SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY NO. 09733

SUFFOLK CONSTRUCTION CO., INC., et al.

v.

COMMONWEALTH OF MASSACHUSETTS / DIVISION OF CAPITAL ASSET MANAGEMENT, et al.

ON REPORT FROM
THE SUFFOLK SUPERIOR COURT

BRIEF OF AMICUS CURIAE BOSTON BAR ASSOCIATION

EDWARD V. COLBERT III (BBO #566187)
LOONEY & GROSSMAN LLP
101 ARCH STREET
BOSTON, MA 02110
(617) 951-2800

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

Other

II. INTEREST OF AMICUS

The mission of the Boston Bar Association ("the BBA"), the nation's oldest bar association founded in 1761 by Boston lawyers including John Adams, is to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large.

The BBA strives for legal excellence by providing legal education programs for its members. Through its many pro bono programs and activities, the BBA also serves the local community by increasing access to justice.

From its early beginnings, the BBA and its members have played active roles in government and public service, have participated in legal and policy discussions and debates, and have served as a resource for the Commonwealth's judicial, legislative and executive branches of government.

The BBA has long maintained that the attorney-client privilege is integral to the professional practice of law and to the administration of justice. The BBA has a particular interest in preserving this long-standing privilege for all individuals, including government officials and employees. In the past

several years, BBA members have appeared before the Legislature in support of legislation to codify the common law attorney-client privilege for government officials and employees, and to exempt written attorney-client communications from the Public Records Law, G.L. c. 4, § 7(26), c. 66. While recognizing the important public policy of open government that underlies the Public Records Law, the BBA continues as amicus its advocacy for formal judicial recognition and preservation of the attorney-client privilege for government officials and employees including in response to public records requests.

II. STATEMENT OF THE ISSUE

The amicus adopts the Statement of the Issue as set forth in the brief of the Commonwealth of Massachusetts.

III. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The amicus adopts the Statement of the Case and the Statement of the Facts as set forth in the brief of the Commonwealth of Massachusetts.

IV. SUMMARY OF THE ARGUMENT

The attorney-client privilege is one of the most hallowed privileges of Anglo-American law. The

history of the attorney-client privilege in the Commonwealth dates back over 170 years. The purpose underlying the privilege, as well as the elements required for application of the privilege, have remained largely consistent during its long history.

The attorney-client privilege enhances the administration of justice by encouraging individuals to seek legal advice, and to be open and candid with counsel when seeking such advice. When individuals are able to discuss legal matters with candor and in confidence with their attorneys, they are more likely to disclose all of the facts surrounding the legal issue. In turn, attorneys made fully aware of the facts are able to render sound legal advice. Providing sound legal advice protects the client's rights and encourages the client to comply with the law.

These important policy objectives are as important today as they were when first established by the Supreme Judicial Court in the 1830's. Our system of laws has grown more complex, with an increase in federal, state and local enactments, regulations and case law. The purpose of the privilege in encouraging individuals to seek legal advice applies with equal

application to all individuals in the Commonwealth, whether acting privately or in a capacity as a public official or employee.

Clients of government attorneys include not only public agencies, but by extension members of the public who are served by these agencies. Like private individuals and entities, the public at large deserves the legal protections afforded by the attorney-client privilege. The absence of an attorney-client privilege for public officials and employees would unfairly disadvantage local and state government and the public interest.

Recognition of the attorney-client privilege, and an exemption of privileged communications from the public records law, also serves the public interest by placing government attorneys on an equal professional and intellectual footing as private attorneys. Equal treatment of public and private attorneys promotes high standards of legal excellence among all attorneys in the Commonwealth.

V. ARGUMENT

A. FOR OVER 170 YEARS THE COMMONWEALTH HAS RECOGNIZED THE ATTORNEY-CLIENT PRIVILEGE.

1. The Supreme Judicial Court Was One Of The First Appellate Courts To Recognize And Explain The Importance Of The Attorney-Client Privilege To The Administration of Justice.

It is well-established that the attorney-client privilege is "among the most hallowed privileges of Anglo-American law." In the Matter of A Grand Jury Investigation, 437 Mass. 340, 351 (2002)[1].

In Massachusetts, the attorney-client privilege dates back to at least 1832, when the SJC issued one of the first appellate decisions in the country in which the privilege was applied to prevent disclosure of attorney client communications. See Foster v. Hall, 29 Mass. (12 Pick.) 89, 93-4 (1831).

