

# INTERPRETATION BULLETIN

## Solicitor–Client Privilege

This interpretation bulletin addresses the solicitor–client privilege exemption, as set out in **section 19** of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and **section 12** of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). This document outlines the types of records that are exempted, specifically records subject to common law solicitor–client privilege (referred to as “branch one”) and those records that fall under statutory privilege (referred to as “branch two”).

### Disclaimer

This information bulletin provides general information only and is not legal advice.

#### Section 19 of FIPPA states:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.



Information and Privacy  
Commissioner of Ontario

Commissaire à l'information et à la  
protection de la vie privée de l'Ontario

### Section 12 of MFIPPA states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

## Two branches of section 19 of FIPPA and section 12 of MFIPPA

Section 19 of FIPPA and section 12 of MFIPPA allow institutions to exempt records protected by solicitor-client privilege or litigation privilege<sup>1</sup> from disclosure. The exemption consists of two branches:

- The first branch is based on solicitor-client communication privilege and litigation privilege at common law.
- The second branch contains statutory privileges created by the acts.

The institution must establish that at least one branch applies in order for a record to be exempted on the basis of privilege.

### Branch one: Common law privilege

At common law, solicitor-client privilege includes two types of privilege:

- solicitor-client communication privilege
- litigation privilege

### Common law solicitor–client communication privilege

The solicitor-client communication privilege at common law exists to ensure that a client may freely confide in their lawyer on a legal matter.<sup>2</sup> The Supreme Court of Canada has recognized that for the justice system to function well, it depends on “... full, free and frank communication between those who need legal advice and those who are best able to provide it.”<sup>3</sup> Clients must have the assurance of confidentiality so that they may make a “clean breast” of the facts with their lawyer.<sup>4</sup> “It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.”<sup>5</sup>

<sup>1</sup> There are some limited exceptions to this common law exemption. See [Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52](#) (CanLII).

<sup>2</sup> Orders [PO-2441](#), [MO-2166](#) and [MO-1925](#).

<sup>3</sup> [Blank v. Canada \(Minister of Justice\), 2006 SCC 39](#) (CanLII).

<sup>4</sup> [Canada \(Privacy Commissioner\) v. Blood Tribe Department of Health, 2008 SCC 44](#) (CanLII).

<sup>5</sup> [Canada \(Privacy Commissioner\) v. Blood Tribe Department of Health, 2008 SCC 44](#) (CanLII).

Accordingly, the private relationship between a lawyer and their client is necessary for the effective administration of justice.<sup>6</sup>

In order for a communication, whether written or oral, to be protected by solicitor-client privilege, it must:

1. be between client and lawyer in their professional capacity;
2. involve the seeking or giving of legal advice; and
3. be intended to be kept confidential by the parties.<sup>7</sup>

Whether solicitor-client privilege attaches to records “... depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.”<sup>8</sup>

This privilege protects direct communications of a confidential nature between lawyer and client (or their agents or employees), made for the purpose of seeking, obtaining or giving legal advice. The privilege covers not only the legal advice itself and the request for advice, but also the continuum of communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.<sup>9</sup>

The privilege may also apply to the lawyer’s working papers directly related to seeking, formulating or giving legal advice, and may include — in limited circumstances — third-party<sup>10</sup> reports prepared for the purpose of providing the advice.<sup>11</sup>

Privilege does not generally apply to facts that have an independent existence outside of privileged communications.<sup>12</sup>

The privilege does not apply where records were simply reviewed by counsel, who provided input and suggested changes.<sup>13</sup>

Where Crown counsel is not acting in a legal capacity, as in providing legal advice, the privilege is not applicable.<sup>14</sup>

The institution must show that the communication was made in confidence, either expressly or by implication.<sup>15</sup> For example, the privilege does not

6 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII).

7 *Solosky v. The Queen*, 1979 CanLII 9 (SCC).

8 *R. v. Campbell*, 1999 CanLII 676 (SCC).

9 *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII) and Order MO-4371.

10 *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA).

11 *Susan Hosiery Ltd. v. Minister of National Revenue*, 1969 CanLII 1540 (CA EXC), 2 Ex CR 27 and Orders PO-4406 and PO-4267.

12 *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95 (CanLII) and *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 (CanLII).

