



## Exception for Attorney-Client Privilege

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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**Reference Number:** MTAS-421

The Tennessee Supreme Court used similar reasoning to determine when meetings between multiple members of a governing body and their attorney concerning pending litigation are required to be open. Although there is no attorney-client privilege exception explicitly set out in the Tennessee Open Meetings Act (hereinafter "TOMA"), the court found that an exception for such communications exists based upon the language in the TOMA that reads "except as provided by the Constitution of Tennessee." The Tennessee Supreme Court held:

The majority of states have fashioned an exception to their states' open meeting laws to permit private attorney-client consultation on pending legal matters even where the statute itself makes no such express exception ... Two approaches, both based upon the same policy consideration, are given for permitting this exception: (1) the evidentiary privilege between lawyer and client and (2) the attorney's ethical duty not to betray the confidences of his client ... we believe the second approach, the attorney's ethical duty to preserve the confidences and secrets of his client, provides a better basis for establishing an exception to the Open Meetings Act. *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 332-333 (Tenn. 1984).

The exception has also been applied to discussions between multiple members of a governing body and their attorney concerning pending controversies that have not yet reached litigation. *Van Hooser v. Warren County Board of Education*, 807 S.W.2d 230 (Tenn. 1991). But not all meetings between multiple members of a governing body and their attorney to discuss pending or threatened litigation may be closed to the public. The application of the exception, whether litigation is threatened or pending, depends on the discussion that takes place. The court in *Smith County* held:

Clients may provide counsel with facts and information regarding the lawsuit and counsel may advise them about the legal ramifications of those facts and the information given to him. However, *once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon the advise of counsel, whether it be settlement or otherwise, such discussion shall be open to the public* and failure to do so shall constitute a clear violation of the Open Meetings Act. *Id.* at 334 (*emphasis added*).

After the members of the governing body provide the attorney facts and information related to the litigation or controversy and the attorney provides the governing body legal advise on the issues, all discussions related to what actions to take and any decisions made related to those discussions must take place in an adequately noticed public meeting.

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