The Honorable Anthony Chang, Chairman
and Members of the Senate Judiciary Committee

Dear Mr. Chairman and Members:

Re: S.B. 1413 Relating to Public Agency Meetings, Records.

My name is Thelma Chang. I am a freelance writer who has for the past several years been working with others to strengthen Hawaii's open-meeting and open-records law. I urge your committee to recommend and encourage passage of S.B. 1413.

I express this hope with some urgency for two reasons.

First, now is the time for a decision. The need for this bill is growing, as is evident in the increasing number of lawsuits and other disputes revolving around the interpretation of H.R.S. Chapter 92. Moreover, earlier versions of this bill have been studied and re-studied for at least the past five years. This bill to strengthen and clarify Chapter 92 has received input from a broad array of sources--community groups, individuals like myself and executive-branch officials. S.B. 1413 is a simplified, shortened version of a bill that was scrutinized by the two preceding Legislatur and that has once passed the full Senate.

In a nutshell, the prior legislative history of this bill follow

In the 11th Legislature, a more extensive version was introduced as S.B. 991. It was heard and amended by the Senate Judiciary Committee and then passed by the full Senate. Upon crossover, that bill was amended slightly and passed by the House Committee on Public Employment and Government Operations. But it died when the Speaker referred it to several committees in the closing days of that Legislature.

In the 12th Legislature, an even stronger version of this bill was introduced in response to more grievances about closed-door government expressed by community groups and by individuals--including one state legislator. But it failed to pass either house; it did, however, receive a public hearing by the Senate Committee on Government Operations and County Relations.

For the 13th Legislature, this bill was cut back to take into account input from executive-branch officials, from community organizations and from individuals like myself.

This prolonged scrutiny of S.B. 1413 and its forerunners indicates that there are no advantages to be gained by indecision; in fact, inaction may lead to more headaches for government officials

My second urgent reason for urging passage of S.B. 1413 by both houses is that 1985 is the 10th anniversary of the enactment of the original law in which the Legislature underscored the importance it attaches to access by the public to the working of the state government and its subdivisions. I believe now is the time to strengthen and modernize this public policy so that in its second decade it better addresses the needs of our Islands.

March 5, 1985

Respectfully,

Thelma Chang

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51:30 a.

TESTIMONY OF BEVERLY ANN KEEVER
REGARDING S. B. 1413
RELATING TO PUBLIC AGENCY MEETINGS, RECORDS
AND ESPECIALLY REGARDING THAT PORTION OF SECTION THREE
RELATING TO CLOSED-DOOR MEETINGS BETWEEN A BOARD AND ITS ATTORNEY

Before the Senate Judiciary Committee
Tuesday, March 5, 1985, 8:30 a.m.

My name is Beverly Ann Keever. I have worked as a professional journalist for many years and am currently a journalism educator at the post-secondary level. Because I am teaching this morning and am unable to present oral testimony, I would like the committee to consider this written version and then to pass S.B. 1413.

My testimony will focus on the one provision of S.B. 1413 that has caused the most trouble for the community-interest groups that have through the years supported versions of this bill designed to strengthen Hawaii's open-meeting law. Such community groups as the League of Women Voters, Common Cause, the Hawaii Council of Churches, and the now-inactive Hawaii Committee for the Freedom of the Press have often coordinated their efforts through the Sunshine Law Coalition, of which I am a member and have served as unpaid volunteer coordinator.

The provision that I will discuss affects one of the five exceptions to open meetings as mandated in H.R.S. Chapter 92. That provision in Section 3 of S.B. 1413 reads:

> [(3)] (4) To consult with the board's attorney[;] only in matters relating to an actual, proposed, or threatened lawsuit in which the board or government agency under which the board falls is named as a party;

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The current law has been construed to give blanket permission to justify closed-door meetings to discuss any subject whatsoever when a board meets with its attorney. This subsection of the law has become a catchall loophole enabling a board to hold a closed-door meeting when it was unable to hold it under any of the other four exceptions to the open-meeting law, according to testimony presented in support of earlier versions of this bill. Thus this provision of the current law facilitates the undercutting of the state policy expressed by the Legislature in Section 92-1. The Legislature has specifically provided in Section 92-1 that "the formulation and conduct of public policy -- the discussions, deliberations, decisions, and action of governmental agencies -- shall be conducted as openly as possible."

