

**The Attorney-Client Privilege Between Municipalities and their Counsel in Light of
Suffolk Construction Co., Inc. v. Division of Capital Asset Management,
449 Mass. 444 (2007)**

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In July of 2007, the Supreme Judicial Court (SJC) decided Suffolk Construction Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444 (2007). In this decision, the SJC strongly affirmed the existence of the attorney-client privilege protecting communications between municipal counsel and their clients. This article will: (1) summarize the Suffolk Construction decision and explain how it is important to local officials; (2) highlight several new issues that have arisen as a result of Suffolk Construction that will need to be addressed in the months and years to come; and (3) enumerate several practical pointers that municipal lawyers should keep in mind when addressing attorney-client privilege issues in light of this decision.²

I. The Decision: A Clarion Call in Support of the Privilege

Suffolk Construction involved litigation between Suffolk Construction Company and the Division of Capital Asset Management (DCAM) relating to the renovation of what is now known as the John Adams Courthouse in Pemberton Square in Boston. During the course of the litigation, Suffolk Construction made two public records requests to DCAM for documents related to the project. Although DCAM produced approximately one-half million pages of documents, it sought to withhold certain documents on the grounds that they were protected by the attorney-client privilege. Suffolk claimed that the documents must be provided because there is no explicit exemption in the public records statute allowing a public agency to withhold documents based on the attorney-client privilege. Suffolk Construction also relied on a 1999 SJC decision, General Electric Co. v. Department of Environmental Protection, 429 Mass. 798 (1999), in which the Court had declined to find an implied exemption in the state public records law codified at G.L. c. 4, sec. 7 cl. 26 and at G.L. c. 66, sec. 10 for information protected by the attorney work-product doctrine.

In a decision authored by Chief Justice Marshall, the SJC affirmed that the attorney-client privilege extends to communications between governmental lawyers and

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their clients. The Court further held that nothing in the state Public Records Law precludes the ability of a public entity to claim the attorney-client privilege for communications between government attorneys and their public clients. In reaching its decision, the Court adopted the position advocated by the City Solicitors and Town Counsel Association in an amicus brief filed on behalf of municipal counsel and their clients throughout the state.³ The unanimous decision includes very emphatic language reaffirming the existence of the attorney-client privilege in the public law context. In reaching its decision, the SJC held as follows:

[T]he attorney-client privilege is a fundamental component of the administration of justice. Today, its social utility is virtually unchallenged. 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.

Suffolk Construction, 449 Mass. at 446.

Suffolk Construction also distinguished the earlier decision of General Electric, *supra*. The SJC specifically found that “General Elec. Co. provides no guidance for our analysis of the question at hand.” *Id.* at 455. In reaching this conclusion, the Court relied principally on the different origins and purposes of the attorney client privileges as compared to the work product doctrine, including the fact that the attorney-client privilege protects communications between lawyers and clients whether or not such communications occur in litigation, has deep roots in the common law, and is firmly established as a critical component of the rule of law. The work product privilege includes materials outside of attorney-client communications, is limited to materials prepared in anticipation of litigation, and represents a “tool of judicial administration, borne out of concerns over fairness and convenience and designed to safeguard the adversarial system, but not having an intrinsic value in itself outside the litigation arena.” *Id.* at 455-456 (quoting Pete Rinaldi’s Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 201 (M.D.N.C.1988)).

Suffolk Construction brings much needed clarity to the question of whether the attorney-client privilege extends to protecting communications between public and governmental lawyers and their clients. This decision should give considerable solace to municipalities and public agencies that the advice given by their attorneys will not be subject to disclosure pursuant to public records requests. With the protection and clarity offered by this decision, public lawyers will be free to give candid and objective advice to their clients unimpaired by the risk that such advice will be disclosed to their clients’ adversaries through public records requests. Suffolk Construction also helps correct the unequal playing field that existed prior to this decision, wherein a city, town or public agency could be forced to turn over attorney-client communications pursuant to public

² This CSTCA Amicus Brief was co-authored by Thomas J. Urbelis of Urbelis & Fieldsteel, P.C., and Christopher J. Petrini and Glenna J. Sheveland of Petrini & Associates, P.C.

records requests served by that governmental body's adversaries, while not enjoying the same right of access to the attorney-client communications of these private parties.

