



Privilege Practice Note

The Office of the Information and Privacy Commissioner of Alberta has developed this practice note for its reviews and inquiries in which a Respondent (public body, organization or custodian) to an access request has claimed solicitor-client privilege or litigation privilege.

Under the *Freedom of Information and Protection of Privacy Act* (section 71(1)), *Health Information Act* (section 51) and *Personal Information Protection Act* (section 79), the Respondent has the burden of proving there is no right of access. The practice note is meant to ensure sufficient evidence is provided to support the claim of privilege. This does not preclude a Respondent from providing the relevant records as evidence.

In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), the Supreme Court of Canada (SCC) suggested that the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests. The SCC also cited *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), 580 A.R. 265 as the relevant authority in Alberta. In this case, the Alberta Court of Appeal discussed the application of Rules 5.7 and 5.8 of the Rules of Court (produced records, and records for which there is an objection to produce). The Court stated (at paras. 42-43):

...Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the “brief description” contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.

Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.

This is the basis for the practice note for the provision of evidence by Respondents claiming solicitor-client privilege over records. The practice note also applies to litigation privilege on the basis of the significance attributed to that privilege by the SCC in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52.

This practice note does not apply to records over which other exceptions to access are being claimed.

The practice note requires an affidavit of records. The affidavit includes a schedule in which the Respondent lists the records (or bundle of records) for which privilege is claimed, along with the description for each record or bundle. The practice note also sets out the test to be met for each claim

of privilege. The description for each record (or each bundle) must be sufficient to meet that test, without revealing the privileged information.

In *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, the SCC determined that more evidence to support the application of solicitor-client privilege is required when advice sought from or given by an in-house or government lawyer is at issue. This is because such lawyers may be called upon to give policy advice, which is not legal advice. The Court said:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

Therefore, a Respondent that is claiming solicitor-client privilege over the advice of an in-house or government lawyer must provide sufficient information about the relationship between the lawyer and the Respondent and about the circumstances in which the advice is being requested and provided, to establish that the subject matter is legal advice rather than policy or other advice.

Affidavit

OIPC File Number _____

Applicant _____

Respondent (Public Body /Organization/Custodian) _____

Affidavit of (name and status) Sworn (or Affirmed) by _____ on _____, 20__.

I, _____ of (Municipality, Province), have personal knowledge of the following (or, where applicable, I am informed and do believe that):

I am an authorized representative of (Name of Respondent).

I have reviewed the records.

The records listed in Schedule 1 are in the custody or under the control of (Name of Respondent).

(Name of Respondent) objects to produce the records listed in Schedule 1 on the grounds of privilege identified in that Schedule.

SWORN (OR AFFIRMED) BEFORE ME

at _____, Alberta,

this ____ day of _____, 20__.

(Signature of Representative)

Commissioner for Oaths in and for the Province of Alberta

Schedule 1

Records in the custody or under the control of (Name of Respondent) for which there is an objection to produce on the ground of solicitor-client privilege or litigation privilege:

| | Privilege Claimed | Description** |
|-----|-------------------|---------------|
| 1.* | | |
| 2. | | |
| 3. | | |

* A group of records may be numbered and treated as a single record if the records are all of the same nature and the bundle is described in sufficient detail to enable the Commissioner to understand what it contains.

** The description of the record or bundle of records must provide sufficient information about the records that, short of disclosing privileged information, shows why the claimed privilege applies to them.

For claims of solicitor-client privilege, the Respondent should provide:

- Information about the relationship between the Respondent and the lawyer *in the context of the relevant communication*
- Information about the circumstances to establish that the record was created in the course of requesting or providing legal advice or is a record revealing such a request or advice
- Information about the confidentiality of the communication

For claims of litigation privilege, the Respondent should provide:

- Information establishing that the record was created for the dominant purpose of litigation
- Information establishing that the litigation has not ended