11th LEGISLATURE

The genesis for amending this provision was the 11th Legislature when S.B. 991 was introduced in 1981 and heard--again by the Senate Judiciary Committee. Coincidentally, its hearing was also held on March 5. But the committee dropped this proposed amendment from the bill before sending it to the full Senate, which then passed the amended version. Although the committee heard several community organizations back the entire bill, it sided with the one paragraph of testimony on this point presented by the office of the attorney general. In that paragraph, the attorney general objected to restricting to actual litigation the subject matter that could justify closing a meeting between a board and its attorney. The written testimony explained:

> "We feel this language is too limited. Oftentimes proposed or threatened litigation must be discussed with a board--to discuss strategy, whether to sue, prosecute, etc., and such discussions are just as important, confidential and protected by the attorney-client privilege, as actual litigation. We feel that such discussions must take place privately to protect the interests of the State."

12th LEGISLATURE

Because of the attorney general's view, the bill revamped for the 12th Legislature included several explicit words cited in the one paragraph of testimony cited above. Instead of only actual litigation, a closed-door meeting could then be held also to discuss proposed or threatened litigation.

Despite the inclusion of these key words, however, the attorney general's office again opposed this provision--this time in seven pages of testimony. His opposition this time largely hinged on the attorney-client privilege. These fresh objections were then answered in writing by the Sunshine Law Coalition, at the request of the chairman of the Senate Committee on Government Operations and County Relations. I would like to summarize the highlights of that rebuttal so that they may be considered simultaneously if the attorney general's office again opposes this provision.

First, the attorney general's testimony glosses over the fact that the Legislature has provided guidelines for the holding of executive sessions on other matters but has not provided any such guidelines with reference to consultations with lawyers. And the loose language used by the attorney general's representative shows why it is necessary to provide clear guidelines.

At one point there is reference to "consultation with attorneys that must of necessity require private deliberation." But in the next sentence there is reference to "the sanctity of the private nature of the consultation of the board as a client with the board's attorney."

The first reference is, of course, consistent with the Legislature's policy as established in Section 92-1. The second reference, however, is so vague and ambiguous that it clearly flies in the face of that policy. It ignores the fact that not all consultations between a board and its attorney must necessarily require a private deliberation. Certainly, in the private sector, where the public has no interest, clients converse in private with their attorneys on a whole panoply of matters. But, when a government board is the client -- and the public is embodied as a part of that client -- then the balancing test prescribed by the Legislature must be made. That is the meeting must "be conducted as openly as possible."

For example, a closed door meeting may serve the public interest better than an open meeting when it involves actual, proposed or threatened litigation because it enhances the State's chances of protecting the larger public interest. The short term disadvantages of secrecy thus are outweighed by the long-term public gain.

The Legislature needs to be as specific in this portion of the bill as it was in that portion wherein it provided for executive sessions only "to deliberate concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property." The

proposed language in S.B. 1413 would provide this clarity and would avoid loose statements such as those made by the attorney general's representative.

Second, the attorney general's argument that the sanctity of the attorney-client privilege protected all discussions between a board and its attorney fails to apply in numerous other states. A tabulation made in 1983 by the Coalition for the Senate Committee indicated that nearly 50 percent of the remaining 49 states restrict discussions to litigation-related, quasi-judicial or similarly specific matters when a board is permitted to close its doors to meet with its attorney. The tabulation of the compilation on this point contained in the open-meeting statutes of all 50 states showed the following breakdown:

> 15 states restrict to LITIGATION, PENDING OR IMMINENT LITIGATION, OR POTENTIAL LITIGATION the subject matter to be discussed behind closed doors when a board meets with its attorney;
>
> 6 states restrict to STRATEGY SESSIONS ON COLLECTIVE BARGAINING AND/OR NEGOTIATION WITH RESPECT TO LITIGATION, COLLECTIVE BARGAINING, AND/OR CLAIMS;
>
> 2 states restrict to QUASI-JUDICIAL FUNCTIONS the subject matter to be discussed behind closed doors when a board meets with its attorney.