13 Order PO-2765.

14 Order PO-3372.

15 *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) and Order MO-2936.

cover communications between a lawyer and a party on the other side of a transaction.<sup>16</sup>

Legal billing information is presumed to be protected by solicitor-client privilege unless the information is “neutral” and does not directly or indirectly reveal privileged communications.<sup>17</sup> When examining whether the presumption of privilege in respect of legal billing information should be rebutted in a given case, the IPC will consider the specific circumstances and ask the following questions:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?<sup>18</sup>
2. Could an “assiduous inquirer” (someone who knows background facts and takes a very methodical and persistent approach to analyzing the billing information in the context of those facts) use the information requested to figure out or otherwise obtain privileged communications?<sup>19</sup>

In several cases, the Office of the Information and Privacy Commissioner of Ontario (IPC) has found that the disclosure of the total amount of fees involved in a specific legal matter would not reasonably reveal privileged communications either directly or indirectly, nor allow an assiduous inquirer to deduce such communications.<sup>20</sup>

In other cases, however, where legal invoices contain more detailed information about the nature of services rendered, including dates and/or the amount of time spent on each, the IPC has found that an assiduous requester could make inferences about the privileged communications, and has upheld the institution’s decision to claim the exemption.<sup>21</sup>

Everyone who is a client has the right to have confidential conversations and communications with their lawyer. This right extends to institutions as institutions can also be clients. In addition, public officials can also be considered clients, apart from the public, notwithstanding the special duties and responsibilities these officials have with respect to the public.<sup>22</sup>

Solicitor-client privilege at common law is not time limited; it is permanent unless the client chooses to waive the privilege.

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16 *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario*, 2012 ONSC 3496 (CanLII).

17 *Maranda v. Richer*, 2003 SCC 67 (CanLII); Order PO-2484, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA).

18 See Order PO-2484, cited above; see also *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (C.A.).

19 See Order PO-2484, cited above; see also *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (C.A.).

20 Orders PO-2548, PO-2484 and PO-4285.

21 Orders PO-4166 and MO-4332.

22 Orders MO-1172 and MO-2222.

## Common law litigation privilege

The common law branch of section 19 of FIPPA and section 12 of MFIPPA also comprises litigation privilege.

Common law litigation privilege is based on the need to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.<sup>23</sup> The litigation privilege exists to protect an attorney’s work product in preparation for trial from the opposing party.

The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.<sup>24</sup>

For a document to be covered by litigation privilege, it must:

1. Be prepared for or gathered by counsel (or someone under counsel’s direction).
2. Be prepared for or gathered in anticipation of litigation.
3. Be created for the dominant purpose of preparing for litigation.<sup>25</sup>

Litigation privilege does not apply to records created outside of the “zone of privacy,” such as communications between opposing counsel.<sup>26</sup>

The Supreme Court of Canada has distinguished litigation privilege from solicitor-client communication privilege in three ways<sup>27</sup>:

1. Litigation privilege is not restricted to communications between solicitor and client (or their agents and employees). Litigation privilege extends beyond communications between lawyer and client to include communications with third parties as well.<sup>28</sup>
2. In contrast to solicitor-client communication privilege that protects the seeking and giving of legal advice more generally, litigation privilege protects records created for the dominant purpose of litigation.
3. Unlike solicitor-client communication privilege, litigation privilege is time limited. It generally comes to an end when the litigation and any directly related legal proceedings have ended.

## Common law loss of privilege

### Waiver

A waiver means giving up a legal right to something. In the context of the disclosure of records, if a client waives solicitor-client or litigation privilege,

23 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII).

24 Order MO-1337-I and *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA); see also *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII).

25 *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) and *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII).

26 *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

27 *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII).

28 *Ontario (Attorney General) v. Holly Big Canoe*, 2002 CanLII 18055 (ON CA).

this would mean they would be giving up the right to keep the records confidential.

Under the common law, only a client may waive solicitor-client or litigation privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily shows an intention to waive it.<sup>29</sup>

There may also be an implied waiver of solicitor-client or litigation privilege where fairness requires it, and where some form of voluntary behaviour by the client supports a finding of an implied or objective intention to waive it.<sup>30</sup>

Waiver has been found to apply in the following situations<sup>31</sup>:

- The record was disclosed to an outside party,
- The communication is made to an opposing party in litigation, or
- The document records a communication made in open court.

Generally, disclosure to outsiders of privileged information is a waiver of privilege.<sup>32</sup> However, waiver may not apply where:

- Privileged information is shared internally among different government departments or ministries;<sup>33</sup>
- Release of privileged information is explicitly required under compulsion of statute;<sup>34</sup>
- Advice was given to several clients by the same counsel;<sup>35</sup>
- The record is revealed to another party that has a common interest with the disclosing party;<sup>36</sup> or
- The record is inadvertently or involuntarily disclosed.<sup>37</sup>

Common interest between parties does not necessarily mean identical interest nor do parties sharing privileged documents necessarily have to be co-parties in a litigation. “So long as (they) anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts.”<sup>38</sup>

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29 *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC).

