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OPINION

Privileges at risk: restoring the rights of the public-sector client

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The attorney-client privilege is one of the oldest and most respected evidentiary privileges. It safeguards confidential communication, empowers individuals to seek legal assistance when necessary, and secures an individual's right to candid legal advice.

The related work product doctrine protects materials prepared in connection with actual or anticipated litigation and thus protects an attorney's mental impressions and ideas from disclosure without a showing of need and hardship.

Current interpretations of the Massachusetts Public Records Law, G.L.c. 66, §10 and G.L.c. 4, §7(26) (MPRL), create an uneven playing field for the public entity engaged in litigation.

Under these interpretations, the time-honored attorney-client privilege and work product doctrine are unavailable to the public entity to the same extent that they are available to the private litigant.

Specific exemptions lacking

The MPRL presently lacks an explicit provision exempting privileged documents and work product from public disclosure, and MPRL caselaw suggests that the two established privileges do not implicitly protect these types of government documents from public scrutiny.

Documents within the scope of the work product doctrine and attorney-client privilege are not subject to public disclosure under 5 U.S.C § 552, the Freedom of Information Act (FOIA).

FOIA, which generally provides broad public access to government documents, specifically exempts "inter-agency or intra-agency memorandums or letters which would not be available by law," which federal courts have interpreted to include attorney-client communications and attorney work product.

FOIA thus balances the public's right to information with the important values protected by the attorney-client and work product privileges.

The time-honored attorney-client privilege and work product doctrine are unavailable to the public entity to the same extent that they are available to the private litigant.

The MPRL is the Massachusetts counterpart to FOIA. Like FOIA, the MPRL requires broad disclosure of government documents with narrowly defined exemptions. Unlike FOIA, however, the MPRL does not contain specific exemptions for privileged communication or attorney work product.

Instead, the MPRL contains several narrower exceptions that courts sometimes utilize to protect the same material protected under FOIA.

For example, exemption (e) protects "notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit."

Exemption (d) excludes "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency."

Initial decisions by the Supreme Judicial Court seemed to support preserving the attorney-client and work product privileges for public entity clients. See *Judge Rotenberg Educ. Center v. Commissioner of the Dep't of Mental Retardation*, 424 Mass. 430, 457 n.26 (1997); *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 302-308 (1991).

Judge Margot Botsford followed this trend in *Brossard v. University of Massachusetts*, 1998 WL 1184124 (Mass. Super. Ct., Sept. 29, 1998), holding that the MPRL does not abolish attorney-client and work product claims for several reasons.

Botsford ruled that the MPRL lacks express intent to eliminate well-recognized privileges and the legislative history does not support such an abolition; government clients have at least the same need for prudent legal advice as private clients because government clients represent the whole community; permitting disclosure through the MPRL would enable a litigant to obtain privileged documents merely by serving a public record request notwithstanding litigation rules to the contrary; and attorneys representing public entities should be entitled to rely on the same rules as private attorneys.

Uncertainty under 'General Electric'

In *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798

(1999), the SJC held that the work product doctrine did not apply under the MPRL because it was not the subject of a specifically enumerated exemption.

The SJC noted that the clear language of the MPRL mandates broad disclosure and refused to find an implicit limitation protecting work product.

The SJC further noted that FOIA contains an explicit statutory exemption for work product and the MPRL does not, and that this omission evidenced legislative intent to deviate from the federal standard.

Based on *General Electric*, parties objecting to public records request must establish that each withheld document falls within an express MPRL statutory exemptions.

The holding in *General Electric* has resulted in uncertainty in the lower courts regarding the continued viability of the attorney-client privilege.

Two Superior Court decisions have held that the attorney-client privilege does not implicitly protect documents from disclosure under the MPRL. See *Kent v. Commonwealth*, 2000 WL 1473124 (Mass. Super. Ct., July 27, 2000); *Lafferty v. Martha's Vineyard Commission*, 2004 WL 792712 (Mass. Super. Ct., Aug. 9, 2004).

