Mass Appeals Court: Attorney-Client Privilege Applies to Town Emails, Despite Open Meeting Law Violation

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Government entities should be aware of a recent decision from the Massachusetts Appeals Court regarding the application of the attorney-client privilege to emails that did not include attorneys, notwithstanding the requirements of the Open Meeting Law.

On March 28, 2025, the Court issued a decision in Kay v. Town of Concord upholding in part and reversing in part a Superior Court ruling on the Town of Concord's withholding of several emails from its response to a public records request. It found that the attorney-client privilege applied to emails between the Town Manager and the Select Board, even in the absence of Town Counsel from the email chain, because the communications related to the seeking of legal advice. The privilege applied even when the emails revealed a deliberation prohibited under the Open Meeting Law, which does not operate as a "statutory public waiver" of the attorney-client privilege according to the Court.

In its decision, the Court emphasized the importance of construing attorney-client privilege narrowly, particularly in a municipal context where "the public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner." The Court, however, noted the importance of public entities having access to confidential legal advice:

"A contrary interpretation would create an obstacle to government officials obtaining the legal advice they need to carry out their duties and would also 'place public entities at an unfair disadvantage vis-à-vis private parties.'"

The attorney-client privilege ultimately prevented the release of three emails in question, while nine emails did not meet the threshold for the



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privilege. In addition, the Court found that plaintiffs were not entitled to a particular email because it fell within the work product exemption. Massachusetts Rules of Civil Procedure define opinion work product as "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Here, the Court held the protection of the work product doctrine applicable to information collected by a Town employee at the request of Town Counsel.

The Court cautioned government entities that consultation with Town Counsel does not automatically render privileged all future communications between Town officials about a particular subject.

In light of this decision, government entities should remain vigilant in their written communications, while also resting assured that the absence of counsel does not render attorney-client privilege wholly inapplicable.

Please contact a member of our Public and Municipal Law Group if you have any questions about this legal update.

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