

“The Basics of Solicitor-client Privilege”

Presentation at the Forum on the Application of Solicitor-client Privilege
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1. Solicitor-client privilege generally

Solicitor-client privilege is a person’s right to refuse to disclose, and to prevent any other person from disclosing, confidential communications made with the person’s lawyer for the purpose of furnishing or obtaining professional legal advice or assistance. (Adapted from *Black’s Law Dictionary*)

It is well accepted in law that solicitor-client communications are “privileged”, i.e. the communications are confidential. This legal privilege is of indefinite duration. It cannot be waived – that is, given up – except by the client. (Order 2000-021 at para. 42)

The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients’ cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice. [*Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39 at para. 26]

2. The exceptions to disclosure

Section 27 of the *Freedom of Information and Protection of Privacy Act*:

27(1) The head of a public body may refuse to disclose to an applicant

- (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

...

(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

Section 27 sets out both discretionary and mandatory exceptions to disclosure

Under section 27(1)(a), a public body may withhold privileged information that relates to a public body.

Under section 27(2), a public body must withhold privileged information that relates to a person other than a public body (e.g., individuals, private organizations).

- Solicitor-client privilege belongs to the client, rather than the solicitor, so section 27(2) does not apply to a record simply because it contains information about the lawyer who provided the advice or prepared the document (Order F2007-014 at paras. 56-57)
- Whether the privilege belongs to an individual employee of a public body, as opposed to the public body as a whole, depends on the facts (see, e.g., Order F2003-015 at para. 76, where an employee was individually named in a lawsuit)

Solicitor-client privilege is not the same as litigation privilege

Litigation privilege does not apply to solicitor-client communications; rather, it applies to third-party communications – papers and materials created or obtained by the client for the lawyer’s use in existing or contemplated litigation, or created by a third party or obtained from a third party on behalf of the client for the lawyer’s use in existing or contemplated litigation (Order 97-009 at para. 102; Order F2003-015 at para. 67).

Main differences:

Solicitor-client privilege applies only to confidential communications between the client and solicitor, whereas litigation privilege can also apply to communications of a non-confidential nature with third parties. Solicitor-client privilege exists any time a client seeks legal advice from a solicitor whether or not litigation is involved, whereas litigation privilege applies only in the context of litigation itself and, absent closely related proceedings, ends upon the termination of the litigation. [*Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39 at paras. 27-28 and 36]

The difference is important because, while section 27 of the Act also protects information subject to litigation privilege, these notes and the OIPC’s *Solicitor-Client Privilege Adjudication Protocol* only deal with information subject to solicitor-client privilege.

3. The test for solicitor-client privilege

A public body must meet the criteria for solicitor client privilege set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837, in that the record must be:

- (i) a communication between a solicitor and client;
- (ii) that entails the seeking or giving of legal advice; and
- (iii) that is intended to be confidential by the parties.

(See, e.g., Order 96-017 at para. 22; Order F2007-013 at para. 72)

Communication between a solicitor and client

Solicitor-client privilege does not attach to advice provided by someone who is not a lawyer; the advice must be sought from a professional legal advisor in his or her capacity as such (Order F2007-022 at paras. 72-73).

Solicitor-client privilege may attach to records passed through a third party agent, as long as the agent is communicating for the purpose of seeking or giving legal advice (Order 97-003 at para. 217).

When a third party serves as a channel of communication between the client and the lawyer, or when the third party's function is otherwise essential to the maintenance or operation of the solicitor-client relationship, the communication is protected by privilege; where, in contrast, the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected (Order F2003-005 at para. 41).

Legal advice

"Legal advice" includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (Order 96-017 at para. 23; Order F2007-013 at para. 73).

The test for legal advice is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to their legal advisor to determine what those legal implications might be (Order F2004-003 at para. 29).

Legal advice may be about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute (Order F2004-003 at para. 30).

Legal advice may be sought and given where it deals with a question that has a legal aspect, and calls upon the lawyer's legal expertise (Order F2007-008 at para. 11).

Confidentiality

There may be an express statement of an intention of confidentiality on the record, or confidentiality may be implicit from the nature of the documents themselves (Order F2007-008 at para. 14).

It may be implicit in the circumstances under and purposes for which the legal advice was being sought or given that the communications were intended to be confidential (Order F2004-003 at para. 30).

Records may be intended to be confidential where the only parties involved were the solicitor and client to the exclusion of others (Order F2003-013 at para. 26).

Examples of records found *not* to meet the test for solicitor-client privilege:

- documents that merely give or request information, rather than give or seek legal advice (Order 97-003 at para. 221)
- letters from the public body's solicitor to the applicant's solicitor (Order 98-004 at para. 63)
- fax cover sheets that merely contain names and telephone numbers, and do not in any way entail the giving or seeking of legal advice (Order 98-004 at para. 51)

The "continuum" of legal advice

Privilege also attaches to information passing between a lawyer and his or her client that is provided for the purpose of giving the advice, as part of the continuum of solicitor-client communications; a particular document need not on its face evince the seeking or giving of legal advice, but to attract the privilege, it must be shown to be part of a continuum in which this is actually being done (Order F2003-005 at para. 39).

Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach (Order 96-020 at para. 137).