I will attach as part of this testimony the state-by-state compendium of this research. Although the precise figures may have changed since 1983, I believe that the order of magnitude they suggest is still significant.

Third, the federal Government In The Sunshine Act restricts even more than does the Senate bill the nature of litigation-related matters that can be discussed behind closed doors by a

federal board and its attorney. The federal Government in the Sunshine Act provides that every portion of every meeting of an agency shall be open, with 10 enumerated exceptions. The sole exception relevant here permits closed-door meetings that

> "specifically concern the agency's issuance of a subpena [sic], or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing."

I hope these three arguments persuade the committee to retain this provision in S.B. 1413--and then to pass the entire bill.

Mahalo nui loa for your consideration of this testimony and for your decision to hold a public hearing on this bill that is so important for keeping the public in touch with and informed about its government.

Respectfully submitted,

Beverly Ann Keever

Attachment: 1

COMPILATION OF STATES THAT RESTRICT THE SUBJECT MATTER THAT MAY LEGALLY BE DISCUSSED BEHIND CLOSED DOORS WHEN A GOVERNMENT BOARD MEETS WITH ITS ATTORNEY

15 STATES THAT RESTRICT TO LITIGATION, PENDING LITIGATION, IMMINENT LITIGATION, OR POTENTIAL LITIGATION THE SUBJECT MATTER TO BE DISCUSSED BEHIND CLOSED DOORS WHEN A BOARD MEETS WITH ITS ATTORNEY:

- Colorado
- Illinois (interpreted as actual litigation by appellate court)
- Iowa
- Kentucky
- Maine
- Michigan
- Missouri
- New York
- North Carolina
- Ohio
- Oregon
- Rhode Island
- Texas
- Virginia
- Wyoming

6 STATES THAT RESTRICT SUBJECT MATTER TO STRATEGY SESSIONS AND/OR NEGOTIATION WITH RESPECT TO LITIGATION, COLLECTIVE BARGAINING AND/OR CLAIMS:

- Connecticut
- Delaware
- Louisiana
- Montana
- Nebraska
- New Jersey

2 STATES THAT RESTRICT TO QUASI-JUDICIAL FUNCTIONS THE SUBJECT MATTER TO BE DISCUSSED BEHIND CLOSED DOORS WHEN A BOARD MEETS WITH ITS ATTORNEY:

- Washington
- Wyoming

Tabulation made March 7, 1983, by Sunshine Law Coalition based on Common Cause state-by-state survey made about two years ago.

League of Women Voters

49 SOUTH HOTEL STREET, SUITE 314 HONOLULU, HAWAII 96813

March 5, 1985

Senator Anthony K.U. Chang, Chairman
Committee on the Judiciary

Testimony from: League of Women Voters of Hawaii
Sherrie Fessler, Member, Sunshine Co-alition

Re: S.B. No. 1413 Relating to Public Agency Meetings and Records

The League of Women Voters of Hawaii endorses this bill. Since 1975, when the Sunshine Law (Chapter 92, HRS) was enacted, most government agencies have tried to observe the spirit of the statute-- to conduct the public's business as openly as possible. Abuses have occurred and efforts have been made to amend the law.

S.B. No. 1413 had its genesis in the 11th Legislature as S.B. No. 991. It passed the Senate Judiciary Committee, with amendment, and the full Senate. In 1982, it passed the House Committee on Public Employment and Government Operations. In the closing days of the Legislature, it was referred to several committees and died without additional hearings.

In the 12th Legislature, a revised bill was introduced in the Senate as S.B. No. 564 and in the House as H.B. No. 1186. In the Senate, the bill was held by the Committee on Government Operations and County Relations. In the House, the bill was not heard in the Committee on the Judiciary.

League endorsed all of the previous bills. We would like to give our reasons for supporting S.B. No. 1413:

(Sec. 92-3) The right of a citizen to address a board must be protected. Other boards should not follow the lead of the Board of Regents, which requires at least 24 hour advance notice for an individual to speak before it. Our intent is to preserve access to testify. The language of this amendment needs some clarification, and we suggest the following:

> The boards shall afford all interested persons REASONABLE ACCESS to submit data, views, or arguments, orally or in writing, on any agenda item.

