



PRACTICE NOTE

Information Protected by Solicitor Client Privilege under the Freedom of Information and Protection of Privacy Act and the Personal Information Protection Act

May 2009

Background to our process

Section 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") authorizes a public body to refuse to disclose information that is subject to solicitor-client privilege in response to a request for access to information. Section 23(2)(a) of the *Personal Information Protection Act* ("PIPA") gives an organization the same authority to refuse to disclose information that is subject to solicitor-client privilege when responding to an individual's request for access to his or her own personal information.

FIPPA and PIPA give the Information and Privacy Commissioner ("Commissioner") the mandate to investigate, inquire into and make orders concerning whether public bodies and organizations have properly applied the statutorily-specified exceptions to the legislated rights of access. This includes oversight of the proper application of s. 14 of FIPPA and s. 23(2)(a) of PIPA. When this requires an assessment of the existence of a claimed solicitor-client privilege ("privilege"), the Commissioner's practice has been to examine the records in issue sparingly, on a confidential basis, solely for the purpose of verifying the existence of the privilege and only when necessary for that purpose alone.

Objectives of our solicitor-client privilege process

Consistent with the cautious approach we have always taken to the review of claims of privilege, being mindful of the importance of the privilege and the need to protect it, we have elaborated our process for exercising our oversight authority under FIPPA and PIPA. Our privilege case review process has the following three objectives:

1. Ensuring respect for the unique importance of privilege within the legal system and the exceptions to disclosure in FIPPA and PIPA;

2. Fulfilling the Commissioner's mandate to investigate, inquire into and make orders concerning whether the exceptions to disclosure in s. 14 of FIPPA and s. 23(2)(a) of PIPA are properly claimed; and
3. Maintaining an appropriate allocation of oversight resources between s. 14 of FIPPA and s. 23(2)(a) of PIPA and the other exceptions to the rights of access to information.

Solicitor Client Privilege Cases

The following outlines the approach the Office of the Information and Privacy Commissioner ("OIPC") takes to cases involving claims of privilege:

1. When the OIPC opens a request for review of a public body's or organization's decision to withhold information, an Early Intervention Officer establishes whether the case includes a denial of access to information under s. 14 of FIPPA or s. 23(2)(a) of PIPA.
2. The Early Intervention Officer discusses with the applicant who is seeking access whether the applicant wishes to pursue or withdraw the part of their request for review that concerns information to which access has been refused on the ground that it is protected by privilege.
3. The Early Intervention Officer explains to the parties that privilege cases are not assigned for mediation by the OIPC under FIPPA or PIPA, but that, if the parties mutually request, a Portfolio Officer who may also be responsible for investigating and mediating standard parts of the request for review will undertake consensual mediation of the privilege case.
4. If consensual mediation of the privilege case is not requested or does not succeed, it moves directly into the privilege stream.
5. The investigation and adjudication of privilege cases happens only in the privilege stream, where a legally-trained Adjudicator is delegated authority from the Commissioner to:
 - a. investigate under s. 42 of FIPPA and s. 36 of PIPA;
 - b. require persons to provide evidence or to produce records or documents under s. 44 of FIPPA and s. 38 of PIPA;
 - c. conduct inquiries under s. 56 of FIPPA and s. 50 of PIPA; and
 - d. make orders under s. 58 of FIPPA and s. 52 of PIPA.

6. An Adjudicator assigned to a privilege stream case:

- a. Examines (i) the applicant's request for access to information, (ii) the public body's or organization's response asserting privilege, and (iii) the applicant's complaint or request for review regarding the claim of privilege;
- b. obtains clarification, if not already apparent, from the public body or organization of the type of privilege claimed (legal professional privilege, litigation privilege, or both);
- c. as necessary in the circumstances of the case, requests the public body or organization to provide factual evidence to establish the existence of the privilege, including an adequate description of the record or document for that purpose;
- d. examines the information, record or document in issue if the public body or organization has elected to include it in the factual evidence to establish the existence of the privilege;
- e. gives the applicant an opportunity to provide evidence rebutting the assertion of privilege and gives the public body or organization an opportunity of reply;
- f. makes any further necessary factual inquiries of the public body or organization;
- g. requests to examine the information, record or document over which privilege is claimed only where necessary to fairly adjudicate the existence of the privilege;
- h. issues a decision determining whether or not the public body or organization is authorized to apply s. 14 of FIPPA or s. 22(3)(a) of PIPA;
- i. takes all reasonable precautions throughout, including receiving evidence in private, to protect privilege and avoid disclosing to any person any information, record or document that is subject to privilege or a claim of privilege; and
- j. extends procedural fairness to the applicant, public body or organization, subject to the foremost necessity of protecting and avoiding disclosure of any information, record or document that is subject to privilege or a claim of privilege.