In contrast, however, one Superior Court decision expressly refused to extend the *General Electric* decision to attorney-client privileged documents. *Kiewitt-Atkinson-Kenny v. Mass. Res. Auth*, 2002 WL 2017107 (Mass. Super. Ct., Aug. 19, 2002).

In this decision, Judge Allan van Gestel ruled:

"[It] should not be the place where a privilege as hallowed in Anglo-American law as theattorney-client privilege crashes on the rocks of a trial court judge's misreading of thelaw. Any extension of ... the *General Electric* decision must come from the high court that wrote it or the creators of the statute that threatens the evisceration of the 'very well established' privilege."

Bill amending MPRL

In response to *General Electric* and conflicting Superior Court interpretations, a bill was proposed in 2001 amending the MPRL to expressly exempt work product and attorney-client privileged documents. The bill was supported by the attorney general, the Boston Bar Association, the City Solicitors and Town Counsel Association and other organizations.

In January 2003, the bill was revived as H.B. 738/S.B. 999 and referred to the Joint Committee on the Judiciary.

H.B. 738/S.B. 999 amends G.L.c. 4, §7 to codify the following new exemption: "(o) attorney work product and attorney-client privileged material."

H.B. 738/S.B. 999 was re-filed in 2005 as H.B. 758 and a public hearing was held on June 28, 2005. No further action has been taken as of Jan. 1, 2006. For the present status of the bill, see http://www.mass.gov/legis/184history/h00758.htm.

Prompt enactment of H.B. 758 is essential for five major reasons.

First, H.B. 758 amends the MPRL to memorialize time-honored privileges taken for granted in the private sphere.

The attorney-client and work product privileges are fundamental to the adversarial process and the rendering of informed legal advice. Without their protections, public clients may be reluctant to speak frankly when seeking guidance, public attorneys may hesitate to provide candid written analyses for fear of disclosure to adversaries, and the quality of legal representation may decline accordingly.

Consistent with its objective of furthering broader public interests, the MPRL should secure the attorney-client privilege and work product doctrine for governmental entities.

Second, government clients have a unique need for informed legal advice. Because government clients act on behalf of the entire community, the public suffers when the government is unable to effectively litigate cases.

For example, when a plaintiff successfully sues a town or city, the taxpayers pay the judgment. Likewise, the public bears the burden when the attorney general is unable to successfully pursue an environmental polluter or a company engaged in consumer fraud.

Since local and state governments play vital roles in delivering essential services and regulating conduct, the legal decisions of the public entity client have far-reaching consequences.

Third, H.B. 758 helps restore a level playing field so that no litigant has an unfair advantage. Under current interpretations, a private litigant can circumvent discovery rules and access privileged documents by making a public records request to an adversary.

The purpose of the MPRL is to educate the public about government actions, not to extend procedural advantages to private litigants at the expense of the general public.

Fourth, the narrow exemption proposed by H.B. 758 does not defeat the MPRL's underlying purpose. The purpose of MPRL is to inform the community, encourage civic participation and assure governmental accountability. The government surely cannot hide behind a narrow exemption merely shielding attorney communications and work product. The public still would have access to the underlying documents revealing government actions, political stances and agency information.

Furthermore, courts strictly interpret the 13 existing exemptions, and there is no reason to believe that courts would treat exemption (o) any differently if enacted.

Fifth, enactment of H.B. 758 would enhance efficiency and minimize litigation concerning public record requests.

Even after *General Electric*, the public entity can defeat requests for privileged documents by utilizing one or more MPRL exemptions.

Enactment of exemption (o) would codify what may already be done, thus making the process less cumbersome for all involved. Exemption (o) likely would decrease the number of frivolous requests, reduce litigation over records, and enable the supervisor of public records to respond to other requests for information that more directly advance the public interests behind the MPRL.

General Electric produced a result that runs contrary to two time-honored doctrines. The Legislature should move expeditiously to restore the longstanding attorney-client and work product doctrine privileges to the public client by enacting H.B. 758.

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