
The Massachusetts Approach to the Intersection of Governmental Attorney-Client Privilege and Open Government Laws

*“Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately [W]hen government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”*¹

I. INTRODUCTION

President Lyndon Johnson secured the public’s right to know the inner workings of government by signing the Freedom of Information Act² (FOIA) into law in 1966.³ Congress did not believe that the right to this information was absolute and carved out exemptions in the FOIA retaining privileges that were available at common law.⁴ In the decades following the FOIA’s passage, a significant judicial tendency emerged: courts began extending the attorney-client privilege to organizational clients, such as corporations, and then, by analogy, to state and local governments.⁵ The FOIA represents an attempt to

1. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

2. 5 U.S.C. § 552 (2006).

3. See generally HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW* 1-61 (Greenwood Press 1999) (examining growth of public’s right to know movement). The press acted as a driving force in lobbying the government to enact legislation that would allow greater disclosure. *Id.* at 14-28. Before the FOIA, the government regularly exercised its power to deny requests for records. See *infra* note 67 (detailing government power to deny records request). The public’s right-to-know movement culminated in the passage of the FOIA. FOERSTEL, *supra*, at 33-42. The citizens’ ability to examine the inner workings of their government is the fundamental formulation of the public’s right to know. *Id.* at 1; see also Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government’s up to*, 11 COMM. L. & POL’Y 511, 520-32 (2006) (demonstrating how freedom to access government information movement resulted in passage of FOIA).

4. See 5 U.S.C. § 552(b) (enumerating statutory exemptions). For example, the FOIA does not apply to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” *Id.* The phrase “would not be available at law” creates an exception for documents that would be privileged in civil discovery. See P. STEPHEN GIDIÈRE III, *THE FEDERAL INFORMATION MANUAL* 245 (2006) (examining Exemption 5’s incorporation of privilege into FOIA). A document that is privileged in civil discovery is also privileged under the FOIA. *Id.* at 248.

5. See Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 540-45 (2002) (observing rise in attorney-client privilege claims contemporaneous with passage of FOIA); Kerri R. Blumenauer, Note, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, 75

create an open and transparent government.⁶ Conversely, the extension of attorney-client privilege to government officials facilitated communication between officials and attorneys while simultaneously ensuring the confidentiality of government records.⁷ These two developments set the stage for two uncertainties in the law.⁸ First, to what extent, if any, does a governmental attorney-client privilege exist, and if it exists, do public records laws negate the privilege?⁹

Often cited as one of the oldest and most necessary privileges, the attorney-client privilege has a long history in the common law.¹⁰ The privilege encourages “open and frank” communications between attorney and client by barring forced disclosure of their private communications.¹¹ Courts frequently encounter difficulty determining who constitutes a “client” when adjudicating attorney-client privilege controversies, especially in the government context.¹² To further complicate the problem, the nascent governmental attorney-client

FORDHAM L. REV. 75, 80-83 (2006) (exploring growth of governmental attorney-client privilege). Courts treated governments as organizational clients in the same manner as corporations, which had the benefit of the attorney-client privilege. See *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (recognizing attorney-client privilege in corporate context); *Ross v. City of Memphis*, 423 F.3d 596, 601-02 (6th Cir. 2005) (accepting justifications for corporate privilege as persuasive for finding governmental privilege).

6. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citing informed citizenry as basic purpose of FOIA); *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2nd Cir. 1999) (noting FOIA enacted to promote honest and open government); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 76 (D.C. Cir. 1982) (recognizing FOIA evinces congressional concern regarding open government); FOERSTEL, *supra* note 3, at 33-42 (detailing legislature's attempt to create open government with FOIA).

7. See GIDIÈRE, *supra* note 4, at 248-49 (noting attorney-client privilege falls under Exemption 5 privileges). The FOIA incorporates common-law attorney-client privilege into Exemption 5, which creates a mechanism for government entities to circumvent liberal access to records. *Id.* at 245-49.

8. See generally *infra* Part II.B (examining governmental attorney-client privilege development); Part II.C (examining open-government statutes).

9. See generally *infra* Part II.B (analyzing whether governmental attorney-client privilege affected by open-government statutes).

10. See *infra* notes 25-27 and accompanying text (exploring history of attorney-client privilege).

11. See, e.g., *Swindler & Berlin v. United States*, 524 U.S. 399, 407 (1998) (holding posthumous disclosures of attorney-client privileged information would hinder full and frank communications); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (noting privilege intended to foster open and frank communication between attorney and client); *Foster v. Hall*, 29 Mass. (1 Pick.) 89, 94 (1831) (noting importance of facilitating communication between attorney and client); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1688-90 (1999) (examining justifications for attorney-client privilege). Clients who understand communications are privileged will be more likely to fully disclose information to their attorneys and, in doing so, serve the public interest. Chud, *supra*, at 1689. The privilege removes the fear of disclosure and encourages clients to discuss potentially damaging information. *Id.* at 1690.

12. See 24 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5475 (2007) (noting uncertainty whether governments could claim attorney-client privilege); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 73 cmt. c (2000) (recommending client status for corporations). The Restatement also posits that government entities should be considered clients in some circumstances. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 74 cmt. b (2000). Proposed Federal Rule of Evidence 503(a)(1) would have extended the attorney-client privilege to government entities, but it was rejected. *Id.*; WRIGHT & MILLER, *supra*, § 5475. A majority of courts, however, have assumed that a government entity can use the attorney-client privilege. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 74 cmt. b (2000); WRIGHT, *supra*, § 5475.

privilege comes up against a proliferation of legislation requiring open and transparent government.¹³

Laws requiring openness or transparency vary from state to state, but all states have statutes comparable to the FOIA.¹⁴ By making government proceedings and records public, the various statutes intend to create an informed citizenry,¹⁵ provide a means for holding governmental institutions accountable,¹⁶ and build an open and transparent government.¹⁷ These fundamental principles create an inherent tension between open records laws and the governmental attorney-client privilege.

The Supreme Judicial Court of Massachusetts (SJC) recently addressed the tension between public records laws and the governmental attorney-client privilege.¹⁸ In *Suffolk Construction Co., v. Division of Capital Asset*

13. See, e.g., Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 567-68 (1993) (acknowledging some form of public right to know legislation in each state); Paul Haridakis, *Citizen Access and Government Secrecy*, 25 ST. LOUIS U. PUB. L. REV. 3, 12 (2006) (detailing passage of open meeting and/or open records laws in all state legislatures); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 36-38 (2005) (exploring growth of public's right to know in relation to FOIA). Before the FOIA, the government could deny access to information very easily. Papandrea, *supra*, at 37. Although some states already had statutes guaranteeing public access to government information, many states enacted similar legislation after the passage of the FOIA. See 1 CHARLES H. KOCH JR., ADMINISTRATIVE LAW AND PRACTICE § 3.40 (2d ed. 2007) (describing post-FOIA growth of state statutes guaranteeing open records); Ira Bloom, *Freedom Of Information Laws in the Digital Age: The Death Knell of Informational Privacy*, 12 RICH. J.L. & TECH. 9, 37 (2006) (noting enactment of state-level freedom of information statutes following FOIA).

14. See Bloom, *supra* note 13, at 37 (acknowledging all fifty states have some form of freedom of information statute). This Note does not attempt to categorize, explain or analyze all fifty of the state open government or similar statutes. Rather, this Note focuses on the public records law in Massachusetts and, to a lesser extent, the FOIA, because many states use it as a model. By exploring the interaction between the Massachusetts public records law and the governmental attorney-client privilege, this Note attempts to examine Massachusetts as an example that is representative of a larger issue. See *infra* Part II.D (examining resolution of open-government law and governmental attorney-client privilege in Massachusetts).

15. See *Asbury Park Press v. Ocean County Prosecutor's Office*, 864 A.2d 446 (N.J. Super. 2004) (stating New Jersey's Open Public Records Act intended to enhance public knowledge). The New Jersey Open Public Records Act helps minimize the potential for corruption and wrongdoing by creating an informed public. *Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 874 A.2d 1064, 1074 (N.J. 2005) (stating purpose of New Jersey Open Public Records Act).

16. See *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974) (explaining FOIA intended to open administrative operations to public scrutiny); *Int'l Fed'n of Prof'l & Technical Eng'rs v. Superior Court*, 165 P.3d 488, 492-93 (Cal. 2007) (reasoning access to government files helps citizens hold government accountable). The Supreme Court of California noted that the California legislature intended to create governmental accountability by passing a statute that secured the right to access public records, and this idea was subsequently adopted into the California Constitution. *Int'l Fed'n of Prof'l & Technical Eng'rs*, 165 P.3d at 492. The citizen's ability to hold governments accountable is a fundamental principle of democracy. *Id.*

17. See *Sapp Roofing Co. v. Sheets Metal Workers' Intern. Ass'n.*, 713 A.2d 627, 629 (Pa. 1998) (explaining motivation behind state freedom of information act to promote government transparency). Although denying a plaintiff's petition requesting documents, the Supreme Court of Pennsylvania noted that the motivation behind Pennsylvania's Right to Know Act was to ensure that the public could see the inner workings of government. *Id.*

18. See *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 45-46 (Mass. 2007) (rejecting

Management,¹⁹ the SJC resolved the question of whether or not a public records law extinguished the attorney-client privilege for government entities.²⁰ The SJC's ruling solidified the governmental attorney-client privilege in Massachusetts and resolved a conflict that many states and the federal judiciary are still struggling to resolve.²¹

This Note first explores the history of the attorney-client privilege and the governmental attorney-client privilege in both Massachusetts and the United States.²² The Note then moves on to an examination of public records laws and the recent *Suffolk Construction* case that established the "Massachusetts approach."²³ Lastly, this Note explores the SJC's approach to examining the nexus between statutorily created rights to information and common-law shields to such access and, given the underlying policy concerns, whether such an approach is appropriate.²⁴

II. HISTORY

A. History of the Attorney-Client Privilege

Courts recognize a privilege for communications between attorney and client in order to facilitate communication, promote complete disclosure so that a client can receive fully informed legal advice without fear of reprisal, and ensure the administration of justice through effective legal representation.²⁵

argument public records law abrogates governmental attorney-client privilege).

