

Preamble to the Solicitor-Client Privilege Adjudication Protocol

The Information and Privacy Commissioner of Alberta has carefully analyzed the decision of the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44. The Court held that the Privacy Commissioner of Canada did not have the authority under the *Personal Information Protection and Electronic Documents Act* to compel the production of records that were subject to solicitor-client privilege.

Although this Protocol has been prepared in response to the Supreme Court's *Blood Tribe* decision, the Commissioner notes that the statutory regime and procedural context in which he operates differs from that of the Privacy Commissioner of Canada in several fundamental respects. The Commissioner is an adjudicator of disputed claims over legal rights and has order-making power similar to that of a court. Further, an order of the Commissioner is final and becomes enforceable as an order of the Court of Queen's Bench upon being filed with the Court. Unlike the Privacy Commissioner of Canada, the Commissioner is empowered to compel production "[d]espite any other enactment or any privilege of the law of evidence...". Finally, the Commissioner does not routinely compel production of information over which solicitor-client privilege is claimed; rather, he does so only on a case-by-case basis, when the party claiming the privilege fails to present adequate evidence of it and/or when opposing, persuasive evidence or argument has been presented to him that, in either circumstance, necessitates production in order for him to fairly decide the issue. Importantly, the Commissioner only compels production to the extent absolutely necessary in exceptional cases.

In such circumstances, a review of the record(s) in question may be required to determine whether the privilege has been properly claimed, thereby potentially permitting the application of an exception to disclosure of or access to information. In this context, the Commissioner has developed and implemented a Protocol, a visual depiction of which is attached, to govern how he and his delegates, as decision-makers in his Office's adjudication unit, will inquire into solicitor-client privilege when such has been claimed as a bar to review and/or disclosure of the record(s) at issue.

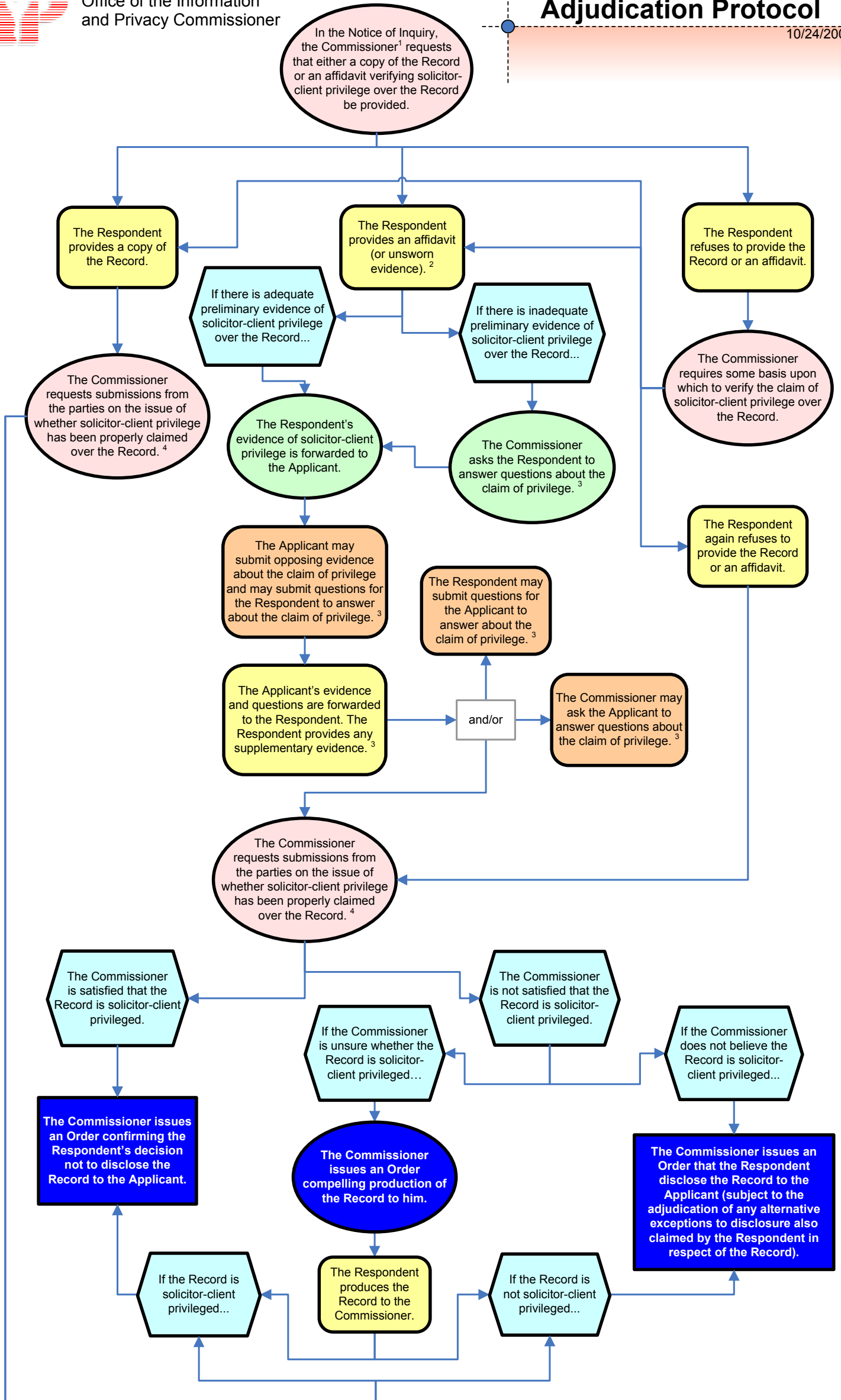
Parties will note that one of the options still available to them within the Protocol is the voluntary production of the record(s) to the Commissioner or his delegated decision-maker. Although doing so would constitute a waiver of solicitor-client privilege as against the Commissioner, it would not entail a waiver of privilege as against the world-at-large. Should a party voluntarily produce copies of any record(s) over which it claims solicitor-client privilege, the Commissioner's Office would not disclose such record(s) to the opposing party or anyone.