(Sec. 92-4) A citizen who accepts service on a government board should attend its meetings. Under the existing statute, a nine member board with a 1/3 quorum provision could adjourn into executive session on the vote of just two members. Changing the law to a majority of members to which the board is entitled could encourage members to attend and ensure a more democratic environment.

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The reasons for executive session are stated in the law. Members should know why they are voting for closed session and inform the attending public. Members should not vote for closed session and then seek a qualifying reason.

(Sec. 92-5 (a)) The present law does not specify the subject matter or the purpose of consultation with the board's attorney. As a result, a board could have its attorney attend a meeting to consult and circumvent the effect of the law. League feels closed-door discussions should be limited to matters related to actual, proposed or threatened lawsuits to which the board is or may be named as a party. The words PROPOSED OR THREATENED were added to meet the Attorney General's objections in the 11th Legislature. In the 12th Legislature, the Attorney General raised new objections to limiting subject matter based on attorney-client privilege. In our representative form of government, board members are surrogates of the people. The client is the public.

(Sec. 92-5 (b)) The League contends that in the spirit of Chapter 92, deliberation and decision-making should be conducted openly. This preserves the declared intent of the law-- to protect the people's right to know.

(Sec. 92-7 (a)) The policy of government agencies about public notification of executive session in advance is inconsistent. If a government agency lists executive session, there is rarely a reason given for the closed-door meeting.

(Sec. 92-7 (b)) Citizens have been frustrated by some boards which place important items last on the agenda and/or continue the item to another date. The effect is to cut off debate and move decision-making to a later day.

(Sec. 92-12) League approves attempts to clarify the role of the Attorney General by directing the Attorney General to investigate a complaint brought by a citizen. Under existing law, the only recourse a citizen may have to a violation is to ask the Attorney General to enforce the law. League also approves establishing the citizen's right to bring suit for violations of this law.

(Sec. 92-51 (b)) Access to public records is a citizen's right. A citizen should not be intimidated by having to state a reason when exercising this right.

(Sec. 92-52) The intent of the proposed language is to discourage frivolous suits.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

HONOLULU BRANCH
1802 KEEAUMOKU STREET
HONOLULU, HAWAII 96822 • PHONE: 537-4702

March 5, 1985

SENATOR ANTHONY K.U. CHANG, Chairman
Committee on the Judiciary

TESTIMONY FROM: AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
HAWAII PACIFIC DIVISION
Sherrie Fessler, Legislative Chair
Honolulu Branch

RE: S.B. No. 1413 Relating to Public Agency Meetings and Records

The American Association of University Women (AAUW), Hawaii Pacific Division, strongly supports passage of this bill.

This year marks the 10th anniversary of Hawaii's Sunshine Law, Chapter 92, Hawaii Revised Statutes. The introductory portion of the law eloquently states its intent-- to make government as open as possible in order to protect the public's interest. Since the law's enactment, sunshine has not become the accepted way of doing public business. There have been violations of the spirit of sunshine as well as efforts to circumvent the letter of the law.

Shortly after passage, some portions of the law were recognized as 'gray', but there have been few substantive changes since enactment. S.B. No. 1413 represents nearly five years of co-operative effort on the part of government officials, interested citizens and organizations to achieve compromise language. The proposed amendments do not repeal any portion of the law; they are an attempt to clarify ambiguities.

Sec. 92-3: The open meetings provision has been expanded to allow citizens to give testimony. We believe citizen participation is key to open government. In its most elementary form, participation is the opportunity to express a personal belief or opinion.

Sec. 92-4: The changes in the executive meeting provision accomplish two things. First, it ensures full board participation. A majority of the members to which a board is entitled is required to close a meeting. Second, it reduces public cynacism. Both members of the board and the public should know why a meeting is closed. The minutes of such meetings are often not available to the public.