19. 870 N.E.2d 33 (Mass. 2007).

20. *Id.* at 40 (stating issue and holding attorney-client privilege not extinguished). The SJC rejected the argument that the public records law abrogated governmental attorney-client privilege. *Id.*

21. See Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 164 (2007) (discussing ambiguity of existence of governmental attorney-client privilege). Federal circuits have reached different conclusions regarding the existence of the governmental attorney-client privilege. *Id.* Further, many courts have wrestled over whether the privilege applies alongside public records laws. *Id.* at 183-84.

22. See *infra* Part II.A (exploring attorney-client privilege); Parts II.B.1-2 (examining governmental attorney-client privilege in Massachusetts and United States).

23. See *infra* Part II.C (examining public record laws); Part II.D (detailing *Suffolk* case history and reasoning).

24. See *infra* Part III.C (analyzing approach taken in *Suffolk* decision); Part IV (arguing court did not adequately weigh countervailing policies).

25. See, e.g., *Hanover Ins. Co. v. Rapo & Jepsen Ins. Serv., Inc.*, 870 N.E.2d 1105, 1111 (Mass. 2007) (summarizing policy purpose of attorney-client privilege to secure adequate legal advice); *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (observing attorney-client privilege enables full disclosure despite potentially embarrassing or damaging nature of facts); *Purcell v. Dist. Attorney*, 676 N.E.2d 436, 438 (Mass. 1997) (recognizing attorney-client privilege intends to eliminate client's apprehension of disclosure); *Hatton v. Robinson*, 31 Mass. (1 Pick.) 416, 419 (1883) (observing administration of justice hindered in absence of attorney-client privilege); see also *supra* note 11 and accompanying text (exploring policy rationale for attorney-client privilege). The availability of adequate legal advice to a client is essential to a just result. *Hanover Ins. Co.*, 870 N.E.2d at 1111. If clients were not forthcoming due to fear of disclosing information, they would not enjoy the benefit of legal expertise. *Id.* Although the attorney-client privilege limits the availability of evidence, not granting such a privilege would result in inadequate legal services and

The attorney-client privilege has been one of the longest standing privileges in American law because of these important policy considerations.²⁶ In Massachusetts, the privilege traces its origins to a number of early nineteenth-century cases that recognized the importance of the attorney-client privilege and adopted it from English common law.²⁷

The privilege does, however, come at a cost as it inevitably restricts the amount of evidence that a court may consider, thereby restricting the public's fundamental "right to evidence."²⁸ As a result, courts engage in a balancing test to determine whether the recognition of a privilege will serve a public good that outweighs the harm of excluding evidence.²⁹ The attorney-client privilege

cause a greater harm. *Id.* The *Hatton* court enunciated one of the earliest formulations of the importance of this privilege, stating that clients

[S]hould 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.

31 Mass. (1 Pick.) at 422.

26. See, e.g., *Swindler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (recognizing attorney-client privilege as one of oldest); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (exploring history of attorney-client privilege); *Hanks v. Klein*, No. WOCV2003-02440, 2006 WL 2848012, at *3 (Mass. Super. Sept. 27, 2006) (noting long recognition of attorney-client privilege). In the seminal *Upjohn* case the Court stated that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." 449 U.S. at 389 (citations omitted); see also Sarah A. Rana, Note, *Restricting the Attorney-Client Privilege: Necessary Limitations or Distorting the Privilege?*, 32 SUFFOLK U. L. REV. 687, 689-94 (1999) (examining early history of attorney-client privilege). But see WRIGHT & MILLER, *supra* note 12 at § 5475 (questioning history of attorney-client privilege). Many courts and academics have followed evidence scholar John Wigmore's interpretation of the attorney-client privilege, tracing its roots back to Elizabethan England. *Id.* The importance and history of the privilege may not have been quite as sacrosanct as Wigmore seems to indicate. *Id.* The privilege appears to have been broader during its early years because it was available to members of the English ruling class and not solely attorneys. *Id.*

27. See *Hatton*, 31 Mass. (1 Pick.) at 418 (noting importance and English origin of attorney-client privilege); *Foster v. Hall*, 29 Mass. (1 Pick.) 89, 90 (1831) (establishing attorney-client privilege in Massachusetts). In an early Massachusetts case, the court held that "[a]n attorney at law, who in his professional character has received from the owner of property confidential communications on the subject of a transfer of it which is subsequently made, cannot be examined, against the consent of the grantee, in relation to such communications." *Foster*, 29 Mass. (1 Pick.) at 90.

28. See *Three Juveniles v. Massachusetts*, 455 N.E.2d 1203, 1205 (Mass. 1983) (acknowledging testimonial privileges conflict with public's right to evidence); *Massachusetts v. O'Brien*, 388 N.E.2d 658, 661 (Mass. 1979) (noting attorney-client privilege runs contrary to policy considerations favoring full disclosure).

29. See *Three Juveniles*, 455 N.E.2d at 1205 (recognizing balancing test when considering application of privilege); see also *Trammel v. United States*, 445 U.S. 40, 50-51 (1980) (recognizing balancing test when considering testimonial privileges). The *Three Juveniles* court considered whether a child should be disqualified from testifying against his parent in a grand jury proceeding. 455 N.E.2d at 1204. The court balanced the interests promoted by the privilege against the need for relevant evidence. *Id.* at 1205. The court held that the public's interest in obtaining evidence outweighed the public policy of preserving family harmony through a broad testimonial privilege. *Id.* at 1207-08. Federal courts prohibited spouses from testifying against

is not absolute and is limited to the extent that it accomplishes the goal of facilitating confidential communications in an effort to obtain informed legal advice.³⁰ This limitation prevents the privilege from being overly broad to the detriment of allowing all relevant evidence.³¹ The attorney-client privilege traditionally dealt with individual clients and their attorneys, but in recent decades courts have extended the privilege to organizations.³²

B. Governmental Attorney-Client Privilege

1. The Corporate and Governmental Attorney-Client Privilege in the United States

Upjohn Co. v. United States first acknowledged that a corporation can be a client for purposes of the attorney-client privilege.³³ The *Upjohn* court reasoned that the privilege for organizational clients is grounded in the same

one another until the *Trammel* Court modified the federal rule to allow voluntary adverse spousal testimony. 445 U.S. at 50-53. The *Trammel* Court instructed courts to supersede the fundamental principle of obtaining all relevant information only if a privilege would serve a greater public good. *Id.* at 50-51. A privilege should be limited and strictly construed to serve the greater public good because it excludes relevant information. *Id.* The Court determined that a spousal privilege preventing all testimony, voluntary or involuntary, was overly broad for protecting marital harmony and limited the privilege only to compelled testimony. *Id.* at 53.

30. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (outlining criteria for application of attorney-client privilege). The attorney-client privilege applies if

- (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. The attorney-client privilege applies only to the extent that it serves the social good of facilitating confidential communications between an attorney and client. *Id.* at 358; see also *supra* note 25 and accompanying text (discussing social good served by allowing attorney-client privilege). Even the earliest of cases noted the importance of strict construction of the attorney-client privilege. See *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1883) (acknowledging privileges act as exceptions to general rule). Privileges should be strictly construed and not extended beyond the policy they are trying to further because they are exceptions to the general rule entitling parties to all relevant evidence. *Id.*

31. See *supra* note 29 and accompanying text (examining narrow construction of privileges to limit harm caused by their recognition).

32. See *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (recognizing organizational clients such as corporations may assert attorney-client privilege). The *Upjohn* Court extended the attorney-client privilege to all employees of a corporation, changing the previous rule that only extended the privilege to employees who were in charge of corporate policy. *Id.* at 391-93. The Court recognized that nonmanagement employees played a significant role in obtaining legal advice and should be covered by the privilege. *Id.* at 392.

33. See *id.* at 389-96 (discussing corporate attorney-client privilege).

policy considerations as the privilege for individuals.³⁴ When an organizational client exercises the privilege, however, other difficult questions specific to the organizational context may arise, such as who owns the privilege.³⁵ Most importantly, in an organizational context, there may be some additional countervailing policy disincentives in allowing the privilege; these considerations can become more acute when the organizational client is a government entity—as opposed to a corporation—because of the government’s unique role in society.³⁶

After *Upjohn*, commentators and scholars began considering whether a government entity was sufficiently analogous to an organizational client to extend the attorney-client privilege to it.³⁷ The Proposed Rule 503 of the Federal Rules of Evidence would have resolved the status of the governmental attorney-client privilege for federal courts by including “public officer” as a type of client, making the attorney-client privilege available to “public and

34. See *supra* note 32 (describing *Upjohn*’s policy rationale for corporate and individual attorney-client privilege). The *Upjohn* court justified the extension of the attorney-client privilege to corporate employees based upon the rationale of facilitating full and frank communications. 449 U.S. at 389; see also generally Blumenauer, *supra* note 5, at 80-82 (detailing expansion of attorney-client privilege to entities). Courts extended the attorney-client privilege to entities like corporations for the same reasons the privilege exists for individuals. Blumenauer, *supra* 5, at 80.

