MH MURPHY HESSE
TL TOOMEY & LEHANE LLP
Attorneys at Law

Municipal Client Advisory
May 2015

Approaching a Level Playing Field:
Work Product May Be Subject To Exemption Under Public Records Law

Overview:

Work product includes materials that are "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney . . . .)" Mass. R. Civ. P. 26(b)(3). Examples of work product are investigatory or consultant studies or reports, as well as documents containing the mental impressions of an attorney or consultant. In General Electric Corp. v. Department of Environmental Protection, 429 Mass. 798 (1999), the Supreme Judicial Court previously held that work product was not exempt from disclosure under the Public Records Law.

However, in a recent decision (DaRosa v. City of New Bedford, SJC-11759, 2015 WL 2258628 (May 15, 2015)), the Supreme Judicial Court revisited General Electric and held that, in certain cases, work product may be considered exempt under the Public Records Law. The Supreme Judicial Court also clarified the scope of what is regarded as the "derivative attorney-client privilege."

Background:

In DaRosa, the City of New Bedford was sued by property owners as a result of soil contamination from an unrestricted ash dump. In response, New Bedford, acting through its city solicitor, engaged an environmental consultant to analyze the property owners' claims and to evaluate potentially responsible parties for the contamination. The outside consultant reported directly to the New Bedford city solicitor.

New Bedford filed a third party complaint against various third parties arising out of the contamination. These third party defendants challenged the assertion of the attorney-client privilege and work product protection in response to their attempts to obtain documents that the outside consultant prepared, including correspondence to the city solicitor and an evaluation report addressing the soil contamination.

Municipal Client Advisory
May 2015

Analysis of DaRosa:

Work Product

- Exemption (d) to the Public Records Law applies to "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency" but does not apply to "reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." The term "policy" in Exemption (d) to the Public Records Law is interpreted broadly, with the purpose of encouraging open and candid deliberations about government decisions.

- When a government agency is involved in litigation or litigation is pending, or acts in anticipation of litigation, decisions about litigation strategy and case preparation may be considered "policy deliberation," and therefore potentially subject to Exemption (d).

- A distinction must be made between "opinion" work product and "fact" work product:

  - "Opinion" work product consists of mental impressions, conclusions, opinions, and legal theories, made by a party's attorney or representative. "Opinion" work product is protected from disclosure under Exemption (d).

  - "Fact" work product is protected by Exemption (d) if:

    - it is not included in a "factual study or report" (*i.e.,* if it is intertwined with "opinion" work product); or

    - it is included in a "factual study or report" that is not "reasonably completed."

    If the study or report is "reasonably completed," those portions of the report that are intertwined with opinions or analysis resulting in opinions are protected by Exemption (d), whereas the purely factual remainder of the study or report is subject to disclosure.

Municipal Client Advisory
May 2015

- It is immaterial whether the subject work product was prepared by an outside consultant or by a government employee – the issue turns on whether the documents are "opinion" or "fact" work product.

Derivative Attorney-Client Privilege

- The derivative attorney-client privilege is very limited, and applies only to "shield communications to a third party employed to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client." Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 306 (2009).

- The derivative attorney-client privilege requires the third party to clarify, facilitate or "translate" the communications among the client and his or her attorney. Examples are where the third party is a foreign language translator or where the subject matter is so technical that the attorney could not otherwise interpret the client's communication.

- In DaRosa, the outside consultant's communications were not within the scope of the derivative attorney-client privilege, because the consultant was not translating client communications. Instead, the outside consultant was "translating" public record technical data, which was not a privileged attorney-client communication.

DaRosa places government agencies on a closer level with private parties, by potentially exempting work product from disclosure, either in response to a public records request or during litigation. In response to a request, government agencies must closely review the content and context of studies, reports and other communications, to determine whether Exemption (d) or the derivative attorney-client privilege may apply.

* * * * * * * * * * *

For questions about the Public Records Law, please contact Attorney Brandon H. Moss at (617) 479-5000, or the attorney assigned to your account. This Client Advisory was written by Attorney Moss, who also filed an amicus motion in DaRosa on behalf of the Massachusetts Municipal Lawyers Association. Murphy, Hesse, Toomey & Lehane, LLP maintains a full service municipal and public sector legal practice, with offices in Quincy, Boston, and Springfield, Massachusetts.

Municipal Client Advisory
May 2015

For a discussion of these and other issues, please visit the update on our website at www.mhtl.com. To receive legal updates via email, contact information@mhtl.com.

This alert is for informational purposes only and may be considered advertising. It does not constitute the rendering of legal, tax or professional advice or services. You should seek specific detailed legal advice prior to taking any definitive actions.