

**“WHEN IS A LAWYER NOT A LAWYER?”—AND
OTHER QUESTIONS THAT MUST BE ANSWERED
WHEN ASSERTING THE GOVERNMENTAL
ATTORNEY-CLIENT PRIVILEGE UNDER OPEN
GOVERNMENT LEGISLATION**

I.	OVERVIEW	211
II.	REVIEW OF OPEN GOVERNMENT EXCEPTIONS FOR THE GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE	213
	A. <i>Exceptions Under the Texas Open Meetings Act</i>	213
	1. <i>Pending or Contemplated Litigation</i>	213
	2. <i>Lawyer’s Duty Under the Texas Disciplinary Rules of Professional Conduct</i>	214
	B. <i>Exceptions Under the Texas Public Information Act</i>	215
	1. <i>Information Relating to Litigation</i>	216
	a. <i>Work Product of the Governmental Attorney</i>	217
	b. <i>Reasonably Anticipated Litigation</i>	217
	2. <i>Lawyer’s Duty Under the Texas Rules of Evidence and Texas Disciplinary Rules of Professional Conduct</i>	218
	3. <i>Information Considered Confidential by Law</i>	219
III.	GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE	219
	A. <i>Defining the “Governmental Attorney”</i>	220
	B. <i>Defining the “Governmental Attorney’s Client”</i>	220
	1. <i>“Governmental Attorney’s Client” Defined Under Texas Disciplinary Rules of Professional Conduct</i>	221
	2. <i>“Governmental Attorney’s Client” Defined Under the Control Group Test</i>	221
IV.	PRACTICAL STEPS TO PROTECTING GOVERNMENTAL ATTORNEY- CLIENT COMMUNICATIONS	222
V.	CONCLUSION	223

I. OVERVIEW

Under both the Texas Open Meetings Act¹ (TOMA) and the Texas Public Information Act² (TPIA), Texas upholds a fundamental philosophy of representative government by providing the public with access to information concerning the affairs of government and the official acts of public officials

1. TEX. GOV'T CODE ANN. § 551.001 (Vernon 1994 & Supp. 2002). See generally Kathryn L. Martin, *Understanding TOMA and its Practical Application to State and Local Government*, 2 TEX. TECH J. TEX. ADMIN. L. 145 (2001).

2. TEX. GOV'T CODE ANN. § 552.001 (Vernon 1994 & Supp. 2002) (formerly the Open Records Act).

and employees.³ The public's access is not absolute in that these acts establish certain exceptions where the government can rightfully deny access to meetings and information.⁴ Several such exceptions recognize and address the conflict between an open and honest government and the governmental attorney-client privilege.⁵

The attorney-client privilege is best defined as follows:

- (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.⁶

Simply put, the attorney-client privilege permits clients "to refuse to disclose and to prevent [their attorneys] from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services."⁷ The purpose of this rule is to protect and promote open discussion "between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system."⁸ The Texas Rules of Evidence recognize public entities as "clients."⁹ Therefore, public entities can rightfully claim a governmental attorney-client privilege.

This comment will review the governmental attorney-client exceptions under the Texas open government laws, discuss the governmental attorney-client privilege by defining both the governmental attorney and the governmental attorney's client, and conclude by establishing practical steps to protect governmental attorney-client communications.

3. *Id.* § 552.001(a).

4. *Id.* §§ 551.071-.088, 552.101-.137.

5. *See id.* § 551.071 (excluding private consultations between the governmental body and its attorney about litigation, settlement offers, and matters where the lawyer's duty to the body pursuant to the Texas Disciplinary Rules of Professional Conduct clearly conflict with the Open Meetings Act); *see also id.* § 552.101 (excluding information considered to be confidential by either constitution, statute, or judicial decision); *see also id.* § 552.103 (excluding certain information relating to litigation); *see also id.* § 552.107 (exempting information that the attorney is prohibited from disclosing because of a duty to the client under either the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct).

6. 8 John Henry Wigmore, *Evidence* § 2292, at 554 (rev. vol. 1961).