35. See *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985) (highlighting special difficulties in applying attorney-client privilege to artificial entities); *Upjohn*, 449 U.S. at 389-90 (noting artificial entities pose complications to application of attorney-client privilege). Controversies regarding the identify of the client in the organizational context can be difficult because corporations are legal fictions that can only act through agents in obtaining legal advice. *Weintraub*, 471 U.S. at 348. The *Weintraub* Court held that in the corporate context management has the power to waive the attorney-client privilege and such power transfers to new management. *Id.* at 348-49.

36. See *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (noting governmental attorney-client privilege incurs more cost than corporate privilege); Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1738-42 (1988) (detailing special considerations in application of governmental attorney-client privilege). The *Reed* court recognized that in determining the existence of the governmental attorney-client privilege, the public interest in an open and honest government needed to be included in the balancing of interests. 134 F.3d at 356. Courts analogized governments to corporations when expanding the attorney-client privilege to government entities, but this analogy fails to consider some important differences between governments and corporations. Barsdate, *supra* at 1738-42. For example, government employees are required to disclose unlawful behavior, whereas corporate employees are not. *Id.* at 1739. Extending the privilege to corporations provides an incentive for corporations to engage in internal policing because they know that any information discovered will be protected. *Id.* at 1740. Without this protection, corporations would be less likely to engage in internal auditing because such audits could create discoverable materials, potentially exposing corporations to liability. *Id.* at 1741. Governments, however, do not need this incentive to engage in internal audits because such audits are publicly mandated. *Id.* at 1739.

37. See, e.g., Todd A. Ellinwood, “*In the Light of Reason and Experience*”: *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291, 1291-92 (2001) (discussing ambiguity surrounding governmental attorney-client privilege); Bryan S. Gowdy, Note, *Should the Federal Government have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 710 (1999) (commenting on scarcity of decisions before *Upjohn* regarding governmental attorney-client privilege); Joel D. Whitley, Comment, *Protecting State Interests: Recognition of the State Government Attorney-Client Privilege*, 72 U. CHI. L. REV. 1533, 1533 (2005) (noting uncertainty regarding governmental attorney-client privilege). But see *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998) (contending courts, commentators, and governments acknowledged governmental attorney-client privilege long before *Upjohn*).

private organizations.”³⁸ Instead, Congress adopted Federal Rule of Evidence 501, allowing courts to formulate privileges from the common law using their discretion in “the light of reason and experience.”³⁹ Proposed Rule 503, although rejected, has influenced a number of states that have adopted its language and courts that look to it as a statement of common law.⁴⁰

Similar to the rationale underpinning the individual and corporate privileges, the policy of encouraging communication between attorney and client is the driving force behind the governmental attorney-client privilege.⁴¹ One difficulty in examining the government’s privilege is that courts presumed, in an almost conclusory manner, that the privilege exists, without providing much justification or detailed analysis.⁴² One court has, however, proffered that a functioning government is multifaceted, complex, and necessary for a modern society, and a government entity requires informed legal advice in order to comply with the many laws its work implicates.⁴³ Additionally, a government entity might not be fully forthcoming if its disclosures were subject to

38. FED. R. EVID. 503, *reprinted in* 56 F.R.D. 183, 235 (U.S. 1973) (proposed July 1, 1973). In proposing the rule, the Advisory Committee stated, “[T]he definition of ‘client’ includes governmental bodies.” FED. R. EVID. 503 advisory committee’s note (a), *reprinted in* 56 F.R.D. 183, 235 (U.S. 1973) (proposed July 1, 1973); *see* WRIGHT & MILLER, *supra* note 12 (discussing effect of adopting Proposed Rule 503).

39. FED. R. EVID. 501; *see also* Ellinwood, *supra* note 37, at 1292 (suggesting Rule 501 leads federal courts to look to common law to define privileges).

40. *See* Leong, *supra* note 21, at 167-69 (discussing influence of Proposed Rule 503). A majority of states have adopted Proposed Rule 503. *Id.* at 168. Some states, however, have not adopted it or, in adopting it, have modified it to some degree. *Id.* at 168-69. The extent of any governmental attorney-client privilege varies from state to state. *Id.* at 169. Federal courts have also used Proposed Rule 503 as evidence of a common-law privilege. *Id.* Massachusetts has not adopted a statute codifying the attorney-client privilege; Massachusetts Proposed Rule of Evidence 501, however, would have taken a similar approach to Federal Rule 501, leaving privileges to common-law interpretation. *See* 5 PAUL E. NEMSER, MASSACHUSETTS EVIDENCE: A COURTROOM REFERENCE § 5.2.1 (Massachusetts Continuing Legal Education 2006) (identifying attorney-client privilege as recognized in Massachusetts). The proposed Massachusetts rule is not law, but does act as persuasive authority for courts. *Id.*

41. *See* Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 870 N.E.2d 33, 39 (Mass. 2007) (asserting identical purpose in public and private realm for attorney-client privilege); *see also supra* note 25 and accompanying text (describing policy rationale for individual attorney-client privilege). *But see* Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (noting increased burdens in acknowledging governmental attorney-client privilege). The Reed court was one of few courts to address the downside of recognizing a governmental attorney-client privilege when it wrote “[t]he recognition of a governmental attorney-client privilege imposes the same costs as are imposed in the application of the corporate privilege, but with an added disadvantage. The governmental privilege stands squarely in conflict with the strong public interest in open and honest government.” *Id.*

42. *See* Banks v. Office of the Senate Sergeant-at-Arms, 222 F.R.D. 1, 3 (D.D.C. 2004) (recognizing governmental attorney-client privilege without providing substantial analysis); Leong, *supra* note 21, at 166-67 (observing minimal analysis with respect to governmental attorney-client privilege); Gowdy, *supra* note 37, at 710-11 (noting scarcity of governmental attorney-client privilege cases and reasoning). Like many courts, the Banks court resolved the issue of whether the government has a privilege similar to corporations and individuals by quickly stating that “[t]here is no doubt that government agencies have the same privilege.” Banks, 222 F.R.D. at 3.

43. *See* Suffolk Constr. Co., 870 N.E.2d at 39 (asserting governmental privilege allows public officials to properly discharge duties); *see also* Chud, *supra* note 11, at 1710-11 (observing privilege enables compliance with laws by public officials).

discovery.⁴⁴ The government's ability to secure informed and confidential legal advice is also arguably in the public's best interest.⁴⁵ Courts have also reasoned that government entities should not be disadvantaged in civil litigation in which their adversaries would have the benefit of the privilege yet they would not.⁴⁶

There is a fundamental difference between the attorney-client privilege in the individual context and the attorney-client privilege in the governmental context due to the countervailing policies discouraging governmental secrecy.⁴⁷ Government openness and transparency are hallmarks of democratic government.⁴⁸ Citizens, many would argue, need to be fully informed of their government's inner workings to be able to effectively hold government entities and officials accountable.⁴⁹ The incentives to encourage communication in the

44. See *Ellinwood*, *supra* note 37, at 1319-25 (arguing absence of governmental privilege would create "chilling effect"). *Ellinwood* posits a hypothetical to illustrate the usefulness of the governmental attorney-client privilege. *Id.* at 1325. If an official encounters two options—A and B—and A is a legal act that produces little public good while B is a potentially illegal act that produces greater public good, *Ellinwood* suggests that the official would opt for A if the privilege did not exist. *Id.* *Ellinwood* reasons that the official would not contact an attorney to check the legality of option B if his communications with an attorney were subject to disclosure. *Id.* But see generally *Leslie*, *supra* note 5, at 498-505 (questioning instrumental justification of governmental attorney-client privilege). The justification that employees would be less likely to seek legal advice without a privilege does not appear to be as strong in the public sector as it is in the private sector. *Id.* at 498-99. In the private sector, employees are more likely to push toward the boundaries of the law in order to maximize profit, whereas in the public sector employees are charged with enforcing the law and not maximizing profit. *Id.*

45. See *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005) (examining public's interest in officials securing best possible legal advice). The ability to seek and receive legal advice is an indispensable part of conducting public business. *Id.*

46. See *Ross v. City of Memphis*, 423 F.3d 596, 602 (6th Cir. 2005) (noting disadvantage for government in civil litigation without attorney-client privilege); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 74 (2000) (noting governmental attorney-client privilege vital for government in civil litigation).

47. See *Barsdate*, *supra* note 36, at 1735-38 (arguing governmental attorney-client privilege runs contrary to open government).

48. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) (contending strong public interest in open government); see also *WRIGHT & MILLER*, *supra* note 12, § 5475 (acknowledging governmental attorney-client privilege may limit government transparency). Although the court in *Duces Tecum* was considering the governmental attorney-client privilege in the criminal context, it did note the importance of open government more generally when it stated,

We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.

112 F.3d at 921. But see *Michael Stokes Paulsen, Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 501 (1998) (reasoning administration of government facilitated by governmental attorney-client privilege). *Paulsen* argues that public officials' ability to properly administer governmental functions is facilitated by the governmental attorney-client privilege. *Id.*

49. See *Mark Fenster, The Opacity of Transparency*, 91 IOWA L. REV. 885, 895-902 (2006) (observing

corporate context may also differ from the government context.⁵⁰

In light of the additional considerations for allowing a governmental attorney-client privilege, it remains to be seen whether a governmental attorney-client privilege will have as strong and enduring of a legacy as the traditional attorney-client privilege.⁵¹ Critics seem skeptical and cautious about a governmental attorney-client privilege, while other commentators extol its necessity.⁵² This uncertainty, however, has not impacted what appears to be a mounting acceptance of the privilege in most jurisdictions.⁵³

2. Governmental Attorney-Client Privilege in Massachusetts

Prior to the *Suffolk* decision, the status of the governmental attorney-client privilege in Massachusetts was uncertain.⁵⁴ The existence of public records laws and open meeting laws undoubtedly contributed to this uncertainty because these statutes required disclosure.⁵⁵ A number of scholars and commentators acknowledged this difficulty in applying the governmental attorney-client privilege in light of statutes requiring disclosure by the government.⁵⁶ Although the majority of Massachusetts cases dealing with

importance of informed public). According to Fenster, governmental transparency facilitates “responsive government . . . [and] a functional society.” *Id.* at 902.

