed was merely a tool of "judicial administration" which just doesn't compare to the importance and significance of the attorney/client privilege. The Court went on to hold that the attorney/client privilege is a fundamental component of the administration of justice, and that "con-

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Confidential communications between public officers and employees and governmental entities and their legal counsel, undertaken for the purpose of obtaining legal advice or assistance, are protected under the normal rules of the attorney/client privilege". Thus, the Court has made it clear that governmental entities have not lost the attorney/client privilege due to the enactment of a Public Records statute.

Conclusion

As a practical matter, what this means to contractors is that when they file a Public Records request, a public entity is permitted to assert a privilege and withhold the production of certain otherwise responsive documents on the basis of the attorney/client privilege. They would be required to provide a listing and identification of the documents which are being withheld and would ultimately have the burden of establishing that the privilege does apply to these documents.

If awarding authorities apply the privilege in the manner in which it is intended, and not assert an unwarranted claim of privilege as to documents, it should not have any significant effect on prosecution of claims and disputes between contractors and awarding authorities. ■



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