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One Financial Center
Boston, Massachusetts 02111
617 542 6000
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212 935 3000
212 983 3115 fax

707 Summer Street
Stamford, Connecticut 06901
203 658 1700

SJC: Attorney-Client Privilege Protects Confidential Communications Between Government Officials and Their Attorneys

Recently, the Supreme Judicial Court of Massachusetts (SJC) held that the state's public records law (G.L. c. 66) does not require the disclosure of confidential communications between public employees and their government attorneys. The Court stated in *Suffolk Construction Co. Inc. v. Division of Capital Asset Management* 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." *Suffolk Construction Co. Inc. v. Division of Capital Asset Management*, 449 Mass. 444, 450 (2007).

Rejecting the plaintiff's arguments about prior precedent, legislative intent and the difficulty of differentiating between privileged and unprivileged communications, the Court relied on the following reasoning:

- "[T]he attorney-client privilege is a fundamental component of the administration of justice" *Id.* at 446. and is a "critical component of the rule of law in our democratic society." *Id.* at 456.

- Allowing the public records law to preclude the attorney-client privilege would "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 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

203 658 1701 fax

1620 26th Street
Santa Monica, California 90404
310 586 3200
310 586 3202 fax

1400 Page Mill Road
Palo Alto, California 94304
650 251 7700
650 251 7739 fax

9255 Towne Centre Drive
San Diego, California 92121
858 320 3000
858 320 3001 fax

The Rectory
9 Ironmonger Lane
London EC2V 8EY England
+44 (0) 20 7726 4000
+44 (0) 20 7726 0055 fax

and effective administration of justice." *Id* at 446.

- "Nothing in the language or history of the public records law, or in our prior decisions, leads us to conclude that the Legislature intended the public records law to abrogate the privilege for those subject to the statute." *Id.*

While the ruling does not protect all information shared by government attorneys and officials, it holds that "confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice" are protected from requests for information made pursuant to the state's public records law. *Id.* at 448.

The SJC also "emphasize[d] that public officials seeking the protection of the attorney-client privilege are required to produce detailed indices to support their claims of privilege." *Id.* at 460.

The Attorney-Client Privilege

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is firmly established "as a critical component of the rule of law in our democratic society" and even survives the death of the client. *Division of Capital Asset Management*, *supra* at 456.

The Supreme Court has clearly stated the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981).

"The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.*

The Supreme Court has acknowledged that "the protection of the privilege extends only to **communications** and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Upjohn,* 449 U.S. at 395-96 quoting *Philadelphia v. Westinghouse Electric Corp.,* 205 F. Supp. 830, 831 (E.D. Pa. 1962) (emphasis in the quoted opinion).

To establish that the attorney-client privilege applies to a communication, the burden rests with the party asserting the privilege to demonstrate the following:

1. the "existence of the attorney-client relationship,"
2. that "the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such,"
3. that "the communications were made in confidence," and
4. that "the privilege as to these communications has not been waived."

In the Matter of the Reorganization of Elec. Mut. Liability Ins. Co. Ltd. (Bermuda), 425 Mass. 419, 421 (1997).

Attorney-Client Privilege Distinguished from Work Product Doctrine

In an earlier case, *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798 (1999), the SJC held that the public records law did not contain an implied exemption for materials otherwise protected by the common-law "work product doctrine." The work product doctrine protects documents prepared by a lawyer in anticipation of litigation. It protects "written statements and mental impressions contained in the mind of the attorney," while the attorney-client privilege exclusively protects communications between the attorney and his or her client. *Hickman v. Taylor,* 329 U.S. 495, 519 (1947). Significantly, the lawyer holds the work product immunity, whereas the client holds the attorney-client privilege exclusively. *In re Grand Jury Proceedings,* 604 F.2d 798, 801 (3rd Cir. 1979). Additionally, while the attorney-client privilege is absolute, the work product doctrine provides only a qualified immunity, which can be overcome upon a showing of need.

Federal Precedents

The federal Freedom of Information Act (FOIA), upon which the Massachusetts public records statute is modeled, provides guidance on the implications of this case, because the U. S. Supreme Court has interpreted FOIA since 1975 as containing an exemption for documents protected by the attorney-client privilege. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 154 (1975). In interpreting the interplay between FOIA and the attorney-client privilege, the federal courts have issued the following guidance:

- The D.C. District Court has held that the attorney-client privilege covers interagency memoranda which contain the agency counsel's "legal conclusions and reasoning." *Ludsin v. SBA*, No. 96-2865, slip op. at 2 (D.D.C. Apr. 24, 1997), 1997 WL 34580166 (D.D.C).