Sec. 92-5: The revisions of the exceptions provision are in response to concerns expressed by boards administered by the Department of Commerce and Consumer Affairs and the Attorney General. Subsection (a) at (1) was added to protect personal information about applicants for vocational and professional

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licenses. Subsection (a) at (4) is a carefully considered revision, incorporating language suggested by the Attorney General, specificly, "proposed" and "threatened" in relation to lawsuit. As originally enacted, the law permits any subject whatsoever to be discussed in executive session. To protect the public's right to know, we believe there should be guidelines limiting subject matter. This is in keeping with the federal Government in the Sunshine Act and the sunshine laws of approximately half the states. The addition at subsection (b) reaffirms the declared policy of open deliberation and decision making.

Sec. 92-7: Expanding notice to include anticipated executive meetings extends a common courtesy to the public; publishing the reason for executive session, protects the public's right to know. The provision to prohibit continuing a meeting to a later date ensures the public's right to participate.

Sec. 92-12: Enforcement is strengthened by enjoining the Attorney General and Prosecuting Attorney to investigate a complaint and by providing citizens the right to sue. We believe citizen participation includes making use of the Sunshine Law.

Sec. 92-51: The attitude of some public officials makes gaining access to public records a frustrating experience. We believe a citizen should not be intimidated by having to state a reason to examine public records. (I can testify to my personal experiences.

Sec. 92-52: Both time and expense are involved when a citizen cares enough to exercise his rights. In criminal cases, the rights of the individual of modest means are protected. In civil cases, we believe the individual should also have the opportunity to claim his rights without financial consideration. Giving courts the option to award attorney fees and court costs to a successful plaintiff accomplishes this. The court is in the best position to judge if an individual warrants compensation to prevent financial injury.

As Hawaii's Sunshine Law begins its second decade, AAUW is preparing to strengthen further its commitment to sunshine in government. In June at our national biennial convention, we will adopt the following legislative position: AAUW supports measures to ensure open, democratic governmental decision-making processes with maximum opportunity for citizen participation.

In closing, I would like to quote a member of this committee. At a workshop in December 1984, according to the 1985 Legislative Action Yellow Pages, Senator Kawasaki said:

> Government is a reflection of its people. Citizen participation is required for democracy to work. Democracy does not work as well as it should because people do not care.

On behalf of AAUW, I am here to tell this committee we care, and we share the Senator's belief in citizen participation.

PRESENTATION OF THE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
TO THE
SENATE COMMITTEE ON JUDICIARY

THIRTEENTH STATE LEGISLATURE
REGULAR SESSION

March 5, 1985

STATEMENT ON SENATE BILL NO. 1413

THE HONORABLE ANTHONY K.U. CHANG, CHAIRMAN,
AND THE MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs has no objections to Senate Bill No. 1413. We appreciate the reasons for such amendments and believe that they have been drafted to address the problems which have occurred without creating new problems or burdens for our boards and commissions. We cannot of course speak for the Attorney General's Office which is given certain responsibilities under this measure.

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COMMON CAUSE/HAWAII

250 S. Hotel St., Rm. 209, Honolulu, HI 96813 Tel: 533-6996/538-7244

TESTIMONY IN SUPPORT OF S.B. 1413
"RELATING TO PUBLIC AGENCY MEETINGS AND RECORDS"

Presented by Ian Lind, executive director, Common Cause/Hawaii
Senate Committee on Judiciary, March 5, 1985

Common Cause supports passage of S.B. 1413 with one amendment. We believe that this bill will strengthen the Sunshine Law by clarifying certain areas of ambiguity and by eliminating certain loopholes which can presently be used to frustrate the public's "right to know".

This bill has been informed by extensive discussions between members of the Sunshine Law Coalition and those who have testified against earlier versions of this bill in prior legislative sessions. The proposals are, in general, well thought out and focused on significant problems with the current statute.

One major set of amendments relate to executive sessions. Section 92-4 is amended to provide that a majority of the members of a board must approve before a meeting can be closed to the public. One proposed amendment to Section 92-5(a) would allow boards which grant professional and vocational licenses to consider personal information in executive session; a second would restrict Section 92-5(a) to consultations with a board's attorney only in matters related to "actual, proposed, or threatened litigation". Finally, boards would be prohibited from actually making final decisions in any executive session.

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The second major set of amendments relate to enforcement, and strengthen the right of individuals to sue in order to protect their rights under the law.