50. See *supra* note 36 and accompanying text (delineating shortcomings of analogy between corporate and government contexts).

51. See *supra* note 37 (questioning legacy and continuation of governmental attorney-client privilege).

52. See *supra* notes 47-49 and accompanying text (observing drawbacks of governmental attorney-client privilege); see also *supra* notes 41-45 and accompanying text (exploring arguments in favor of governmental attorney-client privilege).

53. See *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (assuming governmental attorney-client privilege as settled law but declining to address issue); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 74 (2000) (treating government entities as clients for purposes of attorney-client privilege). But see 99 UNIF. R. EVID. 502 (limiting governmental attorney-client privilege to litigation). The Uniform Rules of Evidence do not allow for an attorney-client privilege between “a public officer or agency and its lawyers” unless it is in relation to a “pending investigation, litigation, or proceeding in the public interest.” *Id.* at 503(d)(6); see also WRIGHT & MILLER, *supra* note 12, § 5475 n.26 (noting exaggeration of number of federal cases acknowledging governmental attorney-client privilege). Federal courts may be more willing to allow the privilege under the FOIA as opposed to circumstances where litigants need to prove their case. WRIGHT & MILLER, *supra* note 12, § 5475 n.26.

54. See 3 PAUL E. NEMSER, MASSACHUSETTS EVIDENTIARY PRIVILEGES § 3.2(b) (2003) (noting uncertain existence of attorney-client privilege for government entities).

55. See *In re Grand Jury Investigation*, 772 N.E.2d 9, 17-18 (Mass. 2002) (noting conflict between attorney-client privilege and legislatively-mandated disclosure). The *In re Grand Jury* court described many of the important functions served by the attorney-client privilege, such as promoting truthful disclosure between client and attorney. *Id.* at 17. The court noted, however, that “unquestionably the attorney-client privilege may conflict with a different public policy where the Legislature has determined that an institution *must* disclose certain information to others.” *Id.* at 18; see also NEMSER, *supra* note 54, § 3.2(b) (remarking uncertainty of governmental attorney-client privilege stems from statutes promoting open government).

56. See NEMSER, *supra* note 54, § 3.2(b) (reasoning public records statutes create uncertainty for governmental attorney-client privilege); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 74 cmt. b (2000) (discussing rationale of governmental attorney-client privilege). The Restatement acknowledges that public record laws may create “a narrower privilege for governmental entities.” RESTATEMENT (THIRD) OF

governmental attorney-client privilege occurred after the legislature enacted statutes promoting open government, courts themselves are still unsure of the status of the privilege.⁵⁷

Many of the statutes carve out exemptions to the public records statutes but are silent regarding the attorney-client privilege, leaving courts to determine whether an attorney-client privilege is implicit in the exemptions or if its exclusion is intended to suspend the privilege.⁵⁸ Very few cases in Massachusetts have dealt directly with the ability of the government to exercise an attorney-client privilege, and when the courts have addressed it, they have assumed there is a privilege but, like their federal counterparts, have failed to justify or explain such a privilege at great length.⁵⁹ Proposed Massachusetts Rule of Evidence 502(d)(6), although never adopted, contemplated a limited view of the privilege, similar to Uniform Rule of Evidence 502(d)(6).⁶⁰

C. Open Government Laws

Open government statutes attempt to make government more transparent and open through various means, including requirements that town meetings be open to everyone, availability of records, and mandatory disclosure of certain documents.⁶¹ These statutes come in different varieties, from open meeting laws to public records laws, but all purport to facilitate government openness, accountability, and greater democratic participation.⁶² Proponents of these

LAW GOVERNING LAWYERS § 74 cmt. b (2000). The government also has no autonomous right of confidentiality in communications relating to government business. *Id.*

57. *See, e.g.*, *Dist. Att’y for the Plymouth Dist. v. Bd. of Selectmen of Middleborough*, 481 N.E.2d 1128, 1130-31 (Mass. 1985) (examining governmental attorney-client privilege in relation to an open meeting law); *Kent v. Massachusetts*, No. 982693, 2000 WL 1473124, at *4 (Mass. Super. July 27, 2000) (concluding public records law excludes governmental attorney-client privilege); *Kiewit-Atkinson-Kenny v. Mass. Water Res. Auth.*, No. 014233BLS, 2002 WL 2017107, at *4 (Mass. Super. Aug. 19, 2002) (acknowledging uncertainty of governmental attorney-client privilege in light of public records law).

58. *See Gen. Elec. Co. v. Dep’t of Envtl. Prot.*, 711 N.E.2d 589, 592-93 (Mass. 1999) (analyzing effect of non-inclusion of common-law privileges in public records statute’s exemptions).

59. *See supra* note 42 and accompanying text (detailing paucity of federal cases justifying governmental attorney-client privilege); *see also Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (noting Massachusetts courts have presumed existence of governmental attorney-client privilege); *Dist. Att’y for the Plymouth Dist. v. Bd. of Selectmen of Middleborough*, 481 N.E.2d 1128, 1131 n.4 (Mass. 1985) (presuming, but not deciding, public clients have attorney-client privilege).

60. *See Brief for Appellant Suffolk Constr. Co. at 34-36, Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, No. 06-P-66, 2006 WL 1167217 (Mass. App. Ct. Mar. 27, 2006) [hereinafter *Suffolk Brief*].

61. *See infra* Part II.C.1-2 (examining two open-government statutes). This Note uses the generic terms “open government,” “public records law,” and “open record” statute interchangeably to describe any type of statute attempting to create open and transparent government.

62. *See Leong, supra* note 21, at 182-83 (discussing intent of open-government statutes); *see also* N.Y. PUB. OFF. LAW § 84 (2001) (stating common policy purposes of public records act). The New York Legislature, in passing the Freedom of Information Law, exemplified the common purposes of public records laws when it stated,

[A] free society is maintained when government is responsive and responsible to the public, and

statutes assert that government openness has many beneficial policy rationales such as transparency, government accountability, informed citizenry, and the necessity for a functioning democracy.⁶³ This Section examines the Freedom of Information Act and the Massachusetts Public Records Law, two open government statutes that implicate the governmental attorney-client privilege.⁶⁴

1. Freedom of Information Act

The FOIA is unique because it is the first piece of federal legislation that freely grants public access to government records.⁶⁵ The statute allows an individual to request any public record without showing a need.⁶⁶ Before the FOIA, an individual had to demonstrate a need for the records and a failure to meet that difficult burden might have resulted in a denial of the request.⁶⁷ The purpose of the FOIA was to create an informed citizenry that could hold the government accountable and foster republican democracy.⁶⁸ These policies are so important that there is debate regarding whether or not the Constitution itself secures the right to access information even in the absence of the FOIA.⁶⁹

when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

N.Y. PUB. OFF. LAW § 84.

63. See generally Brief Amicus Curiae in Support of Respondents Sierra Club and Judicial Watch, Inc. at 1-15, *Cheney v. United States Dist. Court for the Dist. of Columbia*, 2004 WL 530961, at 1-15 (Mar. 11, 2004) (No. 03-475) (arguing open-government statutes serve significant purposes). Fostering open government is necessary for a functioning democracy, as it creates informed citizens and government accountability. *Id.* at 7-8. Open-government statutes expose any potential government secrecy to public scrutiny. *Id.* at 11. These factors help secure republican democracy. *Id.* at 1.

64. See *infra* Part II.C.1 (examining FOIA); Part II.C.2 (discussing Massachusetts PRL).

65. See Haridakis, *supra* note 13, at 12 (describing FOIA as "most comprehensive legislation guaranteeing public access to government records").

66. See Halstuck & Chamberlin, *supra* note 3, at 516 (describing procedure for requesting records under FOIA). The burden falls on the government, not the individual, to prove why a document should not be disclosed. *Id.*; see also GIDIÈRE, *supra* note 4, at 181-217 (detailing procedure for FOIA request).

67. See Papandrea, *supra* note 13, at 37 (noting government could deny request for records at-will before FOIA); see also Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650-51 (1984) (describing capricious denials of request for government records before FOIA). The press noted that government agencies would routinely deny information before the FOIA, possibly to conceal mistakes. Wald, *supra*, at 650.

