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What's up with the attorney-client privilege?

Recent developments in the wake of *Suffolk Construction v. DCAM*

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In July of 2007, the Supreme Judicial Court (SJC) decided the seminal case of *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*.[1] In this decision, the SJC unequivocally affirmed the existence of the attorney-client privilege protecting communications between public sector clients, including cities and towns, and their counsel.

This article will: (1) summarize the *Suffolk Construction* decision and how it is important to municipal officials; (2) address recent developments in court and state agency interpretations of *Suffolk Construction*, particularly as it relates to the Open Meeting Law; and (3) discuss the need for future decisions by the Office of the Attorney General and the courts that gives full meaning, vitality and effect to the right of public bodies to engage to engage in confidential legal conversations with their counsel, a right intended to be secured by *Suffolk Construction.*

I. THE *SUFFOLK CONSTRUCTION* DECISION AND ITS IMPACT ON MUNICIPAL OFFICIALS

Suffolk Construction involved litigation between Suffolk Construction Company and the Division of Capital Asset Management (DCAM), during which Suffolk Construction made two public records requests to DCAM for documents related to a public construction project. Although DCAM produced approximately 500,000 pages of documents, it sought to withhold certain documents on the basis that the attorney-client privilege protected them from disclosure.

Relying on *General Electric Co. v. Department of Environmental Protection*,[2] in which the SJC declined to find an implied exemption in the 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, Suffolk claimed that DCAM was required to provide the documents because the attorney-client privilege also is not an explicit exemption set forth in the Public Records Law.

In its decision, the SJC noted that the attorney-client privilege dates at least from the age of Shakespeare and "is the oldest of the privileges for confidential communications known to the common law.[3] The Court affirmed that the attorney-client privilege extends to communications between governmental lawyers and their clients. The Court further held that nothing in the Public Records Law precludes a public entity from claiming the attorney-client privilege for communications between government attorneys and their public clients. In reaching its decision, the Court held on page 449 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 has given 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. However, the decision left some confusion in the context of the Open Meeting Law, especially since the law was rewritten effective July 1, 2010. Namely, *Suffolk Construction* brought clarity to the question of whether the attorney-client privilege extends to written communications between governmental lawyers and their clients but did not explicitly address the question of whether the privilege also protects oral communications between multi-member public bodies and their counsel.

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Despite the fact that *Suffolk Construction* did not address oral communications between public clients and their counsel, it is undisputed that the decision serves as a clarion call that emphatically reaffirms the existence of the attorney-client privilege between public bodies and their counsel. In view of the longstanding and fundamental nature of the attorney-client privilege, public lawyers should be free to give candid and objective advice to their clients — whether in writing, which is already allowed by *Suffolk Construction*, or orally at executive sessions — unimpaired by the risk that such advice will be disclosed to their clients' adversaries.

Without such protection, the social utility and benefits intended by the attorney-client privilege will not be secured in the public context in the same manner as it is in the private context. Dissimilar treatment of the attorney-client privilege in the private and public contexts would be inimical to the holding of *Suffolk Construction*, which intended to secure the same rights to public clients as those enjoyed by the private clients.

Support for a properly robust interpretation of *Suffolk Construction* also may be found in the distinction the SJC drew between its holding in *Suffolk Construction* and its decision in *District Attorney for the Plymouth Dist. v. Selectmen of Middleborough*.[4] In that case, the Court "rejected the contention of the defendant selectmen that they could shut down an ongoing open meeting in order to hold a closed session with the town attorney for reasons the selectmen acknowledged to fall outside the express statutory exemptions in the open meetings law for closed executive sessions."[5]

The SJC noted that even in *Middleborough*. it had presumed the existence of the attorney-client privilege for public officials and further instructed "[t]hat the Legislature intended certain discussions between public officials and their counsel to take place in the open does not imply that no communication between the public counsel and the public client can ever be confidential." *Id*. The *Suffolk Construction* Court's distinction of *Middleborough* calls into question the continued vitality of that decision, particularly where it is well-settled in the private setting that the attorney-client privilege protects oral communications between clients and their attorneys.[6]

II. RECENT COURT AND AGENCY INTERPRETATIONS OF *SUFFOLK CONSTRUCTION*

A. COURT INTERPRETATIONS

In April of 2011, the SJC relied on its holding in *Suffolk Construction* in determining that documents ordered to be kept confidential under a judicial protective order are not subject to disclosure under the Public Records Law.[7] In *Fremont Investment*, the Court held that the Public Records Law does not override a judicial order protecting from disclosure certain documents the Office of the Attorney General obtained from an investment and loan company in the course of an enforcement action, and the Court further refused to allow a prospective intervenor to obtain such documents from the attorney general through a public records request.[8]

In so holding, the Court reiterated the *Suffolk Construction* Court's guidance that where a statute, such as the Public Records Law, is "silen[t] on a matter of common law of fundamental and longstanding importance to the administration of justice," it does *not* abrogate that fundamental principle of common law.[9] The Court found that this principle applies equally to the attorney-client privilege as well as judicial protective orders, which operate to protect documents from disclosure notwithstanding the lack of an explicit exemption in the Public Records Law.