7. TEX. R. EVID. 503(b)(1); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1994 & Supp. 2002) (TEX. STATE BAR R. art X § 9) (requiring the preservation of the confidential information of one who employed or sought to employ the lawyer).

8. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 1.

9. TEX. R. EVID. 503(a)(1).

II. REVIEW OF OPEN GOVERNMENT EXCEPTIONS FOR THE GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE

Before discussing the existing legal challenges of upholding the governmental attorney-client privilege in an open government, it is important to understand the statutory exceptions that have been established in an attempt to bring these ideals into harmony. Through these statutory exceptions, examples of the kinds of meetings and information in which a governmental client can typically assert the privilege can also be seen. While the statutes are the basis of these exceptions, the Texas Attorney General's Opinions further explain how the exceptions have been and should be applied.

A. Exceptions Under the Texas Open Meetings Act

Upon its adoption, The Texas Open Meetings Act (TOMA) established the fundamental principle that all regular, special, or called meetings of a governmental body must be open to the public.¹⁰ Yet TOMA also established a host of exceptions to this general rule, which permit executive sessions to remain closed.¹¹

In order to assert these exceptions, a majority of the governmental body must first convene in an open meeting for which adequate notice was given.¹² Then, the presiding officer must publicly announce that a closed meeting will be held and identify which exceptions apply.¹³ While in closed session, a tape recording or certified agenda must be made unless the meeting is a private consultation with the body's attorney.¹⁴

One such exception to the general rule permits a governmental body to conduct private consultations with its attorney concerning pending or contemplated litigation and concerning matters in which the attorney has a duty to the governmental body under the Texas Disciplinary Rules of Professional Conduct (TDRPC).¹⁵

1. Pending or Contemplated Litigation

Under section 551.071(1), "[a] governmental body may not conduct a private consultation with its attorney except: (1) when the governmental body seeks the advice of its attorney about: (A) pending or contemplated litigation;

10. TEX. GOV'T CODE ANN. § 551.002 (Vernon 1994). The public is also entitled to receive written notice of the time, place, and subject matter of governmental meetings. *Id.* § 551.041. "Governmental body" is defined in TEX. GOV'T CODE ANN. § 551.001(3).

11. *Id.* §§ 551.071-.086.

12. *Id.* § 551.101.

13. *Id.*

14. *Id.* § 551.103(a); Op. Tex. Att'y Gen. No. JM-840 (1988).

15. TEX. GOV'T CODE ANN. § 551.071 (Vernon 1994).

or (B) a settlement offer."¹⁶ This is a good example of the governmental attorney-client privilege overcoming the policy of open government. As conferring with counsel in the presence of a third party would strip the governmental body of its privilege in regards to the litigation, the privilege is protected through privacy.¹⁷ This consultation may concern settlement offers, legal strategies, or the facts surrounding the litigation.¹⁸

A school board trustee challenged this exception when it was used to bar him from an executive meeting held to discuss the suit he had brought against the remaining trustees.¹⁹ Although each trustee was ordinarily entitled to attend the board meetings, the Office of the Attorney General (OAG) felt the trustees who had been sued had a "right [under the exception of Texas Government Code section 551.071(a)] to communicate privately with their attorney outside of the presence of the opposing party in the lawsuit."²⁰

2. Lawyer's Duty Under the Texas Disciplinary Rules of Professional Conduct

Even without pending or contemplated litigation, TOMA allows governmental bodies to meet with their attorneys in closed sessions to discuss matters in which the duty of the attorney clearly conflicts with the general rule under the TDPRC.²¹ Rule 1.05(b) of TDPRC states that "a lawyer shall not knowingly reveal confidential information of a client or former client to anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."²² According to the OAG, together these provisions incorporate the attorney-client privilege.²³ However, the attorney-client privilege only attaches to a communication that is related to the rendition of legal services.²⁴ Therefore, according to the OAG:

[A] governmental body may hold an executive session to seek or receive the advice of its attorney only with regard to matters in which it seeks the attorney's legal advice or with regard to matters which relate to a specific pending or contemplated legal proceeding. If the discussion does not relate to a specific legal proceeding, the closed door discussion with the attorney must be limited to legal matters. *General discussion of policy, unrelated to*

16. *Id.* § 551.071(1)(A).