68. See *supra* note 63 and accompanying text (detailing benefits of citizen freedom to access information).

69. See generally Haridakis, *supra* note 13, at 5-12 (considering First Amendment's potential for securing access to government records). Courts have not guaranteed a right to access government records under the First Amendment. *Id.* at 10. Courts, however, have hinted at the importance of the public's right to receive

The FOIA did not ensure absolute access to government information.⁷⁰ Congress broadly defined “agency records”—the government documents that a citizen can request to see—but specifically excluded nine categories of documents from that definition, hence exempting certain government records from disclosure.⁷¹ Exemption 5 is the most important exemption to this Note because it retains common-law privileges, including the attorney-client privilege.⁷²

The FOIA’s Exemption 5 triggered litigation concerning whether the government has an attorney-client privilege.⁷³ Very few courts addressed whether government entities could exercise the attorney-client privilege before the FOIA, but when the government began using the privilege to deny the FOIA requests, courts began to see more litigation regarding the privilege.⁷⁴ Since the FOIA’s passage, the governmental attorney-client privilege has gained traction and become generally-accepted legal doctrine, albeit with infrequent analysis and justification.⁷⁵

The FOIA has influenced many states to adopt similar statutes that exempt privileged documents.⁷⁶ A prevailing difficulty under the FOIA and similar state statutes concerning attorney-client privilege is whether the government has the right to exercise an attorney-client privilege.⁷⁷ State statutes modeled after the FOIA that failed to include an exemption similar to Exemption 5

information. *Id.*

70. See 5 U.S.C. § 552(b)(1)-(9) (2006) (listing nine exemptions to FOIA).

71. See GIDIÈRE, *supra* note 4, at 128 (examining scope of “agency record”).

72. See *supra* notes 4-7 and accompanying text (inferring language of Exemption 5 meant to include privileges); see also *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 356 (2d Cir. 2005) (reasoning Exemption 5 includes common law privileges). The Second Circuit has held that Exemption 5 encompasses “traditional common-law privileges against disclosure, including the work-product doctrine, and executive, deliberative process and attorney-client privileges.” *La Raza*, 411 F.3d at 356.

73. See Blumenauer, *supra* note 5, at 84-88 (detailing history of governmental attorney-client privilege relating to Exemption 5). Courts experienced a large growth of government attorney-client privilege cases because of the FOIA. *Id.* at 86; see also Haridakis, *supra* note 13, at 13 (noting significant increase in litigation regarding interpretation of FOIA’s exemptions).

74. See Leong, *supra* note 21, at 167 (reviewing increased litigation concerning whether government had attorney-client privilege after passage of FOIA). Courts normally hesitate to apply a privilege, but under the FOIA request they may be more likely to allow a privilege because such requests are typically made at such an early stage of the litigation that the importance of the documents is yet to be determined. *Id.*

75. See Leslie, *supra* note 5, at 494-96 (describing tenuous justification of attorney-client privilege); see also *supra* Part II.B.1 (examining modern status of governmental attorney-client privilege). Leslie suggests that courts and commentators have not provided a strong justification for governmental attorney-client privilege and have glossed over the issue by relying on the corporate analogy. Leslie, *supra* note 5, at 494-96.

76. See, e.g., COLO. REV. STAT. § 24-72-204(3)(a)(IV) (exempting privileged materials); MD. CODE ANN., [State Gov’t] § 10-615 (2008) (exempting privileged records from disclosure); OR. REV. STAT. § 192.502(9) (2008) (exempting common-law privileges); see also KOCH, *supra* note 13, § 3.40 (observing proliferation of similar FOIA type state statutes after FOIA’s passage). The Colorado Court of Appeals exemplified the common approach toward defining an exemption for privileges in an open records law when it held that the word privilege “incorporated common-law privileges into the Open Records Act.” *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. Ct. App. 1987).

77. See *supra* Part II.B.1 (examining government’s right to exercise attorney-client privilege).

further complicate the issue.⁷⁸ The analysis in these circumstances becomes twofold: does the government have an attorney-client privilege, and if it does, can it exercise that privilege in light of a public records law?⁷⁹ Some states have explicitly included an exemption for attorney-client privilege, narrowed the right, or incorporated privileges from other statutes.⁸⁰ The SJC engaged in this twofold analysis when it resolved *Suffolk*, and other states may have to utilize the same analysis when approaching this issue.⁸¹

2. Massachusetts Public Records Law

Massachusetts enacted a public records law (PRL) in 1851, but the law was ineffective in allowing access to government records until it was amended and updated in 1973.⁸² The Massachusetts legislature modeled the PRL after the FOIA in the same way other states modeled their statutes after the FOIA.⁸³ Like the FOIA, the PRL carves out a number of exemptions in Article IV, Section 7, Clause 26 of the Massachusetts General Laws.⁸⁴ The statute excludes certain records from being defined as a “public” record, exempting them from the PRL.⁸⁵ None of these exemptions, however, are identical to the

78. See Leslie, *supra* note 5, at 480 (examining different approaches to attorney-client privilege in FOIA-like state statutes). Most states have followed the Federal Rules’ example by allowing privileges, while a handful have limited the attorney-client privilege insofar as it applies to government entities. *Id.* Other states adopted the Uniform Rules of Evidence, which limit the governmental attorney-client privilege to litigation, but did away with the litigation limitation, ultimately having the same effect as the Federal Rules. *Id.*

79. See generally *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33 (Mass. 2007) (exemplifying two-step analyses). The *Suffolk* court first determined that there is an attorney-client privilege for government entities. *Id.* at 38. The court went on to find that such a privilege is implicit in a public records law, even though it is not specifically included in the exemptions. *Id.* at 46.

80. See Leslie, *supra* note 5, at 480 (describing various approaches to governmental attorney-client privilege adopted by states in public records statutes); see also *State ex rel. Nix v. City of Cleveland*, 700 N.E.2d 12, 16 (Ohio 1998) (demonstrating example of privilege incorporated by reference to other state laws). The Ohio statute allowing access to government records has also provided an exemption for other state laws. *State ex rel. Nix*, 700 N.E.2d at 16. Ohio law codified the attorney-client privilege and determined that the attorney-client privilege was a valid exemption because it is codified in other state laws. *State ex rel. Nix*, 700 N.E.2d at 16.

81. See *infra* Part III.C (providing analysis of *Suffolk* decision).

82. See *Hastings & Sons Pub. Co. v. City Treasurer of Lynn*, 375 N.E.2d 299, 302 (Mass. 1978) (detailing early history of Massachusetts public record law). The early incarnation of the law had a narrow view of public records, only requiring that certain types of records be made public. *Id.* After the 1973 amendment, the scope of public records expanded to include “a great many more documents to public view.” *Id.*; see also MASS. GEN. LAWS ch. 66, § 10 (2004) [hereinafter PRL] (addressing when records open for public inspection).

83. See, e.g., *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 41 (Mass. 2007) (noting PRL modeled after FOIA); *Gen. Elec. Co. v. Dep’t of Env’tl. Prot.*, 711 N.E.2d 589, 593 (Mass. 1999) (noting FOIA used as model in drafting PRL); WILLIAM FRANCIS GALVIN, A GUIDE TO MASSACHUSETTS PUBLIC RECORDS LAW 26-27 (Dec. 2006), available at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf> [hereinafter GUIDE] (noting Massachusetts PRL modeled after FOIA but with critical difference).

84. MASS. GEN. LAWS ch. 4, § 7, cl. 26(a)-(q) (2004).

85. *Id.* § 7, cl. 26. The statute defines public records and notes that all materials made or received by any “officer or employee of an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof” are public records “unless such

FOIA's Exemption 5.⁸⁶ In *General Electric v. Department of Environmental Protection*,⁸⁷ the SJC found no implied exemption for work product under the PRL, but noted that a court would have upheld such a privilege under Exemption 5 of the FOIA.⁸⁸ Following the decision in *General Electric*, legislators attempted to amend the PRL to include an exemption for attorney-client privilege and work product, but both attempts were unsuccessful.⁸⁹

The PRL's Exemption D is its most similar exemption to the FOIA's Exemption 5.⁹⁰ Exemption D provides a qualified deliberative process privilege that shields an agency from disclosure of records and documents used to formulate law and policy.⁹¹ The deliberative process privilege is a subspecies of work product.⁹² The ambiguity of Exemption D, as compared to the FOIA's much clearer Exemption 5, has led courts to address the issue of whether or not implied exemptions exist in the PRL.⁹³

General Electric is the main case in Massachusetts addressing the ambiguity

materials or data fall within the following exemptions" *Id.*

86. Compare *supra* note 4 and accompanying text (analyzing Exemption 5 language), with MASS. GEN. LAWS ch. 4, § 7, cl. 26(d) [hereinafter Exemption D] (including similar but not verbatim language as Exemption 5). Clause 26(d) exempts from public records "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." *Id.* Exemption D is missing the language of Exemption 5 that provides that inter-agency or intra-agencies must "not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2006). The language "available at law" is how common-law privileges are incorporated under Exemption 5. See *supra* note 4 and accompanying text (discussing Exemption 5 language); see also Gen. Elec. Co. v. Dep't of Env'tl. Prot., 711 N.E.2d 589, 594 (Mass. 1999) (noting Massachusetts legislature did not adopt an exemption similar to Exemption 5). The Massachusetts legislature chose not to adopt language that would have incorporated common-law discovery protections like the FOIA. *Gen. Elec. Co.*, 711 N.E.2d at 594. This conscious decision could signal that the Massachusetts legislature intentionally departed from the FOIA. *Id.* at 594; see also GUIDE, *supra* note 83, at 27 (noting Massachusetts removed "counterpart federal language incorporating common law discovery protections").

87. 711 N.E.2d 589 (Mass. 1999).