II. New Questions Raised by the Suffolk Construction Decision

While Suffolk Construction resolved the fundamental question of the existence and applicability of the attorney-client privilege in the public law context, the decision raises a host of questions that will need to be answered in the months and years to come. Such questions include, but are not necessarily limited to, the following:

- In light of Suffolk Construction, how is the attorney-client privilege properly invoked and preserved in the municipal context, and who is entitled to claim and waive the privilege?
- What impact will Suffolk Construction have on the interpretation of and interaction between the Public Records Law, G.L. c. 4, sec. 7 cl. 26 and c. 66, § 10, and the Open Meeting Law, G.L. c. 39, §23B, when involving attorney-client communications?
- What impact will Suffolk Construction have on the practical application of the Open Meeting Law at meetings of town boards and committees? Is executive session proper only for the specifically enumerated statutory grounds outlined in the Open Meeting Law, or has Suffolk Construction created an implied judicial exemption upon which a board can properly rely upon to go into executive session in cases where the board or commission wishes to consult with or receive legal advice from its attorney consistent with this decision?
- Is the attorney-client privilege waived if a board member references an attorney opinion memorandum at a public meeting? See Commonwealth v. Goldman, 395 Mass. 495, 499-500 (1985) (where a witness testifies about the underlying *topic* of a privileged communication there is no waiver, but where the witness testifies to the *specific* privileged communication, there may be a waiver).

The Supervisor of Public Records and the courts will surely have ample opportunity to address these issues in the months and years ahead as it undertakes to interpret and apply the mandates of Suffolk Construction. In fact, this process has already begun. For example, prior to Suffolk Construction, the Supervisor had broadly construed General Electric and took the expansive position that the attorney-client privilege “may not be used as a basis to withhold responsive records.” See “A Guide to the Massachusetts Public Records Law,” p. 26, (available online as of February 8, 2008 at www.sec.state.ma.us/pre/prepdf/guide.pdf). The decisions issued by the Supervisor of Public Records pre-Suffolk Construction reflected this position. For example, in Decision of Supervisor of Public Records, SPR06/038, (April 6, 2006), the Supervisor ordered production of documents in response to a request for “contracts, agreements,

invoices and other documents reflecting the hourly rate charged by outside counsel for the provision of legal services” in part upon the basis of his conclusion that “common law privileges are not a valid basis for withholding records pursuant to a public records request...[and thus it] appears...that the [SJC] envisioned its holding [in General Electric] to extend to the attorney-client privilege” Id. at p. 2. Relying on General Electric, the Supervisor also used statutory construction principles to support this determination, finding that the omission of an express statutory exemption from public disclosure for attorney-client privileged materials should, given the existence of such an exemption in the federal counterpart Freedom of Information Act, be interpreted as reflecting a legislative intent to require public disclosure and production of such materials. See id. at p. 3-4.

The Supervisor’s position caused considerable agitation to municipal lawyers prior to the issuance of Suffolk Construction, because, if followed, it could seriously diminish the attorney-client privilege in the municipal context and thereby harm the ability of public lawyers to offer candid advice to their clients. After the issuance of Suffolk Construction, the Supervisor of Public Records has acknowledged that it “cannot require the disclosure of attorney-client privileged material” and declined to order such materials to be disclosed. See Decision of Supervisor of Public Records, SPR07/260, p. 4 (December 10, 2007)(declining, on privilege grounds, to order production of certain email content containing legal advice regarding a response to a public records request which was made in connection with a sale of land by the City of Lowell).

In view of the Suffolk Construction decision and the Supervisor’s decisions thereafter, the “Guide to Massachusetts Public Records Law” posted on the Secretary of State’s website should be revised or removed from the site as soon as possible so that incorrect advice is no longer communicated on this sensitive and important topic.

The municipal community will observe with great interest as the Suffolk Construction doctrine evolves to resolve the open questions which the decision has generated.

III. Practical Pointers in Light of Suffolk Construction

Given the terms of Suffolk Construction and the numerous issues it has created, municipal attorneys will be well served to devise and implement a system of procedures to handle requests for records that include documents exempted from disclosure under the attorney-client privilege. The following bullet points set forth a brief sampling of suggested considerations and practices:

- 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 by the attorney-client privilege, as clarified by the Suffolk Construction decision.