The Commissioner seeks the cooperation of all parties in this process so as to permit the proper determination of the issue of the applicability of solicitor-client privilege.



Solicitor-Client Privilege Adjudication Protocol

10/24/2008





Office of the Information
and Privacy Commissioner

Notes to the Solicitor-Client Privilege Adjudication Protocol

1. In this Protocol:
 - (a) “Commissioner” means the Information and Privacy Commissioner of Alberta or his delegated Adjudicator;
 - (b) “Respondent” means the Public Body, Custodian or Organization claiming solicitor-client privilege over records at issue;
 - (c) “Applicant” means the party or parties who applied to the Respondent for access to records;
 - (d) “parties” means the parties to the Inquiry; and
 - (e) “Record” means a record at issue over which the Respondent claims solicitor-client privilege.

2. Evidence in the form of an affidavit sworn by an individual with direct knowledge is strongly preferred. An affidavit sworn on information and belief will be accepted but afforded less weight. If the Respondent is unable to provide an affidavit asserting its claim of solicitor-client privilege, it may submit unsworn evidence of the privilege but whether such evidence is accepted and, if accepted, the weight it is given will be at the discretion of the Commissioner on a case-by-case basis.

In any event, the Respondent should not reveal the content over which solicitor-client privilege is claimed in its evidence, as all evidence will be exchanged among all parties.

The Respondent should identify whether it or some other person or party is the client in the solicitor-client relationship giving rise to the claim of solicitor-client privilege. It may also, but does not have to, identify the specific lawyer or law firm in that solicitor-client relationship.

Solicitor-client privilege must be asserted and evidenced by applying the criteria prescribed by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. Accordingly, the evidence must establish, for each Record, that:

- (a) There is a communication between a lawyer and the lawyer’s client; and
- (b) The communication entails the giving or seeking of legal advice; and
- (c) The communication was intended to be confidential.

In Order 96-017, the former Commissioner defined “legal advice”...to include ‘a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.’”

The Respondent must address and prove all three criteria in respect of every Record over which it has claimed solicitor-client privilege. To do so, it should include in its affidavit all information that supports its claim of privilege.

The attached Record Form will assist the Respondent in addressing some of these points on a Record-by-Record basis. Accordingly, the Respondent should complete this Form in respect of each Record over which it has claimed solicitor-client privilege and append it as an exhibit to its affidavit. Alternatively, the Respondent could incorporate the information contained on the Form in respect of each Record into the body of its affidavit. Again, in its affidavit the Respondent should also include all other information not disclosed on this Form that supports its claim of privilege.

3. Although a party may decide not to answer questions posed by the Commissioner or the other party, a refusal to answer a proper question may result in the Commissioner having insufficient evidence to decide the issue in the manner advocated by the refusing party.
4. A proper claim of solicitor-client privilege over the Record will permit the Respondent to refuse to disclose the Record to the Applicant.



Office of the Information
and Privacy Commissioner

***Solicitor-Client Privilege
Adjudication Protocol
Record Form***

Record#: _____

Who is the Client in the solicitor-client relationship?	_____		
Is that Client also a party to this Inquiry?	(NO NAMES PLEASE)		
	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
Does the Record involve the seeking or giving of legal advice between this Client and the lawyer?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
What is the date of the Record?	_____		
What type of Record is it?	<input type="checkbox"/> Letter	<input type="checkbox"/> Email	<input type="checkbox"/> Brief/Memo
	<input type="checkbox"/> Other (specify) _____		
	(DO NOT REVEAL THE CONTENT)		
Who authored or created the Record?	<input type="checkbox"/> Client's Lawyer	<input type="checkbox"/> Lawyer's Client	
	<input type="checkbox"/> Other (specify) _____		
	(NO NAMES PLEASE)		
To whom is the Record addressed?	<input type="checkbox"/> Client's Lawyer	<input type="checkbox"/> Lawyer's Client	
	<input type="checkbox"/> Other (specify) _____		
	(NO NAMES PLEASE)		
Was the Record copied to anyone?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
	If yes, list recipients _____		
	(NO NAMES PLEASE)		
Were there any attachments to the Record?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
	If yes, describe each separate attachment in general terms, using the criteria referred to herein:		

How long is the Record?	Primary Record _____ pages		
	Attachments 1) _____ pages 2) _____ pages 3) _____ pages		
	(if applicable) 4) _____ pages 5) _____ pages 6) _____ pages		
Were copies of the Record, or of any attachments to it, forwarded subsequently (on their own or as attachments to a separate Record)?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
	If yes, list recipients _____		
	(NO NAMES PLEASE)		