17. *See* TEX. R. EVID. 503(b)(1); *see also* Op. Tex. Att'y Gen. No. JM-100 (1983).

18. TEX. GOV'T CODE ANN. § 551.071 (Vernon 1994).

19. Op. Tex. Att'y Gen. No. JM-1004 (1989).

20. *Id.*

21. TEX. GOV'T CODE ANN. § 551.071(2) (Vernon 1994).

22. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05.

23. Op. Tex. Att'y Gen. No. JC-0233 (2000).

24. TEX. R. EVID. 503(b)(1). The distinction between legal and nonlegal services is not easily defined and has created a challenge in applying the exception, which will be discussed in section III.

*legal matters, is not permitted under the language of [Government Code section 551.071] merely because an attorney is present.*²⁵

For example, a governmental body may consult with its attorney in an executive session to discuss the legal issues involved in awarding a contract, but it is restricted from discussing "the merits of a proposed contract, financial considerations, or other nonlegal matters in an executive session held under [the exception in] section 551.071 of the [Texas] Government Code."²⁶

B. Exceptions Under the Texas Public Information Act

Upon its adoption, the Texas Public Information Act (TPIA) established the fundamental principle that all information collected, assembled, or maintained under a law, ordinance, or in connection with the transaction of official business by or for a governmental body must be available to the public during the normal business hours of the governmental body.²⁷ Yet, TPIA also establishes a host of exceptions to this general rule that allow governmental bodies to refuse disclosure of public information.²⁸

In order to assert one of these statutory exceptions after receiving a request for information, a governmental body must request a decision from the OAG within ten days as to whether the information falls under the exception, unless there has been a previous determination regarding the information.²⁹ If the agency fails to make such a request, the information is presumed to be public.³⁰ Members of the public may also submit written comments stating why the information should or should not be released.³¹

The OAG must promptly render a written opinion determining whether the requested information is a public record and if so, whether the stated exception applies.³² By requesting an opinion from the OAG, a governmental body is not prevented from appealing the Attorney General's ruling after receiving a decision that does not allow for an exception.³³ Although opinions

25. Op. Tex. Att'y Gen. No. JC-0233 (2000) (citing Op. Tex. Att'y Gen. No. JM-100 (1983)); *see also* Gardner v. Herring, 21 S.W.3d 767 (Tex. App.—Amarillo 2000, pet. denied) (upholding opinion of Texas Attorney General).

26. Op. Tex. Att'y Gen. No. JC-0233 (2000).

27. TEX. GOV'T CODE ANN. §§ 552.002, .021 (Vernon 1994 & Supp 2002). "Governmental body" is defined in TEX. GOV'T CODE ANN. § 552.003. A non-exclusive list of what can be considered "information" is located in TEX. GOV'T CODE ANN. § 552.022. TPIA applies regardless of whether the governmental attorney is a private attorney or a permanent public attorney. Op. Tex. Att'y Gen. ORD-499 (1981).

28. TEX. GOV'T CODE ANN. §§ 552.101-.137 (Vernon 1994 & Supp. 2002).

29. *Id.* § 552.301(a).

30. *Id.* § 552.302.

31. *Id.* § 552.304.

32. *Id.* § 552.306.