The only change we would propose would be in Section 92-12(c) to eliminate the potential award of court costs against a plaintiff unless a suit is found to be frivolous. To assess court costs in other cases would seriously discourage any person from seeking legal remedies, and would seriously undermine the effectiveness of the Sunshine Law.

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HONOLULU COMMUNITY MEDIA COUNCIL

POST OFFICE BOX 22415 HONOLULU, HAWAII 96822

March 4, 1985

The Honorable Neil Abercrombie
State Senate
Room 203, State Capitol
Honolulu, Hawaii 96813

Dear Senator Abercrombie,

The Honolulu Community-Media Council knows that open meetings encourage honest government.

In 1974 and 1975, it led a broad community effort to enact a "sunshine" law. That law was passed in 1975.

On this - the tenth anniversary of our "Sunshine" Law - we are pleased that you are sponsoring S. B. 1413 to clarify and strengthen areas that will make it stronger and more effective.

We commend you and support your efforts in this direction.

Sincerely yours,

Seymour Lutzky

Seymour Lutzky,
Chair.

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TESTIMONY OF MICHAEL A. LILLY
ATTORNEY GENERAL OF THE STATE OF HAWAII

ON S.B. NO. 1413

RELATING TO PUBLIC AGENCY MEETINGS AND RECORDS
Before the Senate Committee on Judiciary
Tuesday, March 5, 1985, at 8:30 a.m.
Senate Conference Room 4, State Capitol

The Honorable Chairperson and Committee Members:

The Department of the Attorney General supports the concept of open government, but has reservations about certain provisions of this bill.

SUMMARY

The amendment made to section 92-5(a)(3), Hawaii Revised Statutes, in section 3 of the bill limits confidential attorney-client board communications to actual litigation where the board is a named party. This limitation is too narrow.

The Department of the Attorney General has reservations about attorney fees awards which would be allowed by this bill. The amendment made to section 92-52, Hawaii Revised Statutes, in section 7 of the bill provides for an award of attorneys' fees only to successful plaintiffs. This is unfair.

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DISCUSSION

We believe that boards should be able to consult with their attorneys to obtain the best advice possible, just as private parties do, and obtaining the best advice sometimes requires confidentiality so that full disclosure of facts can be made freely to the attorney. Section 92-5(a)(3), Hawaii Revised Statutes, presently allows this and should remain unamended.

In general, present law gives all parties a privilege of confidential communications between attorney and client. Such communications cannot be forced to be disclosed in court, and lawyers must claim the privilege for their clients. Generally, see Rule 503 of the Hawaii Rules of Evidence enacted as Chapter 626, Hawaii Revised Statutes; McKeague v. Freitas, 40 Haw. 108 (1953), and Wery v. Pacific Trust Co., 33 Haw. 701 (1936); 81 Am. Jur. 2d Witnesses §§ 172-229 and 97 C.J.S. Witnesses §§ 276-292.

Under the attorney-client privilege, when a party seeks legal advice from an attorney, communications relevant to such purpose made in confidence by the client are protected from disclosure. The rule seeks to secure free communications between attorney and client and to permit full disclosure of all facts and circumstances by the client to its attorney. The attorney may then act with full and complete understanding of the matters in which the attorney is employed, and the attorney is able to

better advise the client and properly and intelligently serve the client. The rule promotes greater freedom of consultation between clients and their lawyers.

The attorney-client privilege extends to matters beside lawsuits, so long as the consultation concerns legal rights and obligations. The privilege exists not only when advice is sought regarding pending or impending litigation, but also in any case where the client seeks professional legal advice or assistance. Thus, the attorney-client privilege applies regardless of whether a lawsuit is potential or actual.

Because the attorney-client privilege protects the confidential communication between the attorney and client, if the communication is public, the privilege does not apply. Communication in the presence of, or even overheard by, third persons other than confidential agents is generally not confidential and loses the privilege. If a board consults with its attorney in an open meeting, the privilege is lost.

Without the privilege, boards may not adequately inform their attorneys of facts and may receive misguided or misguiding legal advice as a result. This can damage the State. The loss of the privilege may also enable private attorneys or their investigators to fish for materials for lawsuits attacking the public treasury.