

Deliberative Privilege Off Limits in Government Contract Lawsuit

by Sheri Siegelbaum on June 8, 2012

The Appellate Division's recent decision in a breach-of-contract case involving the State of New Jersey will greatly influence the government's ability to shield documents from the courtroom. The court determined that the deliberative process privilege did not apply to documents that were directly related to the lawsuit.

Correctional Medical Services v. State of New Jersey involved a \$168 million contract between the State of New Jersey and Correctional Medical Services, which was retained to provide medical and dental services at the state's prisons. The state attempted to avoid \$3.6 million in contract payments after audits by the Office of Inspector General (OIG) revealed performance issues.

In the New Jersey breach-of-contract lawsuit that followed, the state withheld or redacted 7,000 documents under the deliberative process privilege. The documents included correspondence and memoranda exchanged by employees of the OIG, the Department of Corrections, and the Treasury Department.

After a lower court ruled the privilege was inapplicable, the state appealed. The Appellate Division however, agreed with the trial court. As the panel was quick to point out, "The purpose of the privilege is to permit open and frank discussions of administrative action before policy is set." In this case, the documents withheld in the breach-of-contract suit had nothing to do with policymaking, but everything to do with the facts in dispute.

The court further highlighted to "the profound distinction between the governmental activities underlying the contractual litigation ... in this case and the governmental analysis leading to the formulation of policy positions and other decisions of comparable weight" that other courts have found covered by the privilege.

As this case highlights, New Jersey government entities will not be allowed to invoke the deliberative process privilege in any lawsuit to which they are a party. Rather, the privilege will only apply to protect documents that reflect actual policymaking.