33. *See* Indus. Found. of the S. v. Tex. Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976).

of the OAG are not controlling in court, great weight should be given such opinions since the legislature has specifically delegated the duty of interpreting and enforcing the statutory requirements to the OAG.³⁴

There are three exceptions to the TPIA.³⁵ These exceptions deal with the attorney-client relationship and allow governmental bodies to refuse disclosure of public information that is related to litigation,³⁶ that is prohibited from disclosure because of a duty to a client under Texas Rules of Evidence or the TDPRC,³⁷ or is considered to be confidential by law.³⁸

1. Information Relating to Litigation

Just as meetings of a governmental body concerning litigation are excepted from TOMA, public information relating to litigation is excepted from TPIA.³⁹ Section 552.103 provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
- ...
- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requester applies to the officer for public information for access to or duplication of the information.⁴⁰

The governmental body carries the burden of showing this exception is applicable and can meet the burden by showing that "(1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to litigation."⁴¹

34. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

35. TEX. GOV'T CODE ANN. § 552.103 (Vernon 1994 & Supp. 2002).

36. *Id.*

37. *Id.* § 552.107.

38. *Id.* § 552.101.

39. *Id.* §§ 551.071(A)(1), 552.103.

40. *Id.* § 552.103(a), (c).

41. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1977, no pet.).

a. *Work Product of the Governmental Attorney*

Information relating to litigation includes the governmental attorney's work product made in preparation for pending or reasonably anticipated litigation.⁴² If made prior to the time when litigation is reasonably anticipated, the exception will not apply.⁴³ Work product comprises materials or communications made or mental impressions developed in anticipation of litigation or for trial.⁴⁴

Once civil litigation is concluded, attorney work product may only be withheld under section 552.111 if it was created for trial and in anticipation of civil litigation, and if it consists of or tends to reveal an attorney's mental processes, conclusions, or legal theories.⁴⁵ Section 552.111 states "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]."⁴⁶

b. *Reasonably Anticipated Litigation*

To establish that litigation is reasonably anticipated, a governmental body must provide "concrete evidence [to the OAG] showing that the claim that litigation may ensue is more than mere conjecture."⁴⁷ The OAG has concluded that litigation is reasonably anticipated when a potential opposing party takes the following objective steps to litigation: hires an attorney and asserts an intent to sue through that attorney,⁴⁸ or files a complaint with the Equal Opportunity Commission.⁴⁹ On the other hand, the OAG has decided that litigation is not reasonably anticipated when the potential opposing party does the following: requests information through his attorney without threatening litigation,⁵⁰ or threatens to bring suit against the governmental body but does not take any steps to filing suit.⁵¹

42. Tex. Att'y Gen. ORD-429 (1985); Tex. Att'y Gen. ORD-574 (1990).

43. See *Tex. Dep't of Mental Health & Mental Retardation v. Davis*, 775 S.W.2d 467 (Tex. App.—Austin 1989, orig. proceeding [leave denied]) (holding that findings by state employees after their attorney instructed them to conduct an investigation immediately following the death of a patient at a state school were not work product because litigation was not reasonably anticipated but merely feared).

44. TEX. R. EVID. 192.5(a)(1-2). Even when prepared in anticipation of litigation, some work product falls under the statutory exception to the litigation exception. See *id.* 2.5(c) (establishing exceptions to the work product exception).

45. Tex. Att'y Gen. ORD-647 (1996).

46. TEX. GOV'T CODE ANN. § 552.111 (Vernon 1994).

47. Tex. Att'y Gen. ORD-452 (1986).

48. Tex. Att'y Gen. ORD-555 (1990).

49. Tex. Att'y Gen. ORD-336 (1982).

50. Tex. Att'y Gen. ORD-361 (1983).

51. Tex. Att'y Gen. ORD-331 (1982).

*2. Lawyer's Duty Under the Texas Rules of Evidence and Texas
Disciplinary Rules of Professional Conduct*

Like TOMA, TPIA incorporates the attorney-client privilege to protect governmental information from the requirement of public disclosure.⁵² Under section 552.107, information is excepted from the requirements of public disclosure if:

- (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to a client under the [Texas Rules of Evidence], or the [TDPRS]; or
- (2) a court by order has prohibited disclosure of the information.⁵³

Beyond rule 1.05(b)(1)(ii) of TDPRC, which is also incorporated in the TOMA exception, this TPIA exception incorporates rule 503 of the Texas Rules of Evidence, which states:

A client has a privilege to disclose and to prevent any other person from disclosing confidential communication made for the purpose of facilitating the rendition of professional legal services to the client;

(A) between the client or a representative of the client and the client's lawyer or representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client;

(E) among lawyers and their representatives representing the same client.⁵⁴

Using this exception of the TPIA, both the OAG and the courts have protected the following attorney-client information from public disclosure: an attorney's notes in a case file documenting client confidences, legal advice, or opinion communicated to the client;⁵⁵ an attorney's independent investigation report made for the primary purpose of providing legal services and advice;⁵⁶ and e-mail communications between attorneys and clients.⁵⁷

52. TEX. GOV'T CODE ANN. § 552.107 (Vernon 1994 & Supp. 2002).

53. *Id.*

54. TEX. R. EVID. 503(b).

55. Tex. Att'y Gen. ORD-574 (1991).

56. Harlandale Indep. Sch. Dist. v. Comyn, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied).

57. Tex. Att'y Gen. ORD-4183 (2001).

On the other hand, the OAG has established the following as public information that requires disclosure: settlement agreements to which a governmental body is a party;⁵⁸ purely factual information recounting calls made, meetings attended, and memos sent;⁵⁹ and information that has been communicated to a third party not acting as the client or a representative of the client.⁶⁰

3. Information Considered Confidential by Law

Under section 552.101 of TPIA, "information is excepted from the requirements of [public disclosure] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁶¹ This section works to exclude information that is protected from disclosure by other statutes.⁶² The OAG has permitted sections of the following statutes to protect information under this section: the Texas Labor Code,⁶³ the Texas Tax Code,⁶⁴ and the Texas Business and Commerce Code.⁶⁵ The OAG has also concluded that general constitutional and common law rights to privacy⁶⁶ as well as case decisions are sufficient basis for withholding disclosure under this exception.⁶⁷

III. GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE

Having discussed the statutory exceptions that have already been established, the focus of this paper shifts to the existing challenges of upholding the attorney-client privilege in an open government. These challenges can be divided into two questions: (1) who is the governmental attorney, and (2) who is the governmental attorney's client? By answering these questions, a clearer line can be drawn between communications that are and are not protected by the attorney-client relationship.

58. Tex. Att'y Gen. ORD-658 (1998).

59. Tex. Att'y Gen. ORD-574 (1991).

60. Tex. Att'y Gen. ORD-0911 (2001).

61. TEX. GOV'T CODE ANN. § 552.101 (Vernon 1994).

62. Tex. Att'y Gen. ORD-0911 (2001).

63. *Id.* Section 402.83 of the Labor Code protects the identities of workers who file workers' compensation claims. *Id.*

64. Tex. Att'y Gen. ORD-1576 (2001). Section 111.006 of the Tax Code protects information secured during an audit from public disclosure. *Id.*

65. Tex. Att'y Gen. ORD-1007 (2001). Section 17.61 of the Business and Commerce Code protects all documentary materials the consumer protection division obtains pursuant to investigations. *Id.*

66. Tex. Att'y Gen. ORD-1570 (2001).

67. See Tex. Att'y Gen. ORD-1576 (2001) (recognizing the informer's privilege through *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969)).

A. Defining the "Governmental Attorney"

In order to assert the governmental attorney-client privilege against the requirements of an open government, it is necessary to know who qualifies as a governmental attorney. While it might seem easy to conclude that a governmental attorney is simply an attorney who serves a governmental body, in actuality, a governmental attorney is defined by more than the clients she serves. The types of services an attorney provides most significantly shapes the definition of governmental attorney.

The governmental attorney-client privilege attaches only if the governmental body consults the attorney for the purpose of obtaining professional legal services.⁶⁸ Therefore, the distinction between legal and non-legal services is an important one. Courts have previously held that when an attorney is acting as an accountant,⁶⁹ bail bondsman,⁷⁰ friend,⁷¹ routine investigator,⁷² or provider of child-placement services,⁷³ the attorney-client privilege does not apply. Beyond these rulings, there is little information available to help draw a clear distinction between legal and non-legal services. Therefore, the governmental attorney should expect communications made while providing services outside the typical legal arena to remain unprotected from open government requirements.

