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A Weak Expressio: In DaRosa v. City of New Bedford, The SJC Serves A Diluted Version Of An Established Statutory Interpretation Rule

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Viewpoints

In *DaRosa v. City of New Bedford*, 471 Mass. 446 (2015), the Supreme Judicial Court made the Massachusetts Public Records Act ("PRA") a less effective tool for citizens seeking government records, just as the Massachusetts government faces sharp criticism from media outlets and good-government groups for lack of transparency. In doing so, the SJC weakened something else: the established canon of statutory interpretation *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other). This canon urges courts not to add "implied" terms to statutes. In its undiluted form, *expressio unius* is a strong constraint on judicial alteration of legislative enactments. But *DaRosa* dilutes it in a way that will affect future interpretation of the PRA, and maybe other statutes as well.

At issue in *DaRosa* was the status of attorney work product under the PRA. In an environmental dispute, the City of New Bedford was withholding such documents from third-party defendants. Those defendants had strong arguments for disclosure. The PRA states that all government records are public, unless they fall within one or more "strictly construed" exemptions from disclosure. *Att'y Gen. v. Ass't Comm'r of the Real Prop. Dep't of Boston*, 380 Mass. 623, 625 (1980). None of those exemptions explicitly protects documents that are attorney work product (or attorney-client privileged). And in *General Electric Co. v. Massachusetts Department of Environmental Protection*, 429 Mass. 798 (1999) ("GE"), the SJC — applying *expressio unius* — declined to add an "implied" exemption for attorney work product:

There is no ambiguity in the statute's explicit mandate that the public have access to all government documents and records except those that fall within the scope of an express statutory exception. As we said in construing an analogous statute, the open meetings law as it applied to municipal governments, G.L. c. 39, § 23B, 'exceptions are not to be implied. Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied.'

Id. at 805-806.

Despite all of this, the City of New Bedford won in DaRosa. The SJC did not go so far as to overrule GE and create an implied exemption for attorney work product — the Court entertained that possibility, but refrained. The practical result was largely the same, however. Reaching an issue that it did not address in GE, the SJC ruled that work product is almost always within an already-existing exemption anyway. That exemption — exemption (d) — covers "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the

agency," except "reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." DaRosa, 471 Mass. at 450-451. The Court held that attorney work product reflects "decisions regarding litigation strategy and case preparation" and thus amounts to development of policy. Id. at 458. (The Court acknowledged that a "reasonably completed factual study or report" would fall outside the scope of exemption (d), but hastened to add that the exemption applies to such work product if it is "interwoven" with "opinions" or "analysis." Id. at 459-460.)

To this point, *DaRosa* may seem to be merely a technical decision about the scope of one of the PRA's long-existing exemptions, with the SJC's conclusion at least plausibly supported by that exemption's text. But *DaRosa* is more than that because of the part of the decision where the SJC considered simply adding an implied PRA exemption for attorney work product. As noted, the SJC refrained from doing so, but, in no uncertain terms, the SJC expressed a *willingness* to do so:

We no longer hold to the view declared in *General Electric* that there are no implied exemptions to the public records act, and that all records in the possession of a governmental entity must be disclosed under the act unless they fall within one of the exemptions identified [therein].

Id. at 453. This is a remarkable statement. It represents a sharp departure from *GE* and its forceful application of *expressio unius*. Moderating that departure, the SJC held that the judiciary should create "implied exemptions" only when necessary to "preserve the fair administration of justice." Id. at 454. But that malleable phrase is not a comforting restraint on a court which has so bluntly broken from *GE*.

While startling, *DaRosa*'s "we no longer hold to" pronouncement did not come from thin air. In two prior cases — *Suffolk Construction Company v. Division of Capital Asset Management*, 449 Mass. 444 (2007), and *Commonwealth v. Fremont Investment & Loan*, 459 Mass. 209 (2011) — the SJC had already departed from the rationale of *GE*. But in both cases it had done so with greater delicacy.

Suffolk was effectively a companion case to *GE*. Recall that in *GE*, the SJC was asked whether the PRA contains an implied exemption for attorney work product, and answered "no." Eight years later, *Suffolk* raised a kindred question: whether the PRA contains an implied exemption for records that are attorney-client privileged. The SJC now answered "yes" — but it managed to do so without overturning GE or announcing a general judicial power to add PRA exemptions. How so? The Court explained that the need for an implied exemption was uniquely compelling in the particular circumstances of that case. The Court took pains to establish the importance and venerability of the attorney-client privilege, which it called "common law of fundamental and longstanding importance to the administration of justice." *Suffolk*, 449 Mass. at 458. The Court presented attorney work product as a doctrine of lesser status, referring to it as a mere "tool of judicial administration." Id. at 456. Further, the SJC persuaded itself that its decision was consistent with the Legislature's intent in enacting the PRA, which, according to the SJC, could not have been to "mandate[] that public officials perform their duties without access to legal advice protected by the attorney-client privilege." Id. at 458-459.

In the 2011 *Fremont* decision, the SJC again read an implied exemption into the PRA — but again without announcing a general power to do so. This time an individual requested documents from the Office of the Attorney General which it had obtained from the defendant in

a civil lawsuit, and which were subject to a protective order issued in that lawsuit. The SJC decided that the PRA contains an implied exemption for such documents. To rule otherwise, held the SJC, would raise "serious constitutional questions about the validity of that law," because protective orders are within inherent judicial powers guaranteed by Article 30 of the Massachusetts Declaration of Rights. *Fremont*, 459 Mass. at 214. In essence, the SJC narrowed the PRA in order to save it. *Fremont*, then, involved another unique situation where the need for an implied exemption was unusually powerful.

Suffolk and *Fremont* read as the decisions of a court that would add a PRA exemption only in an extraordinary situation, and perhaps only in the two particular situations addressed in those cases. *DaRosa* goes further.

This is not to say that *DaRosa* ends a golden age of judicial restraint in which *expressio unius* was rigidly applied. As humorist James Thurber observed, "[t]here is no exception to the rule that every rule has an exception." Historically, courts did read additional terms into statutes. But they did so circumspectly, usually where satisfied by the existing text that the addition was needed to effectuate the Legislature's purpose in passing the statute: "'The maxim [*expressio unius*] will be disregarded . . . where its application would thwart the legislative intent made apparent by the entire act.'" *Halebian v. Berv*, 457 Mass. 620, 628 (2010). *DaRosa* does not suggest that same fastidiousness about separation of powers. Adding "implied" exemptions for the "fair administration of justice" is, at least presumptively, to *frustrate* the PRA's "fundamental purpose to ensure public access to government documents." *GE*, 429 Mass. at 801.

Whether *DaRosa* is ultimately good or bad for citizens seeking government records is unclear. *DaRosa*'s holding about the scope of exemption (d) impairs the PRA as a tool for accessing government records, and the Court's statements about statutory interpretation threaten further diminishment. That said, the decision arrives just as public dissatisfaction with the PRA — which the Boston Globe recently called "anemic" — has reached a boiling point. In further weakening the PRA, the *DaRosa* decision could have the ironic effect of fueling the ongoing efforts to strengthen it.

DaRosa could also have a broader impact. The decision addresses the PRA only. However, attorneys will almost certainly use it to push for judicial revisions to other statutes, and practitioners could find judges more amenable to doing so. If so, in the courthouses of Massachusetts, a strong expressio may start getting harder to find.

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