30 *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

31 Orders PO-2323, PO-2509, MO-2006-F and PO-4226.

32 J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

33 Order PO-2995.

34 *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC).

35 *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII).

36 *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA); Orders MO-1678 and PO-3167.

37 *R. v. Ward*, 2016 ONCA 568 (CanLII).

38 *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) followed in PO-3154 and PO-3167.

## Branch two: Statutory privilege

The branch two exemption in section 19 of FIPPA and section 12 of MFIPPA is a statutory privilege that covers records used in giving legal advice or in contemplation of or for use in litigation.

Under section 19 of FIPPA, this privilege applies to records prepared by or for either Crown counsel (section 19(b)) or counsel employed or retained by a hospital or educational institution (section 19(c)), “for use in giving legal advice or in contemplation of or for use in litigation.”

Crown counsel here is defined as a “legal advisor” which includes both internal and external counsel<sup>39</sup> and applies in both the criminal and civil contexts.<sup>40</sup> Furthermore, Crown counsel must be acting as a legal advisor to the Crown.<sup>41</sup>

Section 12 of MFIPPA refers simply to “counsel employed or retained by an institution.”

The statutory litigation privilege is not restricted to records that fall within the scope of common law litigation privilege.<sup>42</sup> It protects records prepared for use in the mediation or settlement of litigation.<sup>43</sup> Also, in contrast to the common law litigation privilege, it does not end upon conclusion of the litigation and directly related proceedings but continues to protect records on a permanent basis.<sup>44</sup>

Like at common law, the statutory litigation privilege does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.<sup>45</sup>

Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt from disclosure under the statutory litigation privilege.<sup>46</sup> Documents not originally created for use in litigation, which are copied for a Crown brief as the result of counsel’s skill and knowledge, are also covered by this privilege.<sup>47</sup> However, the privilege does not apply to records in the possession of the police that were created during a police

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39 Order [PO-3238](#).

40 [Ontario \(Correctional Services\) v. Goodis](#), 2008 CanLII 2603 (ON SCDC).

41 [Ontario \(Children’s Lawyer\) v. Ontario \(Information and Privacy Commissioner\)](#), 2003 CanLII 72347 (ON SCDC).

42 [Liquor Control Board of Ontario v. Magnotta Winery Corporation](#), 2010 ONCA 681 (CanLII).

43 [Liquor Control Board of Ontario v. Magnotta Winery Corporation](#), 2010 ONCA 681 (CanLII).

44 [Ontario \(Correctional Services\) v. Goodis](#), 2008 CanLII 2603 (ON SCDC).

45 See [Ontario \(Attorney General\) v. Holly Big Canoe](#), 2006 CanLII 14965 (ON SCDC); [Ontario \(Correctional Services\) v. Goodis](#), cited above.

46 Order [PO-2733](#).

47 [Ontario \(Correctional Services\) v. Goodis](#), 2008 CanLII 2603 (ON SCDC), and Order [PO-2733](#).



investigation, just because copies of those records later become part of the Crown brief.<sup>48</sup>

If waiver is claimed, the IPC will examine whether the statutory privilege in sections 19 FIPPA/12 MFIPPA have been lost through waiver.<sup>49</sup>

## Solicitor–client privilege and severance

The court has found that “Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege”.<sup>50</sup> However, this does not preclude the application of the severance provisions in sections 10(2) of FIPPA and 4(2) of MFIPPA to records containing other non-privileged information in addition to solicitor-client privileged information.

## Privilege as a discretionary exemption

Section 19 FIPPA/12 MFIPPA is a discretionary exemption. As an institution is permitted to disclose information notwithstanding the application of privilege, the institution must exercise this discretion.<sup>51</sup> An adjudicator could determine, on appeal, that an institution failed to exercise its discretion altogether or did not exercise its discretion properly, where<sup>52</sup>:

- It does so in bad faith or for an improper purpose.
- It takes into account irrelevant considerations.
- It fails to take into account relevant considerations.

In such cases, the IPC will return the matter back to the head of the institution to exercise its discretion or to re-exercise its discretion properly.

48 Orders [PO-2494](#), [PO-2532-R](#) and [PO-2498](#), upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

49 See discussion above under Branch 1, “Loss of Privilege.” Also, see Order [PO-3627](#) and *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC).

50 Orders [PO-1663](#) and [MO-4413](#).

51 Orders [PO-2475](#) and [PO-3949](#).

52 Orders [PO-2475](#) and [PO-3949](#).