B. Defining the "Governmental Attorney's Client"

The greatest challenge of asserting the governmental attorney-client privilege is determining who are the governmental attorney's clients.⁷⁴ This is because a governmental attorney does not often represent a single client but instead represents an entire governmental body. A governmental body does not communicate with one voice but with many.⁷⁵ Realizing this, the question becomes whose communications to the governmental lawyer should be protected under the attorney-client privilege.⁷⁶

Once again, it is necessary to balance the principles of open government and the protection of the privilege. Allowing the communication of the entire

68. TEX. R. EVID. 503(b)(1).

69. *Clayton v. Candia*, 223 S.W.2d 264, 266 (Tex. Civ. App.—Texarkana 1949, no writ).

70. *Cathy v. State*, 467 S.W.2d 472, 473-74 (Tex. Crim. App. 1971).

71. *Modern Woodmen of Am. v. Watkins*, 132 F.2d 352, 354 (5th Cir. 1942).

72. *In re Tex. Farmers Ins. Exchange*, 990 S.W.2d 337, 440 (Tex. App.—Texarkana 1999, orig. proceeding). *But see Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 333-35 (Tex. App.—Austin, 2000, pet. denied) (finding that an investigation conducted by an attorney as a basis for legal services and advice was protected by the attorney-client privilege).

73. *Thacker v. State*, 852 S.W.2d 77, 81-82 (Tex. App.—Austin 1993, writ denied).

74. STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 503.3 (2nd ed. 2001).

75. *Id.*

76. *Id.*

governmental body to fall within the privilege would result in an excessive amount of information being kept from the trier of fact.⁷⁷ On the other hand, without the protection of the attorney-client privilege, a governmental body will not feel free to communicate with its attorney and will not receive effective legal counsel.⁷⁸ In order to resolve this problem, the governmental attorney's client must be defined with great care.

1. "Governmental Attorney's Client" Defined Under Texas Disciplinary Rules of Professional Conduct

Under TDPRS, a governmental attorney hired to represent an organization represents the organization separate and apart from the "directors, officers, employees, members, shareholders or other constituents."⁷⁹ It continues by saying that such an organization speaks through both its officers and its employees.⁸⁰ Therefore, "[w]hen one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by [the attorney-client privilege]."⁸¹

Under this definition, it seems any communication between a member of a governmental body and a governmental attorney is protected under the governmental attorney-client privilege as long as the client's communication stems from her capacity in the governmental body. Consequently, this definition does not draw an even balance between the principles of open government and the attorney-client privilege but weighs heavily in the favor of protecting communications made by members of a governmental body to their attorney. Therefore, other definitions must be explored.

2. "Governmental Attorney's Client" Defined Under the Control Group Test

By using the control group test to define the governmental attorney's clients, the correct balance between the principles of open government and the attorney-client privilege could be achieved. The control group test is currently used in Texas' private sector to determine whose communication is protected under the attorney-client privilege⁸² and "is based on the premise that only an employee who controls the actions of the corporation can personify the

77. *Id.*

78. *Id.*

79. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 cmt. 1.

80. *Id.*

81. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 cmt. 3.

82. *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993, orig. proceeding).

corporation."⁸³ In contrast to the control group test is the subject matter test, which is similar to the definition under the TDPRC and allows employees at any level to gain the protection of the attorney-client privilege.⁸⁴

The control group test was adopted by the Texas Supreme Court⁸⁵ and the Texas Rules of Evidence.⁸⁶ Texas Rule of Evidence 503(a)(2)(A) provides that "[a] 'representative of the client' is a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client."⁸⁷ Therefore, by applying this definition to the public sector, only those members of a governmental body able to make the decision to acquire legal counsel and act upon legal advice receive protection under the attorney-client privilege.⁸⁸

