

CORRESPONDENCE/MEMORANDUM

DEPARTMENT OF JUSTICE

Date: January 14, 2013

To: Interested Parties

From: J.B. Van Hollen
Attorney General

Subject: The Wisconsin Supreme Court's analysis of contractors' records under the Wisconsin public records law in *Juneau County Star-Times v. Juneau County*, 2013 WI 4, ___ Wis. 2d ___, ___ N.W.2d ___

Introduction. On January 8, 2013, the Wisconsin Supreme Court decided *Juneau County Star-Times v. Juneau County*, 2013 WI 4, ___ Wis. 2d ___, ___ N.W.2d ___: <http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=91351>. The court clarified the scope of the Wis. Stat. § 19.36(3) “contractors’ records” provision of the Wisconsin public records law, as it applies to the unique “tripartite” relationship created by a liability insurance policy among a policyholder subject to the public records law, the policyholder’s insurance company, and the law firm retained by the insurance company to represent the policyholder. The court held that law firm invoices in possession of the insurance company—but not the policyholder—are “contractors’ records” under § 19.36(3) and are therefore subject to disclosure. *Id.*, ¶¶ 81-83. The court also concluded that records produced or collected “under” a contract for § 19.36(3) purposes means records that are produced or collected “in accordance with, pursuant to, in compliance with, in carrying out, subject to, or because of” a contract, or “in the course of” the contracted-for matter. *Id.*, ¶¶ 37, 57, 83.

Statutory language. Section 19.36(3) requires, in relevant part, that “each authority shall make available for inspection and copying under s. 19.35(1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority.” This statutory provision is an exception to the general framework of the public records law, in which records of private entities usually are not subject to disclosure in response to public records requests.

Facts. This case involves a county, the county’s insurance company, and a law firm retained by the insurance company to represent the county in a particular matter. The county contracted with the insurance company for a liability insurance policy; among other things, the policy required the insurance company to defend the county on covered claims and to pay attorneys’ fees and other costs of defending such claims. The county did not enter into a written contract directly with the law firm. The county accepted the law firm’s representation pursuant to the liability insurance policy and worked with the law firm in preparation of a defense in the matter, thereby creating an attorney-client relationship.

A newspaper made a public records request to the county for the law firm’s invoices for representing the county in the particular matter. The law firm had submitted its invoices to the insurance company, not the county, and the county did not have copies of the law firm invoices. Because the county had not entered into a contract directly with the law firm, the parties

disagreed about whether § 19.36(3) required the county to produce the law firm invoices in response to the newspaper's public records request.

Analysis. The unique tripartite relationship involved in this case differs from the typical relationships contemplated by § 19.36(3) among an "authority" subject to the public records law, a contractor of the authority, and a subcontractor of the contractor. *Juneau County*, 2013 WI 4, ¶¶ 49-51. "In the ordinary business relationship between an authority, a contractor, and a subcontractor of the contractor, the authority does not have a direct contractual relationship with the subcontractor; the subcontractor is not an agent of the authority; and the authority does not work directly with the subcontractor." *Id.*, ¶ 50.

As before, a subcontractor's records produced or collected under a contract with an entity other than an authority are not subject to disclosure under the public records law unless something "bridge[s] the gap" between the authority and the subcontractor. *Id.*, ¶¶ 75-78, citing *Building & Construction Trades Council v. Waunakee Community School District*, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1998) (payroll records of subcontractor who had contracted only with general contractor were not § 19.36(3) contractors' records on account of general contractor's contract with authority, to which subcontractor was not a party).

There was no such gap in this case because the law firm invoices were generated and submitted as a result of the unique tripartite relationship created by the liability policy. *Juneau County*, 2013 WI 4, ¶ 79. A "tripartite relationship" arises from a liability insurance policy when an insurance company retains a law firm to represent a policyholder pursuant to a liability insurance policy, and the policyholder's acceptance of representation by the law firm creates an attorney-client relationship between the law firm and the policyholder. *Id.*, ¶ 45. The liability insurance policy therefore formed the basis of three contractual relationships in this case:

- Between the county and the insurance company—because the insurance company agreed in the policy to pay damages owed by the county and to pay attorneys' fees for the county's defense.
- Between the insurance company and the law firm—because the insurance company retained the law firm pursuant to the liability insurance policy, to represent the county and agreed to pay the attorneys' fees.
- Between the law firm and the county—because pursuant to the liability insurance policy the law firm retained by the insurance company entered into a contractual attorney-client agency relationship with the county.

Id., ¶ 11.

In construing § 19.36(3), the court adopted commonly understood meanings of the terms "produced," "collected," and "under" in context of the factual setting of this case. *Id.*, ¶¶ 41-43.

The law firm invoices were produced or collected in the course of the law firm's representation of the county and insurance company under the liability insurance policy, so the invoices fell under the liability insurance policy and § 19.36(3) requirements were met. *Id.*, ¶¶ 13, 57.

Confidentiality rules unchanged. The supreme court decision does not alter existing rules regarding confidentiality, attorney-client privilege, attorney work product, or any other rules protecting certain information from disclosure. *Id.*, ¶ 15. The county acknowledged in the supreme court proceedings that the specific law firm invoices involved in this case did not contain any confidential attorney work product or attorney client privileged information. *Id.*, ¶ 14.

Public records law resources. Anyone with questions about the Wisconsin public records law may find it helpful to review the Department of Justice's Public Records Outline, available to view, print, or download free of charge at http://www.doj.state.wi.us/dls/OMPR/2012OMCG-PRO/2012_Pub_Rec_Outline.pdf. Persons with questions also may contact the Department of Justice at (608) 266-3952 to consult with one of the Department's public records experts.