---

[1] In his treatise on evidence, Professor Wigmore explains the history of the attorney-client privilege as follows: "The history of this privilege goes back to the reign of Elizabeth, where the privilege already appears as unquestioned. . . . The policy of this privilege has been plainly grounded, since the latter part of the 1700's. . . . In order to promote the freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent." 8 J.Wigmore, Evidence, §§ 2290 (3d ed. 1940).

In Foster, testimony was sought from a debtor's attorney to determine whether the debtor had conveyed property without consideration. The SJC held that the attorney could not be compelled to testify about the conveyance, because the information sought was protected from disclosure by the attorney-client privilege. SJC Chief Justice Lemuel Shaw (who incidentally was one of the founders and early presidents of the BBA), in writing for the Court, stated that the attorney-client privilege had been "very well established" in the context of communications relating to a "prosecution or defence of a suit at law, existing or contemplated." Foster, 29 Mass. at 93-4. Chief Justice Shaw expanded the privilege to communications unrelated to litigation, and described as follows the importance of the privilege in seeking to resolve legal matters with the assistance of counsel:

> "[W]hether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations,

> although the purpose be to correct a defect in title, by obtaining a release, to avoid litigation by compromise, to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes, not connected with a suit in court."

Foster, 29 Mass. at 98.

Two years later, Chief Justice Shaw reiterated the importance of being able to seek legal advice in confidence, particularly given the complexities of the law at the time:

> "[T]hat so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be for ever sealed."

Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833).

Approximately forty years after the SJC's decisions in Foster and Hatton, the United States Supreme Court, in a case where a life insurance company sought testimony from the attorney of a

deceased policy-holder's wife in an effort to discredit her claim for benefits, refused to allow the attorney's testimony, stating that:

> "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance."

Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 458 (1876).

In 1950, the United States District Court for the District of Massachusetts succinctly recognized the importance of the attorney-client privilege in an ever increasing system of complex laws:

> "In a society as complicated in structure as ours and governed by laws as complex and detailed as to be imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity."

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (1950).

More recently, the SJC recognized application of the rule as a "necessity" for the administration of justice:

> "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." (citations omitted).

Matter of A John Doe Grand Jury Investigation, 408 Mass. 480, 481-2 (1990).

As to the withholding of information that accompanies the recognition and application of the privilege, the SJC recognized the "social good" that the privilege serves:

> "[T]hat is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure. The "social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweigh[s] the harm that may come from the suppression of the evidence." *Commonwealth* v. *Goldman*, 395 Mass. 495, 502, cert. denied, 474 U.S. 906 (1985), quoting *United States* v. *United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950).

Id. at 482-3.

The social good that accompanies the proper and equal application of the attorney-client privilege and that supports the availability of justice for "every

citizen" is as important today as it was when the SJC introduced it back in Foster and Hatton.

2. The Supreme Judicial Court Has Consistently Applied The Elements Of The Attorney-Client Privilege To Confidential Communications Between Lawyers And Clients, Including Public Officials And Employees.

Since the time that these important policy objectives have been established, the SJC has continued to recognize the privilege for communications with counsel in a number of contexts including, for instance, in general civil litigation, Darius v. City of Boston, 433 Mass. 274 (2001); in criminal proceedings, Purcell v. District Attorney of Suffolk County, 424 Mass. 109, 115 (1997); and as it applies to corporations. Simmons v. O'Keeffe, 419 Mass. 288, 299 (1995).

The SJC has also analyzed the attorney-client privilege under claims of privilege by state government officials. See Vigoda v. Barton, 348 Mass. 478, 485 (1965)(Court considered application of attorney-client privilege to letter from state official to state assistant attorney general where issue concerned whether the privilege was waived); Judge Rotenberg Educational Center, Inc. v.

Commissioner of the Dept. of Mental Retardation (No. 1), 424 Mass. 430, 457 n. 26 (1997) (Court considered application of attorney-client privilege to discussions between agency employees and attorney when determining that discussions did not involve legal advice). The SJC has also assumed that local government officials may claim the attorney-client privilege. See District Attorney for Plymouth v. Selectman of Middleborough, 395 Mass. 629, 632 n. 4 (1985) (Court assumed without deciding that "public clients have an attorney-client privilege"), citing Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 450 (S.D.N.Y. 1955), Proposed Mass. R. Evid. 501(a)(1) and (d)(6) (1980).