This recent decision is a resounding affirmation of the concept that a fundamental right under the common law (such as the attorney-client privilege) remains intact where the Legislature does not specifically address the matter in related legislation. Since the SJC has now found a second common law basis for exemption from the Public Records Law despite the lack of explicit statutory exception, one might expect that the same tenet would extend to the application of common law exceptions to the new Open Meeting Law. The common law doctrine makes no distinction between written and oral communications for purposes of obtaining legal advice; both are protected.

However, we have yet to see whether the Court's holding in *Middleborough* will be wholly overturned in light of *Suffolk Construction*, and the attorney general unfortunately has failed to fully protect the attorney-client privilege as it relates to meetings of public bodies.

B. ATTORNEY GENERAL INTERPRETATIONS

Unfortunately, the Office of the Attorney General, the agency charged with interpretation and enforcement of the new Open Meeting Law codified in G.L. c. 30A, §§18-25, has taken an improperly narrow view of the applicability of the attorney-client privilege and has held that it does not serve as a basis for entering executive session unless the meeting with counsel relates to one of the exemptions specifically enumerated in the Open Meeting Law.

For instance, in a Dec. 17, 2010, decision concerning an alleged violation of the Open Meeting Law, the attorney general held that such a violation did occur when the offending public body received legal advice from counsel in executive session to the extent that such advice was not related to a specifically enumerated exemption.[10] Citing the *Middleborough* case, the attorney general stated that "[w]hile a public body may meet in executive session to communicate with counsel, it may do so only for one of the enumerated purposes for executive session" and that such a meeting with counsel "does not allow the Board free reign to discuss substantive and important issues appropriately left for discussion during open session."

Additionally, the Attorney General's Open Meeting Law Guide, updated as of March 24, 2011, advises that "a public body's discussions with its counsel do not automatically fall under [the litigation exemption] or any other Purpose for holding an executive session."

III. NEED FOR JUDICIAL INTERPRETATION AND CLARIFICATION

The attorney general's stance is contrary to the SJC's direction in *Suffolk Construction* regarding the status and continued vitality of the common law attorney-client privilege. The SJC in *Suffolk Construction* clearly indicated that a statute that is silent as to a fundamental common law right such as the attorney-client privilege does not automatically override the privilege. Access to municipal counsel in a protected context encourages complete and honest discussion and therefore serves the public interest and furthers interests of social utility.[11]

While not every communication with legal counsel is protected, communications concerning legal advice should be entitled to the privilege. The *Suffolk Construction* Court acknowledged the ability of government officials and their counsel to distinguish between privileged and unprivileged communications.

The attorney general appears to have less confidence in the ability of municipal officials to limit executive session discussions with counsel to matters entitled to the privilege, as the 2010 enforcement decision may be read to prohibit any private discussions between a quorum of a public body and its attorney unless the discussion relates to topic that is independently appropriate for executive session, such as pending litigation or real estate negotiations. This view poses challenges for public bodies in reconciling the Open Meeting Law with the Public Records Law, especially in light of the Open ➤17

EQUAL RIGHTS AMENDMENT

Continued from page 14

> with respect to the enumerated classes, the policy considerations that ordinarily illuminate equal protection analysis are not relevant to interpretation … If a class is not addressed by [the ERA] it does not follow that strict scrutiny is inappropriate but merely that there is no express constitutional mandate that such scrutiny be applied.[25]

In this way, the SJC has reconciled the ERA's curious enumeration with its clear goal of establishing gender as a suspect classification. While the enumeration provides an exclusive list of classifications always deemed suspect, discrimination based on other classifications may also be deemed to warrant strict scrutiny upon further constitutional analysis.[26]

IV. CONCLUSION

The Declaration of Rights is, without exaggeration, the last bastion for Massachusetts residents who seek protected class status. From the *Quock Walker* cases challenging slavery in 1783, to *Goodridge*, the Massachusetts courts have led the way in protecting individual rights. Taking it as a statement of general principles, in view of the evils it was intended to remedy, the ERA must apply to discrimination against certain unenumerated classes deserving of heightened protection.

