

IPC protocol for appeals involving solicitor–client privilege claims where the institution does not provide the records at issue to the IPC

The Office of the Information and Privacy Commissioner of Ontario (IPC) has developed this protocol for use at the adjudication stage where an institution has claimed the solicitor–client privilege exemption as the basis for denying access to the records at issue.¹

Where access is refused on the basis of an exemption from the right of access, the institution bears the burden of proving that the exemption applies. This is equally true for the solicitor-client privilege exemptions.²

In some cases where the exemption claimed is the solicitor-client privilege exemption, the institution does not provide the IPC with copies of the records. The remainder of this protocol applies to such situations, and is designed to ensure that sufficient evidence is provided to allow the adjudicator to decide the claim of privilege.³ The institution must provide sufficient information about the record that shows why the claimed privilege is applicable to it.⁴

The steps described in this protocol are for general information. The adjudicator deciding an appeal may deviate from these steps where appropriate in the circumstances. Also, as in any adjudication, the requester is generally given an opportunity to make representations on the institution's exemption claim.

1 See the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, s. 12; *Freedom of Information and Protection of Privacy Act (FIPPA)*, s. 19.

2 See *MFIPPA*, s. 42, *FIPPA*, s. 53.

3 However, this protocol does not apply for exemption claims other than solicitor-client privilege.

4 *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.



The steps are as follows:

1. Usually, the adjudicator will first ask the institution to provide a copy of the records at issue.
2. If the institution does not provide the records, the adjudicator will require the institution to submit an affidavit that lists the records for which solicitor-client privilege is claimed, along with a description of each record.

The adjudicator will review the affidavit and decide whether enough information has been provided to allow the privilege claim to be decided.

In cases where the adjudicator is satisfied that the affidavit provides enough information to decide the solicitor-privilege claim, the adjudication will proceed. The resulting order may uphold or reject the solicitor-client privilege exemption claim.

3. Where the affidavit provided by the institution does not satisfy the burden of showing that the privilege exemption applies, the adjudicator may give the institution the opportunity to provide more evidence, usually in the form of a more detailed affidavit, to include additional information identified by the adjudicator.

The institution should provide as much information as possible in order for the adjudicator to be able to decide the solicitor-client privilege issue.

Examples of information that could be included in an affidavit are:

- A description of the nature of each record (for example, email, letter or other document) and the date of each record, including other particulars sufficient to identify each document
- A statement as to why each record satisfies the privilege exemption. The statement should include whether the institution relies on communication privilege or litigation privilege. If litigation privilege is claimed, the statement should identify the litigation to which the document relates
- Information about each party to the communication, in particular his or her place of employment and position at such place of employment, and an explanation of the solicitor-client relationship among these individuals (if solicitor-client communication privilege is claimed), or whether and how these individuals form part of any zone of privacy around the allegedly privileged communications (if litigation privilege is claimed)
- A statement as to why any privilege in an email or other document has not been waived or lost by disclosure to others, in particular with respect to emails that have been sent/copied to third parties outside of the institution

If, despite the IPC's request, the institution does not provide sufficient information to decide the solicitor-client privilege issue, the adjudicator may decide that the institution has not met its burden to show that the exemption applies, and may order disclosure of the information at issue to the requester.

At any time during the adjudication of a solicitor-client privilege exemption claim, the adjudicator retains the right, in certain circumstances, to require the institution to produce copies of the records to the IPC if the adjudicator is not satisfied that he or she can adjudicate the matter based on the information provided by the institution.⁵

⁵ See *MFIPPA*, section 41(4) and *FIPPA*, section 52(4), and *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.