- As a preventative measure, to help protect communications from disclosure, any correspondence exchanged between municipal officials or employees and municipal counsel should contain a prominently displayed privilege claim header stating that the correspondence is protected by the attorney-client privilege and other exemptions to the Public Records Law and Open Meeting Law, if available. This disclaimer should appear on correspondence transmitted not only by municipal counsel but also correspondence (including e-mails) transmitted by municipal employees or officials to municipal counsel.
- Municipal counsel should circulate a memorandum to municipal officials and employees advising them to insert the standard attorney-client privilege disclaimer at the top of all written correspondence sent to the municipality's attorney. This memorandum should also advise such officials and employee not to copy any unnecessary parties or non-municipal employees or officials on any correspondence transmitted to the municipal counsel, nor to forward any e-mails or other correspondence from municipal counsel in a manner that might render the correspondence shared or disclosed and thus potentially deprived of the attorney-client privilege. The memorandum also should state that the privilege may not be waived by any individual member of the board or commission to whom the communication is addressed, but rather only by vote of the board at a posted meeting.
- In instances where an official, board or commission to whom privileged communication was sent determines that certain written legal advice or the substance of such written legal advice needs to be made public for reasons of public policy or politics, such official, board or commission may wish to ask the municipal attorneys to prepare two versions of the communication: one to remain confidential, and another less detailed and more general summary to be made available for public inspection. Before resorting to this measure, however, public lawyers and their client should consider whether the public disclosure of such a condensed summary memorandum could, in the context of the unique relevant circumstances, erode or destroy the existence of the privilege with respect to the principal, confidential, document. See, e.g., Goldman, supra, 395 Mass. at 499-500.
- In my opinion, Suffolk Construction now constitutes a separate and independent ground to enter executive session for the purpose of giving legal advice to municipal clients. Because the giving of advice by an attorney has not been expressly established as an independent statutory justification to move into executive session under the Open Meeting Law, boards and commissions also would be wise to cite one or more of the statutory exemptions set forth in G.L. c. 39, § 23B to the extent applicable, in addition to Suffolk Construction, before going into executive session.

- Upon receipt of a request for municipal documents, municipal employees and officials should consult with their city or town attorney to determine if any documents are protected by the attorney-client privilege or otherwise exempt from disclosure.
- Even if some of the documents requested are exempt from disclosure, the municipality must provide access to and copies of all documents that are public as provided for in the Public Records Law, G.L. c. 66.
- The municipality must respond to the request for documents without unreasonable delay and within ten days at the most. G.L. c. 66 §10. The response should produce the requested records, provide an estimate of the cost to identify, locate and provide copies of the documents, or provide a written denial citing the specific reasons for withholding any requested documents. Any denial also should state that the requestor has the right to appeal to the Secretary of State pursuant to 950 CMR 32 and G.L. c. 66.
- If the person requesting the documents disagrees with the assertion of privilege and appeals to the Secretary of State, municipal counsel should prepare a detailed index or log of all documents that you claim are exempt from disclosure under the attorney-client privilege.
- The index must identify each document that the municipality claims is exempt under the attorney-client privilege. Generally, the date of the document, the identity of the person who authored it, the identity of the person to whom it was addressed, identification of all persons who received copies, the subject matter of the document, and the basis of the privilege claim should be included in the index.

CONCLUSION

Suffolk Construction v. Division of Capital Asset Management is one of the most important municipal law decisions to be issued in the past several years. This decision unequivocally establishes that confidential communications between governmental officials, boards and commissions and their attorneys are entitled to the same protections of the attorney-client privilege as enjoyed by individuals and private entities and their attorneys over the last several hundred years. While Suffolk Construction emphatically resolved the fundamental question of whether the attorney-client privilege exists in the public law context, the decision raises a host of issues regarding the application of this decision and its relationship to other statutes and laws that will undoubtedly need to be sorted out by the courts, agencies and the legislature in the months and years to come. The fundamental principle, however, has been firmly and unequivocally established: 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 by the attorney-client privilege.