88. See *infra* notes 94-100 and accompanying text (detailing *General Electric* decision).

89. See *Suffolk Brief*, *supra* note 60, at 25-26 (detailing legislative activity following *General Electric* decision). In 2001 and 2003, the Massachusetts legislature proposed a bill that would have included an exemption in the PRL for attorney-client privilege and attorney work product. *Id.*

90. See *supra* note 86 and accompanying text (comparing Exemption 5 and Exemption D).

91. See ALEXANDER J. CELLA, 39 MASSACHUSETTS PRACTICE, ADMINISTRATIVE LAW AND PRACTICE § 1167 (2007) (detailing Exemption D's policy and purpose). Exemption D provides a deliberative process privilege. *Id.* The exemption "is designed to provide and encourage the widest possible interchange of ideas and information among and within governmental agencies concerning the development of agency policy." *Id.* Like the attorney-client privilege, the deliberative process privilege exists "to foster frank internal discussion without the fear or inhibitions which public disclosure, particularly premature public disclosure, might well engender." *Id.* The privilege does not apply to "reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." MASS. GEN. LAWS ch. 4, § 7, cl. 26(d) (2004).

92. See *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (categorizing deliberative process privilege as sub-species of work-product privilege).

93. See *Gen. Elec. Co. v. Dep't Env'tl. Prot.*, 711 N.E.2d 589 (Mass. 1999) (opining whether or not implied exceptions exist in PRL).

between a public records law and implied exemptions.⁹⁴ The Massachusetts Department of Environmental Protection (DEP) argued that certain documents created in anticipation of litigation were not subject to disclosure under the PRL because the statute implicitly included work-product protections.⁹⁵ The *General Electric* court noted that the legislature intended to create broad disclosure under the statute and, as such, courts must construe exemptions narrowly.⁹⁶ Although not required, the court also held that an attempt to include an exemption for work product failed.⁹⁷ The court declined to import implicit exemptions into the statute due to the statute's plain and unambiguous meaning.⁹⁸ *General Electric* highlights the substantive difference between the PRL and the FOIA—namely, that a court would have upheld the work-product privilege under Exemption 5 of the FOIA, but not under the PRL.⁹⁹ The court in *District Attorney for Plymouth District v. Board of Selectmen of Middleborough*¹⁰⁰ reached a similar conclusion when determining that there was no implied exemption in an open meetings law.¹⁰¹ The court also noted that, due to the limited number of exemptions, other privileges that the government could raise may be considered waived, including the attorney-client privilege.¹⁰²

Lower courts encountered difficulty applying the *General Electric* decision in the context of governmental attorney-client privilege because *General Electric* did not directly address the attorney-client privilege.¹⁰³ Massachusetts

94. *Id.*

95. *See id.* at 591-92 (summarizing DEP's argument of implicit exclusion of work product).

96. *Id.* at 592 (describing legislative intent to provide broad public access to government documents subject to limited exceptions). The statute favors broad disclosure, meaning that the exemptions must be "strictly and narrowly construed." *Id.*

97. *Gen. Elec. Co.*, 711 N.E.2d at 593 (observing failure to pass work-product exemption during PRL's drafting).

98. *See id.* (dismissing need to find implicit exemptions). Even in light of the common law, the court can find no reason to qualify the statute by including limitations. *Id.*

99. *See supra* notes 94-98 and accompanying text (detailing *General Electric* decision).

100. 481 N.E.2d 1128 (Mass. 1985).

101. *See Dist. Att'y for Plymouth Dist.*, 481 N.E.2d at 1130-31 (refusing to find implied exceptions to open meeting law). The SJC reasoned that when a statute is unambiguous and enumerates several exceptions, the legislature did not intend any exemptions other than those enumerated. *Id.*

102. *See id.* at 1131 (suggesting omission of attorney-client meetings exemption creates statutory waiver of public client's privilege). The court acknowledged that a client can waive the attorney-client privilege. *Id.*

103. *See Kiewit-Atkinson-Kenny v. Mass. Water Res. Auth.*, No.014233BLS, 2002 WL 2017107, at *4 (Mass. Super. Aug. 19, 2002) (cautioning against applying *General Electric* decision to attorney-client privilege). *But see Lafferty v. Martha's Vineyard Comm'n*, No. 03-3397, 2004 Mass. Super. LEXIS 107, at *14 (Mass. Super. April 9, 2004) (finding attorney-client privilege not exception to PRL in light of *General Electric*). Judge van Gestel—the judge in *Kiewit-Atkinson-Kenny*—was uneasy about abrogating the attorney-client privilege in light of the PRL, although the *General Electric* decision seemed to call for this. 2002 WL 2017107, at *4. Thus, Judge van Gestel submitted the case for appellate review and certified the question as

Whether materials in the possession of an entity or person to which the Public Records Law, G.L.c. 66, Sec. 10, applies may be withheld from production solely on the basis that such materials fall within the protection of the attorney-client privilege, or are such materials not protected from

courts had two issues to resolve in addressing the governmental attorney-client privilege: whether or not an attorney-client privilege for government entities exists in Massachusetts, and if so, whether the PRL implies that privilege.¹⁰⁴ In dicta, the *General Electric* decision suggested that Massachusetts would not recognize an attorney-client privilege as an implicit exemption.¹⁰⁵ One reading of the case law prior to *Suffolk*, including the Secretary of the Commonwealth of Massachusetts, would have assumed that the attorney-client privilege was not exempt under the PRL.¹⁰⁶ Somewhat abruptly, the SJC moved away from the reasoning in *General Electric*, finding the attorney-client privilege implicit in the PRL.¹⁰⁷

D. Suffolk Construction Co. v. Division of Capital Asset Management

The *Suffolk* decision addressed the intersection of governmental attorney-client privilege and public records laws.¹⁰⁸ The unanimous SJC decision resolved two important issues in Massachusetts law.¹⁰⁹ After *Suffolk*, there clearly is an attorney-client privilege for government entities, and this privilege is not abrogated by its absence from the PRL's exemptions.¹¹⁰

disclosure under the Public Records Law unless those materials fall within the scope of an express statutory exemption?

Id. The case then settled and the question remained unanswered. See *Suffolk Brief*, *supra* note 60, at 47. The *Lafferty* court noted that an appellate court had not answered the question Judge van Gestel posed and therefore declined to follow the *Kiewit* decision. *Lafferty*, No. 03-3397, 2004 Mass. Super. LEXIS 107, at *14; see also *Kent v. Massachusetts*, No. 982693, 2000 WL 1473124, at *4 (Mass. Super. July 27, 2000) (finding in attorney-client privilege not included in PRL's exemption). Superior Court Judge Botsford found nothing in *General Electric* that could construe the PRL "to include any implied exceptions, regardless of public policy concerns, of the common law, or of any other consideration." *Lafferty*, No. 03-3397, 2004 Mass. Super. LEXIS 107, at *14.

104. See *supra* Part II.B.1 (explaining uncertain existence of attorney-client privilege for government entities); *supra* notes 54-58 and accompanying text (outlining difficulty in applying governmental attorney-client privilege in PRL cases).

105. See *Kent*, 2000 WL 1473124, at *4 (reasoning *General Electric* stated no implicit exemptions in PRL).

106. See GUIDE, *supra* note 83, at 26 (expressing public official's belief PRL did not allow governmental attorney-client privilege). The Secretary of the Commonwealth of Massachusetts, the highest ranking official for public records, expressed the belief that the attorney-client privilege is not exempt under the PRL. *Id.*; see also *Kent*, 2000 WL 1473124, at *4 (finding PRL abrogates attorney-client privilege). Judge Botsford, who wrote the *Kent* opinion, now sits on the SJC, but did not at the time *Suffolk* was decided. See Supreme Judicial Court of Massachusetts, <http://www.mass.gov/courts/sjc/justices/botsford.html> (noting Judge Botsford appointed in September 2007).

107. See *infra* Part II.C (examining *Suffolk* decision); see also GUIDE, *supra* note 83, at 26 (acknowledging likelihood attorney-client privilege abrogated by *General Electric* decision and PRL). The Secretary of the Commonwealth of Massachusetts noted that, after *General Electric*, it appeared that the SJC intended to extend the holding to the attorney-client privilege. GUIDE, *supra* note 83, at 26.

108. See *infra* Part III.C (articulating relevance of *Suffolk* decision in resolving governmental attorney-client privilege and public records law conflicts).

109. See *infra* note 110 (stating issues *Suffolk* decision resolved).

110. See *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (holding

The *Suffolk* case involved a dispute between Suffolk Construction Company (Suffolk) and the Division of Capital Asset Management and Maintenance (DCAM) over a fee relating to the renovation of the John Adams Courthouse.¹¹¹ Suffolk requested a number of DCAM's records under the PRL, and DCAM responded by producing over a half-million pages of documents, excluding a number of documents under the attorney-client privilege.¹¹² Suffolk first argued that it is questionable whether a government entity, like DCAM, can exercise attorney-client privilege and alternatively, even if such a privilege does exist, the PRL abrogates it because it is not included in the PRL's exemptions.¹¹³

The *Suffolk* court first addressed whether the attorney-client privilege should be extended to government entities and emphasized the important social utility of the attorney-client privilege, citing many of the common justifications such as full and frank disclosure, administration of justice, and an attorney being able to successfully perform her duties.¹¹⁴ The court also noted that the attorney-client privilege is extremely important to the administration of government and thus reasoned that the attorney-client privilege should apply to government entities.¹¹⁵

Once the court settled that government entities could use the attorney-client privilege, it then addressed the question of whether the privilege could be exercised in light of the PRL.¹¹⁶ The PRL makes no mention of the attorney-

government entities have attorney-client privilege). The court explicitly stated that "confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege." *Id.*; see also *id.* at 36 (holding PRL does not abrogate attorney-client privilege).

111. See *id.* at 35 (stating nature of dispute between litigants).

112. See *id.* (detailing DCAM's response to Suffolk's PRL request).

113. See *id.* at 37; see also *Suffolk Brief*, *supra* note 60, at 10-14 (arguing PRL does not exempt attorney-client privilege).