This does not mean, however, that any state-based classification would be subjected to strict scrutiny if a discrete and insular minority is targeted.[27] Classifications that do not infringe "fundamental personal rights" are not subject to strict scrutiny unless they are "inherently suspect."[28] Instead, "experience, not abstract logic, must be the primary guide" in determining which classifications violate equal protection.[29] Further, a group's "political powerlessness" is a relevant consideration — though not itself sufficient to justify strict scrutiny.[30]

Finch clears the way for advocates to proceed with equal protection claims under the Massachusetts Constitution, even if the discrimination alleged is not based on one of the enumerated classifications. Existing precedent informs the legal practitioner that the ERA is not only coextensive with the 14th Amendment, but also can be a source of added consumer protections and claims. Legal practitioners should consider the usefulness of the ERA and its application to non-enumerated protected classifications for civil class action lawsuits. ■

1) U.S. Gov't Accountability Office, GAO-10-899, Fiscal Pressures Could Have Implications for Future Delivery of Intergovernmental Programs 1–3 (2010).
2) Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655 (2011).
3) Mass. Const. art. CVI.
4) Originally, Article I read: "[a]ll *men* are born free and equal."
5) *Id.* at art. CVI.
6) *E.g.* United States v. Virginia, 518 U.S. 515 (1996); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).
7) Opinion of the Justices to the Senate, 373 Mass. 883 (1977).
8) *Id.* at 886-87 ("With the exception of sex, [the Article 106] classifications have long been afforded extensive protection under the 14th Amendment to the Constitution of the United States. Race, color and national origin have been designated suspect classifications and as such have been subject to the strictest judicial scrutiny. Governmental action which apportions benefits or burdens according to such suspect categorizations is constitutionally permissible only if it furthers a demonstrably compelling interest and limits its impact as narrowly as possible consistent with the legitimate purpose served").
9) Commonwealth v. King, 374 Mass. 5 (1977).
10) *Id.* at 21 (*citing* Loving v. Virginia, 388 U.S. 1 (1967) (race as a suspect classification); Graham v. Richardson, 403 U.S. 365 (1971) (alienage as a suspect classification); Oyama v. California, 332 U.S. 633 (1948) (national origin as a suspect classification); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (religious distinction affecting fundamental First Amendment rights)).
11) Opinion of Justices to House of Representatives, 374 Mass. 836 (1977).
12) *Id.* at 839–40, 842.
13) Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 328 (2003) (quoting from Arizona v. Evans, 514 U.S. 1, 8 (1995)); Planned Parenthood League of Mass. v. Attorney Gen., 424 Mass. 586, 590 (1997).
14) See, e.g., Commonwealth v. King, 374 Mass. at 21 ("The classifications set forth in art. 106 … , with the exception of sex, are within the extensive protection of the 14th Amendment … and are subjected to the strictest judicial scrutiny"); Goodridge, 440 Mass. at 313 ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution … ."); Moe, 382 Mass. at 651 ("We think our Declaration of Rights affords a greater degree of protection to the right asserted here than does the Federal Constitution … .").
15) Opinion of the Justices, 363 Mass. 899, 908-09 (1973) ("The guaranties contained in [Articles 1 and 10 of the Declaration of Rights] are at least as great as those guaranties provided in the equal protection clause of the Federal Constitution.").
16) Zayre Corp. v. Attorney General, 372 Mass. 423, 433 n.22 (1977) (the federal decisions may reflect a standard of review less restrictive than that required by the Massachusetts Declaration of Rights)
17) Goodridge, 440 Mass. at 329.
18) *Id.* at 329.
19) *Id.* at 312.
20) Moe v. Sec'y of Admin. & Fin., 382 Mass. 629 (1981)
21) See *id.* at 650. recognition of "a woman's freedom of choice" and held that such freedom did not "carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices," Harris v. McRae, 448 U.S. 297, 316 (1980), this Court went further in applying the values of Massachusetts, holding that "when a State decides to alleviate some of the hardships of poverty by providing medical care," it "may not use criteria which discriminatorily burden the exercise of a fundamental right." Moe, 382 Mass. at 652 (internal quotation marks omitted).
22) See also, e.g., Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416 (1973) (stating that this Court "is not bound by federal decisions, which in some respects are less restrictive than our Declaration of Rights"). Compare also McDuffy v. Sec'y, 415 Mass. 545, 606 (1993) (holding that the commonwealth has a duty under the Massachusetts Constitution "to provide an education for all its children, rich and poor, in every city and town of the Commonwealth at the public school level"), with San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
23) *See* infra Part III.
24) United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938)
25) Finch, 459 Mass. at 664 (2011).
26) *Id.*
27) Rules that treat discrete and insular groups lacking political power differently from others are not inherently suspect in all circumstances. Harlfinger v. Martin, 435 Mass. 38, 50, (2001) (minors); Longval v. Superior Court Dept. of the Trial Court, 434 Mass. 718, 723 (2001) (prisoners); accord, e.g., Gregory, 501 U.S. 470 ("age is not a suspect classification under the Equal Protection Clause"); Zipkin v. Heckler, 790 F.2d 16, 18 (2d Cir. 1986) ("incarcerated felons are not a suspect classification").
28) Paro, 373 Mass. at 649
29) City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).
30) *Id.* (citation omitted).