Besides the court's and legislature's adoption of the control group test, the control group test should be used in the public sector because it would be fairly simple to apply. Generally, only someone relatively high in an organization will qualify for the privilege.⁸⁹ Therefore, governmental attorneys should be able to determine in advance whether communications with a client will be protected under the attorney-client privilege.⁹⁰

IV. PRACTICAL STEPS TO PROTECTING GOVERNMENTAL ATTORNEY-CLIENT COMMUNICATIONS

Although some of the following steps were originally established to benefit only city attorneys,⁹¹ they seem applicable to any type of governmental attorney who is interested in protecting attorney-client communications. A governmental attorney can protect communication with her client by doing the following:

1) Taking charge of the situation—following a request by a governmental body to attend a meeting, the governmental attorney should find out the purpose and subject matter of the meeting and exclude non-essential personnel from the meeting.⁹² This will prevent the loss of the attorney-client privilege by protecting communications from being exposed to a third party.⁹³ In the

83. *Id.* at 197.

84. *See* *Upjohn v. United States*, 449 U.S. 383 (1981) (establishing the Court's preference, but not adoption of, the subject matter test).

85. *National Tank*, 851 S.W.3d at 198.

86. TEX. R. EVID. 503(a)(2) (adopting the control group test).

87. *Id.*

88. GOODE, *supra* note 74, at § 503.3.

89. *National Tank*, 851 S.W.3d at 197.

90. *See id.*

91. Jeffery L. Goodman & Jason Zabokrstsky, *The Attorney-Client Privilege & the Municipal Lawyer*, 48 DRAKE L. REV. 665, 674-76 (2000).

92. *Id.*

93. *Id.*

same way, governmental attorneys should make sure information they do not want to be public is not exposed through routine distribution to a third party.⁹⁴

2) Defining their role—since the role of the attorney will impact whether the different forms of communications are privileged or not, it is important to clarify what the governmental body needs its attorney to do.⁹⁵

3) Identifying their clients—while governmental attorneys are most often hired to represent governmental bodies as a whole, they are sometimes hired by governmental bodies to represent individual representatives of a governmental body.⁹⁶ Identifying who the client is prevents unwanted exposure of protected communications to third parties or opposing parties within the governmental body.⁹⁷

4) Waiting until litigation is pending to act—in order to fall under the litigation exceptions of TPIA and TOMA, a governmental attorney must not prematurely act in fear of litigation,⁹⁸ but should wait until the opposing party has taken an actual step towards litigation.⁹⁹

5) Following correct procedure in asserting exceptions—in order to use the attorney-client exceptions provided in both TOMA and TPIA, the governmental attorney must follow the correct procedures outlined prospectively.¹⁰⁰

V. CONCLUSION

The attorney-client privilege and principle of open government stand squarely in conflict. One is the most basic form of individual liberty while the other is a hallmark of a truly democratic republic. Yet when these two fundamental legal principles meet, they work in near harmony through the exceptions laid out in the Texas Open Meetings Act and the Texas Public Information Act.

The challenges that remain for the governmental attorney client-privilege in an open government can be met by the courts and the OAG working to better define legal and non-legal services and through an outright adoption of

94. See *Carmen County v. Hinojosa*, 760 S.W.2d 742 (Tex. App.—Corpus Christi 1998, orig. proceeding [leave denied]) (denying that the attorney-client privilege protects the public disclosure of letters that are routinely sent to three county offices besides the one claiming the privilege).

95. *Id.*

96. *Id.*

97. *Id.*

98. TEX. GOV'T CODE ANN. §§ 551.071(1)(A), 552.103 (Vernon 1994 & Supp. 2002).

99. Tex. Att'y Gen. ORD-452 (1986).

100. See TEX. GOV'T CODE ANN. §§ 551.101, .103(a) (Vernon 1994 & Supp. 2002) (outlining the assertion of exceptions to TOMA); see also *id.* §§ 551.1045, 52.103-06 (outlining the assertion of exceptions to TPIA).

the control group test to better define the governmental attorney's clients.

by Chris M. Riley