114. See generally *Suffolk Constr. Co.*, 870 N.E.2d at 37-40 (acknowledging fundamental nature and importance of attorney-client privilege). The court stressed the importance of the privilege in establishing full and frank communications that result in adherence to the law and facilitate justice. *Id.* at 39.

115. See *id.* at 38-39 (reasoning government entities need benefit of privilege to serve public interest). The court noted that the attorney-client privilege "serves the same salutary purposes in the public as in the private realm." *Id.* at 39. Officials can serve the public interest by seeking advice from counsel "without inhibitions arising from the fear that what they communicate will be disclosed to the world." *Id.* Government lawyers would be less likely to serve the public interest if they are unable to gather all relevant facts. See *id.* (exploring problem of not extending privilege to government officials and entities). The court placed substantial weight on the Restatement of Law Governing Lawyers and other treatises to justify extending the attorney-client privilege to government entities. See *id.* at 39-40 (presenting authority in support of governmental attorney-client privilege). In citing the Third Restatement of the Law Governing Lawyers, the court does not mention the Restatement's acknowledgement that public records laws may affect governmental attorney-client privilege. Compare *Suffolk Constr. Co.*, 870 N.E.2d 39 (citing Restatement as authority), with RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 74 cmt. b (2000) (acknowledging public records law may narrow governmental attorney-client privilege).

116. See *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 40 (Mass. 2007) (addressing whether the PRL extinguishes attorney-client privilege for government entities).

client privilege, so its exclusion from the law would have to be implicit.¹¹⁷ The court tried to determine whether the legislature intended to abrogate the attorney-client privilege by not specifically exempting it.¹¹⁸ To do so, the court had to address *General Electric*, which appeared to find no implicit exemptions in the PRL.¹¹⁹ In distinguishing *General Electric*, the court reasoned that the legislature could not have intended to implicitly reject the attorney-client privilege, a privilege the history of which was so “fundamental and longstanding,” without explicit language.¹²⁰ The court disagreed with Suffolk’s argument concerning the legislative history, holding that a failure to adopt an attorney-client privilege exemption should not be construed as legislative intent.¹²¹

The *Suffolk* case illustrates the approach taken by Massachusetts courts in resolving potential conflicts that arise between public records laws and governmental attorney-client privilege.¹²² Questions still remain whether such an approach will have adverse consequences in light of the policy objectives of public records laws and the nascent recognition of governmental attorney-client privilege.¹²³

III. ANALYSIS

A. Justification of Governmental Attorney-Client Privilege

Courts have relied on the attorney-client privilege’s lengthy history and its ability to foster communications between attorney and client when justifying the privilege.¹²⁴ This justification, however, does not appear to be fully

117. See *id.* at 41 (finding words “attorney-client privilege” not present anywhere in PRL).

118. See *id.* at 41-42 (analyzing intent of legislature in adopting PRL).

119. See *id.* at 42-45 (distinguishing *General Electric* facts from present facts). The court held that the *General Electric* holding was limited to the proposition that the PRL specifically exempted the deliberative process privilege, a sub-species of work product, to limit the work-product doctrine and not necessarily other matters of “common law of fundamental and longstanding importance to the administration of justice.” *Id.* at 43-44. It is not clear whether the governmental attorney-client privilege has such a longstanding and fundamental history. See *supra* Part II.B.1 (examining growth of governmental attorney-client privilege). The court’s reasoning overstates the attorney-client privilege’s historical foundation by not differentiating between the attorney-client privilege and the governmental attorney-client privilege, apparently a more recent extension of the privilege. See *supra* Part II.B.1 (exploring governmental attorney-client privilege’s recent recognition). The court’s opinion itself seems to contradict this by answering the question of whether the governmental attorney-client privilege is recognized in Massachusetts and then stating that it has a long-standing history. Compare *Suffolk Constr. Co.*, 870 N.E.2d at 43-44 (recognizing governmental attorney-client privilege in Massachusetts), with *Suffolk Constr. Co.*, 870 N.E.2d at 44 (holding legislature could not intend to abrogate long-standing privilege without explicitly stating so).

120. See *Suffolk Constr. Co.*, 870 N.E.2d at 46 (finding implicit exemption for attorney-client privilege).

121. See *id.* at 45 n.18 (finding legislative failure to adopt change does not amount to intent).

122. See *supra* Part II.D (discussing *Suffolk* decision resolving conflict of PRL and attorney-client privilege).

123. See *infra* Part III.C (analyzing *Suffolk* decision and approach taken).

124. See *supra* notes 25-31 and accompanying text (expounding justification of attorney-client privilege).

applicable when used to justify the governmental attorney-client privilege.¹²⁵ The governmental privilege, like its corporate counterpart, has only been recently recognized and does not have the historical weight of the attorney-client privilege protecting private, individual clients.¹²⁶ Many courts assume that the privilege must extend to government entities because of its longstanding presence in the common law without independently weighing factors that are unique to government entities.¹²⁷

The government is neither an individual seeking legal advice in its own best interest nor a corporate client seeking to protect and maximize profit, but rather a social institution whose first obligation is to the public.¹²⁸ Courts should take these obligations into account when addressing governmental privileges in the civil context, but in actuality courts rarely address the disincentives for allowing the privilege outside of criminal proceedings.¹²⁹ Courts instead rely on the justifications for the corporate and individual attorney-client privilege without weighing the cost of denying open and transparent government to the public.¹³⁰

While the government should have an attorney-client privilege, it should be somewhat limited as advocated by some commentators.¹³¹ Courts should engage in an active discussion, weighing the benefits and harms and acknowledging the unique aspects of the government context.¹³² Courts should not continue to piggyback the governmental attorney-client privilege onto the

125. See Leong, *supra* note 21, at 182 (finding justification for governmental attorney-client privilege unpersuasive). The privilege is supposed to promote confidence and an expectation of privacy, but government officials do not have the same expectations of privacy as individuals. *Id.* Additionally, lower level officials do not have the power to waive the privilege, making their expectation of privacy even less reasonable. *Id.* at 184-85. See generally Leslie, *supra* note 5, at 499-527 (suggesting justification of governmental attorney-client privilege falls short). Government employees do not need an incentive to disclose information to an attorney. Leslie, *supra* at 502-03.

126. See *supra* Part II.B.1 (observing modern recognition of corporate and governmental attorney-client privilege).

127. See *Ross v. Memphis*, 423 F.3d 596, 601 (6th Cir. 2005) (noting case law has assumed existence of attorney-client privilege for government). Courts have assumed that the privilege exists, but have not fully addressed the issue. See *In re Grand Jury Investigation*, 399 F.3d 527, 532 (2d Cir. 2005) (noting governmental attorney-client privilege undisputed in case).

128. See *supra* notes 47-50 and accompanying text (addressing government's unique burdens); see also Barsdate, *supra* note 36, at 1738-39 (discussing government's special role in society).

129. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997) (acknowledging disincentives of governmental attorney-client privilege). The Eighth Circuit acknowledged that the attorney-client privilege for government officials may not be necessary, especially in the criminal context. *Id.* The court also addressed the corporate analogy and determined that there can be critical differences in the public context. *Id.*

130. See Barsdate, *supra* note 36, at 1734 (noting lack of case law discussing justification of governmental attorney-client privilege).

131. See 99 UNIF. R. EVID. 502(d)(6) (limiting government's attorney-client privilege to litigation context). *But see* Chud, *supra* note 11, at 1731-32 (reasoning limitation of government attorney-client privilege in criminal context not necessary); Rana, *supra* note 26, at 704-05 (arguing against limiting government's attorney-client privilege).

132. See *supra* Part III.A (discussing drawbacks of governmental attorney-client privilege).

traditional attorney-client privilege's history and justification without giving the full consideration and reasoned analysis to the peculiarities of the governmental context.¹³³

B. Effect of Open Government Laws

There are two types of open-government statutes that implicate the governmental attorney-client privilege.¹³⁴ The first type of statute, like the FOIA, does not specifically address the attorney-client privilege, but does retain common-law privileges that include the attorney-client privilege.¹³⁵ When considering a FOIA-like statute, courts must analyze whether the government has an attorney-client privilege.¹³⁶ The second type of statute, similar to the Massachusetts PRL, is one that does not address the attorney-client privilege and does not specifically retain all common-law privileges.¹³⁷ In this scenario, courts should use a two-step analysis similar to that used by the SJC in *Suffolk*.¹³⁸

C. The Two-Step Massachusetts Approach

When applying the two-step approach, courts should first analyze whether the governmental attorney-client privilege is justified by weighing the privilege's positive and negative aspects.¹³⁹ If the court determines that the privilege is not justified, then there is no need to move onto the next step.¹⁴⁰ If the court does decide that the governmental attorney-client privilege is justified, then the courts should consider how open-government statutes affect

133. See *supra* notes 124-130 and accompanying text (analyzing judicial treatment of governmental attorney-client privilege).

134. See *infra* notes 135-136 and accompanying text (detailing different types of open-government statutes).

135. See *supra* note 76 (providing examples of FOIA-like state statutes with exemptions for privileged materials).

136. See *supra* Part III.A (examining analysis justifying governmental attorney-client privilege).

137. See MASS. GEN. LAWS. ch. 4, § 7 (2004) (listing exemptions to definition of public records, but not mentioning privileges); N.H. REV. STAT. ANN. § 91-A:5 (2008) (listing exemptions to open record law); N.C. GEN. STAT. ANN. § 132-6 (2007) (failing to exclude common-law privileges). The New Hampshire statute lists nine exemptions, but makes no mention of common-law privileges or the attorney-client privilege. N.H. REV. STAT. ANN. § 91-A:5.