- But the D.C. District Court has also held that counsel's memoranda that was "merely inserted in counsel's internal file" and never communicated or sent to the client is not protected under the attorney-client privilege. *Direct Response Consulting Serv. v. IRS*, 1995 WL 623282 at *3 (D.D.C. Aug. 21, 1995).

- The District Court for the Northern District of California has stated that the privilege protects documents "[c]reated by attorneys and by the individually-named employees (defendants) for purposes of obtaining legal representation from the government." *Wishart v. Comm'r of Internal Revenue*, 1998 WL 667638 at *6 (N.D. Cal.), *aff'd*, 1999 WL 985142 (9th Cir.)

- The U.S. Court of Appeals for the First Circuit has held that the attorney-client privilege "does not allow the withholding of documents simply because they are a product of an attorney-client relationship.... It must also be demonstrated that the information is confidential." *State of Maine v. U.S. Dept. of the Interior*, 298 F.3d 60, 71–72 (1st Cir. 2002) *quoting Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F. 2d. 242, 253 (U.S. App. D.C. 1977)).

Additionally, the federal courts can provide further guidance as to the SJC's emphasis that state entities provide a detailed index of documents withheld by the state entity based on a claimed privilege. Federal courts frequently require the government entity to provide a "Vaughn" index which provides an extensive "description of the requested material or information, and the agency's reason for withholding each document or portion of a document." *Carpenter v. U.S. Dept. of Justice*, 470 F. 3d. 434, 442 (1st Cir. 2006); *see also Church of Scientology Int'l v. U.S. Dept. of Justice*, 30 F.3d 224 (1st Cir. 1994).

Waiver of the Attorney-Client Privilege; Inadvertent Disclosure

The protections afforded by the attorney-client privilege can be lost if the client waives the privilege and courts are frequently required to determine if inadvertent disclosure of a privileged document constitutes such a waiver. See *In the Matter of the Reorganization of Elec. Mut. Liability Ins. Co. Ltd.* (Bermuda), 425 Mass. 419 (1997). Massachusetts courts apply a "middle test" to determine whether inadvertent disclosure results in a waiver of the attorney-client privilege. "Where it can be shown … that reasonable precautionary steps were taken [to maintain confidentiality], the presumption will be that the disclosure was not voluntary and therefore unlikely that there has been a waiver." *Id*. at 423.

Once the client has demonstrated that the document is privileged,

Massachusetts courts then consider the totality of the circumstances in determining whether the client has met its burden of establishing that it took adequate precautions to maintain confidentiality. Specifically, the courts will consider:

1. the reasonableness of precautions taken to prevent inadvertent disclosure;
2. the amount of time it took the producing party to recognize its error;
3. the scope of the production;
4. the extent of the inadvertent disclosure; and
5. the overriding interest of fairness and justice.

McMahon v. Universal Golf Construction, No. 042342, 2005 WL 2542928 at *3 (Mass. Super., Sept. 8, 2005) (Agnes, J.).

Public officials and employees must be cautious of waiving the attorney-client privilege as the privilege may be found to be waived when communications are dispersed outside the attorney-client relationship, even if the information remains within the public agency. The "burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from general disclosure." *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 863. (D.C. Cir. 1980).

Conclusion

Massachusetts lawyers have been uncertain for many years whether documents otherwise protected by the attorney-client privilege were nonetheless subject to disclosure under the Massachusetts public records statute, and the matter has long been disputed by a long line of Supervisors of Public Records and an equally long line of Attorneys General. This case resolves the issue in a manner designed to encourage candid exchanges between government officials and their government attorneys.

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If you would like further information on any subject covered in this Advisory, please contact one of the attorneys listed below or the Mintz Levin attorney who ordinarily handles your legal affairs.

John Regier
617.348.1720 | JRRegier@mintz.com

Tony Starr
617.348.4467 | TStarr@mintz.com

Elissa Flynn-Poppey
617.348.1868 | EFlynn-Poppey@mintz.com