



Municipal Client Advisory January 2009

Attorney Client Privilege – Public Records Law

In a decision of monumental importance to Massachusetts municipalities the Massachusetts Supreme Judicial Court held in the case of Suffolk Construction Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444 (2007) that by enacting the public records law the Legislature did not intend to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to that law, and that 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. The decision was issued on July 13, 2007.

The case arose out of a dispute between Suffolk Construction Co., Inc. (Suffolk) and the Division of Capital Asset Management and Maintenance (DCAM) over payment of construction costs for the renovation of the former “old” court house in Pemberton Square, Boston, now known as the John Adams Courthouse. In the course of the dispute Suffolk made two public records requests. In response to those requests DCAM produced approximately one-half million pages of documents as well as an index of documents withheld from disclosure on grounds of, among other reasons, attorney-client privilege. Suffolk argued that production of the privileged information was required under the holding of the Supreme Judicial Court in General Electric Company v. Department of Environmental Protection, 429 Mass.. 798 (1999).

The issue in the Suffolk v. DCAM case was whether, by enacting the public records law, G.L. c.66, § and G.L. c.4, §7, Twenty-sixth, the Legislature intended to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to that law. The Supreme Judicial Court firmly answered that question in the negative. In other words, the Supreme Judicial Court has held in this case that by enacting the public records law the Legislature did not intend to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to that law.

The Supreme Judicial Court stressed that the attorney-client privilege is a fundamental component of the administration of justice. The Court noted that “the result Suffolk seeks - a global withdrawal of the attorney-client privilege from all documents and records of officials and agencies subject to the public records law – is not required by the plain terms of the public records law. It would also severely inhibit the ability of government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-à-vis private parties with



Municipal Client Advisory Update January 2009

whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public's strong interest in the fair and effective administration of justice". 449 Mass. at 446.

The court indicated "One obvious role served by the attorney-client privilege is to enable clients to make full disclosure to legal counsel of all relevant facts, no matter how embarrassing or damaging these facts might be, so that counsel may render fully informed legal advice. In a society that covets the rule of law, this is an essential function". (citation omitted) 449 Mass. At 449.

The Court held

"We now state explicitly that 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. (citation omitted) The necessity of the privilege for governmental entities and officials flows directly from the realities of modern government. Public employees must routinely seek advice from counsel on how to meet their obligations to the public. It is in the public's interest that they be able to do so in circumstances that encourage complete candor, without inhibitions arising from the fear that what they communicate will be disclosed to the world. If counsel, despite all diligence, are unable to gather all of the relevant facts, they will less likely serve the public interest in good government by preventing needless litigation or ensuring government officials' compliance with the law. In short, counsel will be less likely to perform adequately the functions of a lawyer. (citations omitted)

Because the attorney-client privilege serves the same salutary purposes in the public as in the private realm, 'it is now well established that communications between government agencies and agency counsel are protected by the privilege as long as they are made confidentially and for the purpose of obtaining legal advice for the agency.'" (citation omitted) 449 Mass. at 450, 451.



Municipal Client Advisory Update January 2009

The Court noted that the public records law opens records made or kept by a broad array of governmental entities to public view; the primary purpose of the public records law is to give the public broad access to governmental records; that not every record or document kept or made by the governmental agency is a “public record”; that the statute specifies fifteen categories of materials or information that fall outside the definition of a “public record”, either permanently or for a specified duration; and that nowhere in the public records law is the term “attorney-client privilege” found. 449 Mass. at 452-454.

The Court rejected an argument by Suffolk that the public records law abrogates the attorney-client privilege for government officials and entities within the statute’s purview with regard to written communications. The Court distinguished its holding in the case of General Electric Company v. Department of Environmental Protection, 429 Mass. 798 (1999). In the General Electric Company case a company contesting the proposed designation of its property as a Superfund site sought public records law disclosure of documents held by the Massachusetts Department of Environmental Protection (DEP). The DEP claimed that the documents were protected by the common-law attorney work-product doctrine. The Supreme Judicial Court in the General Electric Company case declined to find an implied exemption in the public records law for information otherwise protected by the attorney work-product doctrine. The Court held in that case that the public records law and its history expressed the Legislature’s intent to abrogate the broad attorney work-product privilege, and instead to provide to attorney work-product the narrower, time-limited protection afforded under G.L. c.4, §7, Twenty-sixth(d), the so-called “deliberative process” exemption.

G.L. c.4, §7 Twenty-sixth(d) provides a public records law exemption for

“inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.”

The Supreme Judicial Court held in the Suffolk v. DCAM case that the attorney-client privilege and the work-product doctrine are readily differentiated. The Court noted “The attorney-client privilege has deep roots in the common law and is firmly established as a critical component of the rule of law in our democratic society. (citations omitted) The work-product doctrine in contrast, is a ‘tool of judicial administration, borne out of concerns over fairness and convenience and designed to safeguard the adversarial system,



Municipal Client Advisory Update January 2009

but not having an intrinsic value itself outside the litigation arena' (citations omitted). The Court held "The deliberative process privilege is a 'sub-species of work-product privilege that covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'. (citations omitted)... There is no 'deliberative process' subset of the attorney-client privilege. That the Legislature expressly intended to truncate the protections of the attorney work-product doctrine under the public records law by providing an exemption from disclosure to a distinct subset of attorney work product, then, does not speak to the Legislature's intentions with regard to attorney-client privilege... We do not employ the conventions of statutory construction in a mechanistic way that upends the common law and fundamentally makes no sense... The holding of General Elec. Co. does not lead to the conclusion that, in enacting the public records law, the Legislature mandated that public officials perform their duties without access to legal advice protected by the attorney-client privilege." 449 Mass. at 457-459.

The Court noted that "Governments must not only follow the laws, but are under additional constitutional and ethical obligations to their citizens. The [attorney-client] privilege helps insure that conversations between [government] officials and attorneys will be honest and complete. In so doing, it encourages and facilitates the fulfillment of those obligations... Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest. (citations omitted) If the Legislature intended to divest government officials and entities subject to the public records law of a privilege as basic and important as the attorney-client privilege, it would have made that intention unmistakably clear." 449 Mass. at 460,461.

In summary, in the case of Suffolk Construction Co., Inc. v. Division of Capital Asset Management, 449 Mass. 494 (2007) the Massachusetts Supreme Judicial Court held that an attorney-client privilege exists in the public sphere, and that by enacting the public records law the Legislature did not intend to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to the public records law, and that confidential communications between public officers and employees and governmental entities and their legal counsel undertaken from the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege.

In our opinion this holding extends to minutes of executive sessions of town boards, commissions and committees. Information in such minutes which represents



**Municipal Client Advisory Update
January 2009**

communications between a town board, commission or committee and its lawyer which are made confidentially and for the purpose of obtaining legal advice is protected by the attorney-client privilege and is not required to be disclosed.

If you have any further questions about the Public Records Law, please contact John P. Flynn or the attorney assigned to your account at (617) 479-5000. If you have general questions about Murphy, Hesse, Toomey & Lehane, LLP, please contact information@mhtl.com.

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Murphy, Hesse, Toomey & Lehane, LLP, is a full-service law firm with offices in Quincy, Boston, and Springfield, Massachusetts. As counsel to cities, towns and other Governmental entities throughout the Commonwealth of Massachusetts, the firm assists and advises public officials and committees with respect to matters of day-to-day management, as well as initiating or defending litigation on their behalf.

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