138. See *infra* notes 139-142 (proposing two-step analysis to resolve conflict between open-government laws and governmental attorney-client privilege).

139. Compare Chud, *supra* note 11, at 1709-11 (discussing positive aspects of governmental attorney-client privilege), with Gowdy, *supra* note 37, at 718-21 (examining negative aspects of governmental attorney-client privilege).

140. See *supra* note 53 and accompanying text (discussing mounting acceptance of governmental attorney-client privilege). Courts appear to be widely accepting the governmental attorney-client privilege. *Id.* Despite this growing acceptance, some jurisdictions have yet to determine whether the governmental attorney-client privilege exists; for example, Massachusetts courts only recently decided this issue. See *supra* notes 54-60 (discussing pre-*Suffolk* uncertainty in regards to government's attorney-client privilege).

the privilege.¹⁴¹ In doing so, the court should determine whether or not legislators intended to abrogate the privilege by passing an open-government statute.¹⁴²

In *Suffolk*, the Massachusetts SJC employed the two-step approach to determine how public records legislation affects the governmental attorney-client privilege.¹⁴³ In the second step, the *Suffolk* court held that the legislature never intended to suspend the governmental attorney-client privilege by passing the PRL.¹⁴⁴ Although the SJC applied the correct framework by analyzing the existence of the government's attorney-client privilege and then interpreting the effect of a public records law, the SJC did not reach the appropriate conclusion.¹⁴⁵

The *Suffolk* court failed to justify the government's attorney-client privilege.¹⁴⁶ The court cited the attorney-client privilege's long history—"dating at least from the age of Shakespeare"—without differentiating between the traditional, individual attorney-client privilege and the recently acknowledged governmental attorney-client privilege.¹⁴⁷ The court extolled the benefits of governmental access to the privilege and merely mentioned that the privilege may impede access to all relevant facts.¹⁴⁸ The court emphasized incentivizing public officials to seek the advice of counsel by offering confidentiality, presumably ignoring the fact that such an official may not have the power to keep communications confidential and may already have

141. See *Grossman v. Schwarz*, 125 F.R.D. 376, 380-81 (S.D.N.Y. 1989) (holding New York Freedom of Information Law does not create privilege for agency records). A federal court applying New York state law found that the legislature's intent in passing an open-government statute was to give wide access to government documents. *Id.* at 380. Therefore, the court narrowly construed the statute's exemptions. *Id.*

142. See *Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824-25 (Fla. 1985) (holding Florida legislature did not intend to exempt attorney-client privilege meetings from open-government statute). In *Neu*, the statute under consideration was an open-government statute that required government meetings to be open to the public. *Id.* at 823. The *Neu* court held that attorney-client meetings were not exempt from the statute because previous legislative action indicated the legislature did not intend such an exemption. *Id.* at 824-25. *But see* *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 44 (Mass. 2007) (holding PRL does not abrogate attorney-client privilege).

143. *Suffolk Constr. Co.*, 870 N.E.2d at 33.

144. *Id.* at 45. The court reasoned that the legislature did not express its intent to abrogate the attorney-client privilege by failing to pass several proposed bills that would have exempted the privilege from PRL. *Id.* at 45 n.18.

145. See *infra* Part IV (concluding *Suffolk* court inadequately weighed drawbacks of governmental attorney-client privilege).

146. See *supra* Part III.A (analyzing weak justification of governmental attorney-client privilege).

147. See *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (noting long history of attorney-client privilege).

148. See *id.* at 36, 39-40 (elucidating benefits of attorney-client privilege). The court maintained that the privilege is a "fundamental component of the administration of justice" and that "[i]ts social utility is virtually unchallenged." *Id.* at 36. While the court admitted that one drawback is the impediment of access to all relevant facts, the court reasoned that this privilege must be protected because it ensures the availability of justice to all citizens. *Id.* at 38.

incentives to seek legal assistance.¹⁴⁹ While the court recognized that the government will be disadvantaged in litigation against private parties, it failed to tailor the governmental attorney-client privilege by limiting it to litigation.¹⁵⁰ Lastly, the court noted that abrogating the governmental attorney-client privilege without weighing any countervailing interest in disclosure would impede the public's access to "fair and effective administration of justice."¹⁵¹

The second step of the court's analysis examined whether the PRL negated the government's attorney-client privilege, and the court concluded that if the legislature intended to abrogate the privilege then "it would have made that intention unmistakably clear."¹⁵² The court reasoned that the legislature's statutory silence "on a matter of common law of fundamental and longstanding importance to the administration of justice" cannot be interpreted to negate the privilege, even though that privilege has been scantily recognized in Massachusetts.¹⁵³ The court deemed the legislature's failed attempts at including an exemption for the attorney-client privilege or an exemption that would have been similar to the FOIA's Exemption 5 inconclusive regarding the legislature's intent.¹⁵⁴ The court also reasoned that the legislature's "strong

149. *See id.* at 39 (reasoning public employees less likely to seek advice without protection of attorney-client privilege). A public employee may be powerless to prevent other higher ranking officials from waiving the privilege and exposing their communications, meaning that the attorney-client privilege may not incentivize such disclosures at all. *See supra* note 27 and accompanying text (discussing waiver of government's attorney-client privilege). Public officials have more motivation to seek legal advice than their individual and corporate counterparts. *See Leslie, supra* note 5, at 502-03 (noting incentives different in public context than private).

150. *See Suffolk Constr. Co.*, 870 N.E.2d at 36 (noting government placed at disadvantage in litigation with private parties). While only a handful of states have adopted the Uniform Rules of Evidence, they provide for governmental attorney-client privilege, but limit the privilege to litigation. *See* 99 UNIF. R. EVID. 502.

151. *See Suffolk Constr. Co.*, 870 N.E.2d at 36 (reasoning public has strong interest in justice). The court, however, does not mention the public's potential interest in accessing information which involves creating an informed citizenry, government accountability, open and transparent government, and the facilitation of democracy. *See supra* notes 48-49 and accompanying text (describing public's interest in open and transparent government).

152. *See Suffolk Constr. Co.*, 870 N.E.2d at 46 (concluding legislature did not intend to suspend attorney-client privilege by passing PRL).

153. *See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 44 (Mass. 2007) (holding PRL does not evince intent of legislature to abrogate common-law privilege). The use of "fundamental" and "longstanding" does seem excessive given the speculative nature of the government's attorney-client privilege before the *Suffolk* case. *See supra* note 54 and accompanying text (discussing uncertain status of governmental attorney-client privilege in Massachusetts). By tacking the government's attorney-client privilege onto the traditional attorney-client privilege, the court engaged in reasoning that may have been disingenuous. *See supra* Part III.A (arguing justification of government attorney-client privilege as faulty). The court also used this method to distinguish prior precedent, reasoning that the privilege in this instance was "well established," even though now the court had to "state explicitly that confidential communications between public officers and employees and governmental entities and their legal counsel . . . are protected under the normal rules of the attorney-client privilege." *Compare Suffolk Constr. Co.*, 870 N.E.2d at 45 n.20 (calling governmental attorney-client privilege well established), *with id.* at 39 (establishing existence of governmental attorney-client privilege).

154. *See Suffolk Constr. Co.*, 870 N.E.2d at 45 n.18 (rejecting petitioner's argument that legislative history amounts to proof of intention to abrogate attorney-client privilege). The difficulties of the legislative process can contribute to the legislature's failure to pass amendments; therefore, courts give little merit to suggested

policy [of] favoring open government” is not contravened by finding an implied exemption for the attorney-client privilege.¹⁵⁵

IV. CONCLUSION

The *Suffolk* court’s approach to resolving conflicts between the attorney-client privilege and public records laws is commendable and can serve as a model for other jurisdictions that are confronted by similar issues due to the absence of explicit exemptions for privileges in their respective open-government statutes.¹⁵⁶ The two-step analysis that the court engaged in is the appropriate method for dealing with these controversies. The decision itself, however, seems to falter.

Most importantly, the court’s decision did not adequately differentiate between the governmental attorney-client privilege and the traditional attorney-client privilege.¹⁵⁷ In doing this, the court created misleading impressions of the governmental attorney-client privilege’s weight and authority. Whereas the attorney-client privilege has long-standing recognition in common law, the governmental attorney-client privilege has only recently been recognized and, as such, its importance at common law is not nearly as significant as the individual attorney-client privilege. This becomes critically important when courts examine whether an open government statute abrogates the governmental attorney-client privilege. By categorizing the governmental attorney-client privilege in the same manner as the individual attorney-client privilege, courts are less likely to acknowledge the governmental attorney-client privilege’s recent recognition. It is also critical for courts to take into account that the governmental attorney-client privilege has unique drawbacks that are not present in the individual or corporate context. Lastly, the *Suffolk* decision puts too little emphasis on the legislature’s attempt to create a more transparent and open government through the passage of an open-government statute.¹⁵⁸ The legislature’s failure to include an exemption for attorney-client privilege can be construed as an intentional exclusion or amount to a waiver by the government.

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amendments, especially ones that were not subject to a floor vote. *Id.* The court also noted that at the time the PRL was passed, it was not clear what effect the FOIA’s Exemption 5 had in regard to the attorney-client privilege. *Id.*

155. *Id.* at 45.

156. *See supra* note 137 (delineating some states whose open-government statutes do not address privilege).

157. *See supra* Part III.A (arguing for more nuanced analysis of governmental attorney-client privilege).

158. *See supra* notes 152-155 and accompanying text (analyzing *Suffolk* court’s reasoning in regards to legislature’s intent).