



## Office of Legal Counsel

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### Solicitor-Client Privilege

*"If law were a religion, solicitor-client privilege would be its cathedral..."*

Solicitor-client privilege ('privilege'), is one of the basic tenets of the Canadian justice system and has been a recognized principle since the mid-16<sup>th</sup> century. Underlying privilege is a recognition that the legal system is complex and in order to effectively navigate it, laypeople need to obtain professional legal advice. The quality of that advice however, is dependent on the ability of the client to be completely candid with his or her lawyer without fear that their disclosures may be revealed and used against them. Without full disclosure, the quality of the advice and the legal system itself, are negatively affected.

It is important to note however, that not all disclosures made to a lawyer will be protected under privilege. In order to qualify for privilege, there are certain necessary components:

1. the lawyer must be acting in their professional capacity (cocktail party chatter may not qualify); the disclosures must be made in the context of giving or receiving specific legal advice; merely speaking to a lawyer or sending documents for safe-keeping does not in itself invoke the privilege; and
2. it is intended the disclosures are to be confidential; if facts are disclosed that are available from other sources, those facts may not be covered by privilege.

Once privilege attaches however, it continues to exist at the discretion of the client. Privilege belongs to the client and it is only the client who can waive the privilege. A client can waive privilege expressly by consent or by implication through disclosure to a third party.

Privilege is supported as an almost absolute promise of confidentiality both in the courts and in legislation. For example, privilege is one of the exemptions to disclosure under the *Freedom of Information and Protection of Privacy Act* (FIPPA). However as noted, privilege is an 'almost' absolute promise with a few, well-defined exceptions such as communications made in furtherance of crime or a fraud, where there is an imminent threat to the public, or where the innocence of a criminal accused may be put at risk.

#### **What does privilege have to do with business at the University?**

Sometimes, circumstances arise which require the University to seek legal advice. What we want is to obtain the best advice possible, which will require the disclosure of all relevant information; the good, the bad and the ugly. What we don't necessarily want is to have all those details made public. It is in the University's best interest to take steps to protect those discussions from inadvertent disclosure.

#### **What steps can be taken to protect privilege?**

1. If an employee receives legal advice from University counsel, the advice should be shared internally on a need-to-know basis only.

2. Emails, letters or memos containing legal advice should **NOT** be shared with third parties.
3. In order to protect sensitive information, University counsel should be brought into the discussion early so that privilege can be invoked.

**Examples to consider:**

**Scenario 1:** A University employee has an email exchange with University counsel on wording for a contract under negotiation with Party X. Both the employee and Party X are concerned with third parties accessing the contract and outlines specific concerns. University counsel provides advice to the employee about the effect of FIPPA on the confidentiality of the terms of the contract given the specific concerns. The employee forwards the University counsel's email to Party X for information. A third party makes a FIPPA request for the contract and all records applicable to the contract.

**Q:** Can the email exchange between the employee and the University counsel be protected?

**A:** Probably not. When the email communication was just between the University counsel and the employee, the communication was privileged and disclosure would not have been required. By sharing the email with Party X, it is likely that privilege would be seen to be waived and the email exchange including the specific concerns and the University counsel's advice would have to be disclosed.

**Scenario 2:** A University committee is established to formulate a policy on civility in the workplace. The committee decides to hold a number of townhall meetings to gather input for consideration in their policy work. Judy, one of the employees on the committee, is an administrator who also happens to be a lawyer. At one townhall meeting, an individual rises to speak in a particularly forceful and to some, a particularly uncivil manner. After the townhall, one of the committee members emails Judy with some very disparaging remarks about the individual but asks Judy to keep the remarks confidential.

**Q:** If a request for records was made, either in litigation or through FIPPA, would Judy be able to protect the emails under solicitor-client privilege?

**A:** Probably not. While Judy may have the credentials of a lawyer, she is not employed by the University to give legal advice and was not in receipt of the emails for the purpose of giving or receiving legal advice.



**Contact us:**

Office of Legal Counsel  
University of Guelph  
Room 403, 4th Floor  
University Centre  
Guelph, ON N1G 2W1

T: 519 824-4120, x53082  
F: 519 767-5259  
W: [www.uoguelph.ca/  
legalcounsel/](http://www.uoguelph.ca/legalcounsel/)