ATTORNEY-CLIENT PRIVILEGE

Continued from page 15

Meeting Law's express recognition of the attorney-client privilege as it relates to the written records of meetings of public bodies.

Moreover, the new Open Meeting Law is not entirely silent on the topic of the attorney-client privilege and, in fact, contains two explicit provisions recognizing the privilege, both found in G.L. c. 30A, §22(f). Section 22(f), which provides in part as follows:

> When the purpose for which a valid executive session was held has been served, the minutes, preparatory materials and documents and exhibits of the session shall be disclosed **unless the attorney-client privilege or 1 or more exemptions under [the Public Records Law]** apply to withhold these records, or any portion thereof, from disclosure. For purposes of this subsection, if any executive session is held pursuant to clause (2) or (3) of subsections (a) of section 21, then the minutes, preparatory materials and documents and exhibits used at the session may be withheld from disclosure to the public in their entirety, unless and until such time as a litigating, negotiating or bargaining position is no longer jeopardized by such disclosure, at which time they shall be disclosed **unless the attorney-client privilege or 1 or more of the exemptions under [the Public Records Law]** apply to withhold these records, or any portion thereof, from disclosure (emphasis supplied).

In two separate instances in Section 22(f), the Legislature recognized the attorney-client privilege as a separate and independent basis for protecting from disclosure the minutes, preparatory materials, documents and exhibits of an executive session even after the purpose of the executive session has been served, and even if one or more explicit statutory exemptions do not apply.

Accordingly, it stands to reason that if the attorney-client privilege allows a public body to withhold the minutes of an executive session from disclosure, the discussions summarized in those minutes (namely, receipt of oral advice from counsel even if not related to a specific statutory exemption) must have been entitled to the privilege in the first instance. The statutory language contained in Section 22(f) broadly recognizes the privilege as a basis for withholding executive session minutes and does not impose the additional requirement that privileged discussions must be related to an enumerated purpose of executive session in order to be withheld.

Generally accepted principles of statutory construction require the various provisions of a statute to be harmonized, recognizing that the Legislature would not intend one provision of a statute to contradict another.[12] Thus, the remainder of the new Open Meeting Law must be harmonized with the two specific provisions containing affirmative references to the attorney-client privilege. The attorney general's truncated and unduly narrow interpretation of the privilege creates confusion and conflicts with both the statutory language as well as the SJC's guidance in *Suffolk Construction*.

CONCLUSION

We call upon the legislators, the courts, and the attorney general to properly implement the robust protections intended for the attorney-client privilege, as so particularly described in *Suffolk Construction,* for all public agencies and political subdivisions, including the 351 cities and towns within the Commonwealth of Massachusetts.

The attorney-client privilege is a fundamental common law right of the utmost importance to municipal officials, who should be encouraged to discuss legal matters candidly with their counsel without fear of disclosure to opposing parties. Recognition of the attorney-client privilege in the context of the Open Meeting Law would serve the public interest in promoting public body access to legal advice, and not creating two separate classes of legal clients, one in the private sector entitled to confidential legal advice and one in the public sector stripped of that right. ■

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1) 449 Mass. 444 (2007).
2) 429 Mass. 798 (1999).
3) Suffolk Construction Co. v. Division of Capital Asset Management, 449 Mass. 444, 448-49 (2007), *citing* Upjohn Co. v. United States, 449 U.S. 383, 389 (1991).
4) 395 Mass. 629 (1985).
5) *Suffolk Construction*, 449 Mass. at 459.
6) *See, e.g.,* Neitlich v. Peterson, 15 Mass. App. Ct. 622, 624 (1983).
7) Commonwealth v. Fremont Investment & Loan, 459 Mass. 209 (2011).
8) *Id.*
9) *Id.* at 216.
10) Attorney General, OML 2010-6.
11) *Suffolk Construction*, 449 Mass. at 460.
12) In re Birchall, 454 Mass. 837, 849 (2009).