Although the Court has not expressly applied the attorney-client privilege to prevent the disclosure of communications between a public officer and its attorney, the application of the privilege to facts in these cases demonstrates the Court's proper recognition of the privilege for public officers.

B. The Court Should Formally Recognize The Attorney-Client Privilege For Public Officials and Employees And Exempt Attorney-Client Communications From Being Disclosed Pursuant To A Public Records Request.

Massachusetts was a leader in establishing the attorney-client privilege in the United States, and the SJC has never differentiated in its application to individuals where they have acted in a public rather than private capacity.

As the objectives of the attorney-client privilege are as important today as they have ever been, the privilege should be applied equally to all.

In today's Commonwealth, individuals are governed by and required to comply with a complex array of local, state, federal and international laws, and should be encouraged to seek legal advice from attorneys in confidence. Whether an individual is serving his own interests or those of the public, the assurance of confidence is what will encourage the individual to seek legal advice in order to resolve a dispute or to determine legal compliance in our complex system of laws.

The consequences of not recognizing an attorney-client privilege for those acting on behalf of the

public are great. Government officials possessing no such privilege will undoubtedly fail to seek needed legal advice. For an official who acts on his or her own in enforcing a law without appropriate legal advice, that official may deny an individual due process of law or other constitutional or legal rights. An official who resolves a monetary dispute with a business entity without the benefit of legal advice may fail to recognize the strength of the government's position and act in a way contrary to the public interest and the public fisc. Either way, government officials without a legally recognized attorney-client privilege would inevitably affect adversely the rights of individuals and the public interest by failing to seek legal advice.

To afford the privilege to private individuals, criminal defendants, corporations and other institutions, but not for public officials acting on behalf of the citizens they serve, would place private interests ahead of the public interest in a number of ways and in many areas of the law.

For instance, a private individual engaged in a business transaction with the government agency could, through a public record request, determine what legal

advice had been given to agency officials and could use that advice to negotiate a better bargain for itself and to the disadvantage of the government. Likewise, an individual engaged in a dispute or in litigation with a government agency could, through a public record request, review the legal advice given to the agency, including the agency's strengths and weaknesses in a particular case, and use that information to gain an unfair advantage over the agency in negotiations or at trial. Clearly, this type of uneven playing field, whether the government is acting as market participant or party litigant, could cost the citizens and taxpayers who are served by the government agency.

Likewise, when a government agency is seeking to enforce a law or regulatory program against an individual or business, the alleged violator's access to the legal advice given by government attorneys to an agency official could adversely affect the public interest and the program sought to be enforced on behalf of the public.

The absence of an attorney-client privilege for public officials could also create inequities among private citizens or entities. In the world of

regulated industries, for instance, business competitors could seek legal opinions and other communications with agency counsel concerning their competitor's compliance with a government regulation or program, and seek to use the information against them in competition or through litigation or some other means.

In these ways as well as others easily conceived, the interests of the government, and the level playing field that exists for both government officials and private individuals through equal application of the attorney-client privilege, would be compromised in the event the attorney-client privilege were not recognized for public officials and employees.

Therefore, this Court should uphold the attorney-client privilege in the same manner for public officials and employees as it applies to private individuals.

V. CONCLUSION

Based on the foregoing, the BBA respectfully requests that this Court recognize an attorney-client privilege for public officials and employees of the Commonwealth, and that it allow government agencies and departments to withhold documents based upon such privilege including when responding to a public records request.

Respectfully submitted,

BOSTON BAR ASSOCIATION
AMICUS CURIAE

By its attorneys,

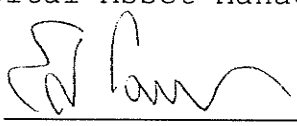
Edward V. Colbert III (BBO # 566187)
Looney & Grossman LLP
101 Arch Street
Boston, MA 02108
(617) 951-2800

CERTIFICATE OF SERVICE

I, Edward V. Colbert III, certify that on August 17, 2006, I served two copies of the attached Brief of Amicus Curiae of the Boston Bar Association on the following by first class mail:

Joel Lewin, Esq.
Hinckley, Allen & Snyder
28 State Street
Boston, MA 02109
Counsel for Suffolk Construction Co., Inc.

Daniel Hammond, Esq.
Assistant Attorney General
Attorney General's Office
One Ashburton Place
Boston, MA 02108
Counsel for The Commonwealth of Massachusetts/
Division of Capital Asset Management



Edward V. Colbert III