Examples of records found to be part of the continuum of legal advice:

- records that provide factual information relative to which the legal advice was sought (Order F2004-003 at para. 31; Order F2007-008 at para. 11)
- records outlining facts in relation to which the legal advice was given, or which provide factual background for the advice (Order F2006-011 at para. 10)
- written communications quoting or documenting legal advice that was given orally to the client by the solicitor (Order 99-013 at paras. 62-66; Order 2000-021 at para. 41)
- a fax cover sheet that itself meets the criteria for solicitor-client privilege because it contains information that entails the giving or seeking of legal advice (Order 96-021 at para. 85; Order 99-005 at para. 85)

Documents that are not actually passed between the solicitor and client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege.

More examples of records found to be part of the continuum of legal advice:

- a discussion between two public officials about how to frame the question that is to be asked of the lawyer (Order F2007-008 at para. 12)
- written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor (Order 99-013 at paras. 62-63; Order 2001-025 at para. 67)
- communications discussing the application of legal advice given by a solicitor (Order 96-020 at para. 133)
- an employee's notes regarding a solicitor's legal advice, and comments on that advice (Order 99-027 at para. 95)
- notes "to file" in which legal advice is quoted or discussed (Order F2005-008 at para. 42)
- solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice (96-017 at para. 30)

Lawyers' bills of account

Lawyers' bills of account are presumed to be subject to solicitor-client privilege, but the presumption is rebuttable; solicitor-client privilege may be shown not to apply if there is no reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege (Order F2007-014 at para. 51).

4. There must be evidence of solicitor-client privilege

A document does not attract solicitor-client privilege simply by virtue of its presence in a lawyer's file (Order F2003-005 at para. 38).

It is not sufficient for a finding of solicitor-client privilege that a public body gave records to the public body's solicitor; not every record dropped off or otherwise given to a public body's solicitor has been given in confidence for the purpose of giving or seeking legal advice; just because a solicitor may have been involved is not enough to find that solicitor-client privilege applies to records (Order 2000-019 at paras. 38-39).

In order to show that there is a continuum of legal advice in regard to records, it is not enough to simply make this assertion; evidence must be provided to support the assertion (Order F2004-021 at para. 143).

Examples where solicitor-client privilege might not be established:

- records are given by a public body to its solicitor, but there is no evidence as to what legal advice was sought or given, who sought it, or to whom the legal advice was given (Order 2000-019 at para. 38)
- the public body does not explain how documents were relevant to the seeking or giving of legal advice (Order F2003-005 at para. 45)
- there is no evidence as to whether or which solicitors filled out a document and for what clients (Order 98-004 at para. 49)
- letters are from the applicant's (or any other) solicitor, but there is no evidence that the letters were actually sent to the public body's solicitor for legal advice (Order 98-004 at paras. 56 -57)
- it does not appear that the public body presented the documents to its solicitor for legal advice, as the solicitor was retained to respond to very specific issues only (Order 98-004 at paras. 65-69)

- it is unclear whether communications were provided merely for information or whether they were sent for the purpose of seeking legal advice (Order F2007-013 at para. 76)

5. Solicitor-client privilege does not apply if it has been waived

Only the client can waive solicitor-client privilege

Solicitor-client privilege can only be waived by the client for whom the records were prepared (Order 2000-023 at para. 26).

If a client has not waived solicitor-client privilege, the client has a continuing right of legal control over the record, despite the fact that a solicitor may physically have custody of it (Order 2000-021 at para. 42).

How solicitor-client privilege might be waived, and to what extent

Waiver of a right requires the intentional, voluntary relinquishment of a known right (Order 98-017 at para. 61).

Privilege may be waived by the actions of the parties; for example, solicitor-client privilege may be lost by making legal advice public or by disclosing it to an opposing party (Order F2007-022 at para. 84).

A public body could be said to have waived solicitor-client privilege where there is no evidence that the public body intended to maintain confidentiality by restricting the use of the communication by the person who received it (Order 96-017 at para. 35).

Waiver depends on intention and may be for a limited purpose (Order 98-017 at para. 62).

There may be waiver as between the client and certain parties, but not the client and other parties or the world at large (Order 97-009 at para. 127).

Examples where solicitor-client privilege was found to be waived:

- the public body (who was the client) previously disclosed the documents to the applicant (Order F2003-001 at para. 53; Order F2003-013 at para. 25)
- the applicant (who was the client) provided the documents to the public body (Order 98-004 at para. 47)

- the applicant and public body relied on the same solicitor regarding the subject of the advice, and the public body (who was the party claiming privilege) tended to share advice it received from the solicitor with the applicant and discuss it at public meetings (Order F2007-022 at para. 85)

Examples where solicitor-client privilege was found *not* to be waived:

- the public body (who was the client) previously disclosed records to the applicant, but the information in the withheld records was not the same (Order 2000-031 at para. 25)
- the public body (who was the client) merely copied documents internally to its own employees, to employees in the department that provided the solicitors to represent the public body, or to the minister or deputy minister to whom the public body reported (Order 96-020 at para. 130; Order 99-005 at para. 86)
- documents were not copied (“cc’d”) to anyone outside of the solicitor-client relationship (Order 99-027 at para. 92)
- the third party (who was the client) provided the documents voluntarily to the public body, but had no intention to waive privilege by doing so (Order 97-009 at para. 125)
- a statement was made by the public body’s legal counsel and reported in a newspaper article, but it was not found that privilege was waived by such a statement (Order F2006-011 at para. 13)
- the public body supplied information through the media, the court process and an Auditor General’s report, but on review of the disclosed information, there was no evidence that privilege had been waived (Order 99-020 at paras. 90-91)