

<b>TITLE:</b>	Consultation with LSB Regarding Section 14 Solicitor Client Privilege		
<b>REVIEWED:</b>		<b>POLICY NO:</b>	00CRSCP.00
<b>OWNER:</b>			
<b>APPROVED BY:</b>			
<b>COMMENT:</b>	<a href="#">Policy Feedback Blog</a>		

**Purpose:**

This policy highlights a requirement for client ministries to seek the advice of legal counsel when deciding whether to waive solicitor client privilege for an FOI request.

**Policy:**

Legal Services Branch is consulted by client ministries regarding solicitor client privilege in relation to records considered for disclosure by a client ministry in response to a Freedom of Information request. Privilege belongs to the client and can only be waived by the client. However, with respect to government records, the decision on whether it is appropriate to waive privilege is determined through consultation between the client ministry and its legal counsel. Section 2(f) of the *Attorney General Act* says the Attorney General "must advise the heads of the ministries of the government on all matters of law connected with the ministries".

Government public bodies are required to consult with their designated legal counsel before disclosing a record to which privilege is attached. Legal counsel's role is to provide advice as to whether harm could result by waiving privilege and disclosing a privileged record. The client ministry considers the legal advisors' advice in deciding whether to assert or waive the privilege.

Requests for consultation may come from the client ministry's Freedom of Information coordinator or the Legal Services Branch FOI coordinator.

<b>TITLE:</b>	Solicitor Client Privilege in Government		
<b>REVIEWED:</b>		<b>POLICY NO:</b>	00SCPG.00
<b>OWNER:</b>			
<b>APPROVED BY:</b>			
<b>COMMENT:</b>	<a href="#">Policy Feedback Blog</a>		

### **Purpose:**

This policy outlines the nature of Solicitor Client Privilege in Government.

### **Policy:**

The fact that government legal services are “in-house” does not affect the creation or character of solicitor-client privilege. Solicitor-client communications by government officials, employees and agents with in-house counsel (or counsel retained by the Attorney General to act for the government) clearly enjoy the privilege.

A difference, however, does exist between the solicitor-client relationship in government, and that which exists in the private sector. These differences exist in the identity of the client, the direction of the client, and the ability of the client to waive the privilege.

### ***Who is the client?***

Pursuant to the *Attorney General Act*, RSBC 1996, c.22, the “clients” of the Attorney General are:

- the Lieutenant Governor<sup>1</sup> and
- Her Majesty in Right of the Province of British Columbia generally and on all matters of law referred to the Attorney General by the government.<sup>2</sup>

The government and its ministries cannot act except through its properly authorized officials, employees or agents. Officials, employees or agents of the government can communicate with the Attorney General for the purpose of receiving legal advice to carry out the functions and duties of their office. The Attorney General does not provide legal advice to government officials, employees or agents on matters outside or not connected with the operations of government. The legal advice provided by the Attorney General is for the benefit of the government and the Attorney General must see that the administration of public affairs is in accordance with the law.<sup>3</sup> The advice given will generally take into account the interests of government in a particular matter. The privilege belongs to the government (the “client”). The privilege does not belong to government officials, employees or agents personally.

Government employees, as a term and condition of employment in their official capacity, are required to swear or affirm an oath of employment as prescribed under the *Public Service Act* RSBC 1996, c.385.<sup>4</sup> The Standards of Conduct for Public Service Employees<sup>5</sup> specifically states that “confidential information that employees receive through their employment must not be divulged to anyone other than persons who are authorized to receive the information.” It also states that “a written opinion prepared on behalf of government by any legal counsel is to be treated as subject to solicitor/client privilege and is, therefore, confidential. Such an opinion is not to be released to persons outside the public service without prior written approval of the Legal Services Branch and/or the Criminal Justice Branch, Ministry of Attorney General.”

### ***Client Direction***

The Attorney General has both an advisory role and a role in representing the government in litigation, which may often exist simultaneously or overlap. The degree of client direction can differ depending on whether the Attorney General is exercising the role of legal advisor, or the role of legal counsel in litigation.

In an advisory role, the government is, in principle if not in practice, free to accept or reject the Attorney General's advice. Since it is the statutory duty of the Attorney General to see that the administration of public affairs is in accordance with the law, the Attorney General would have to carefully consider whether he or she could continue to hold the office if, in deciding to reject the Attorney General's legal advice, the government acts unlawfully.

In representing the government in litigation, the Attorney General takes instructions from the appropriate officials in the ministry representing the client and ordinarily presents the government's position in accordance with these instructions. However, if the Attorney General is of the opinion that these instructions are not consistent with the law or the public interest, the Attorney General will determine the position to be taken in a particular case. The authority for this determination is in the *Attorney General Act*, which states that the Attorney General "...has the regulation and conduct of all litigation for or against the Crown..."<sup>6</sup>

### ***Who can waive the privilege?***

Who should act on behalf of the government to determine whether information subject to the privilege should be waived? Privilege is waived by the deliberate disclosure of privileged communications to persons not covered by the privilege and may also be waived by conduct inconsistent with the privilege. Generally, the decision on whether it is required by law or otherwise in the public interest to waive privilege will be determined in the course of routine consultations between the client ministry and the Attorney General. However, in the unlikely event that the client ministry and the Attorney General are unable to agree on this issue, the basic principles underlying the role of the Attorney General support the following conclusions:

- (1) In regard to the disclosure of privileged documents in the conduct of litigation, the ultimate decision rests with the Attorney General; and
- (2) In all other circumstances (unrelated to the conduct of litigation), the ultimate decision rests with the Lieutenant Governor in Council. The Lieutenant Governor in Council means the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council.<sup>7</sup>

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1. See section 2(a). The Lieutenant Governor is appointed by the Governor General in Council (s.58 of the *Constitution Act, 1867*). The Lieutenant Governor does not use any personal initiative or discretion in the exercise of his or her powers of government, except for certain "reserve powers" or "personal prerogatives", which are exercisable only in exceptional circumstances. The Lieutenant Governor is obliged by the conventions of responsible government to act on the advice of the Executive Council.
  2. See sections 1(2) and 2(d)
  3. See section 2(b).
  4. This applies to all employees, including Order in Council appointees appointed by the Lieutenant Governor in Council (See sections 12, 15 and 21 of the *Public Service Act*, RSBC 1996, c.385).
  5. Policy Directive 5.4
  6. See section 2(i)
  7. See section 29 of the *Interpretation Act*, RSBC 1996, c.238, and note 1, above.

<b>TITLE:</b>	Solicitor Client Privilege Statement – Briefing Notes and Issues Notes Prepared for Clients		
<b>OWNER:</b>	ADAG	<b>POLICY NO:</b>	07SCPBIN.01
<b>APPROVED BY:</b>		<b>APPROVAL DATE</b>	
<b>DATE REVIEWED:</b>	January 15, 2018		
<b>DATE AMENDED</b>	January 15, 2018	<b>AMENDMENT DESCRIPTION</b>	Update policy template  Revise policy name to include “Prepared for Clients” for greater accuracy and clarity
<b>COMMENT:</b>	<u>Policy Feedback Blog</u>		

### **Purpose:**

This policy recommends the use of a solicitor client privilege statement in all briefing notes and issues notes that contain the input of a Legal Services Branch lawyer.

### **Policy:**

When a lawyer within LSB creates, provides input into or reviews an Issues Note, Information Note, Briefing Note, or other type of briefing document for the Public Affairs Bureau or any other provincial Ministry or agency, the lawyer should either add the statement below to the document, or insist that it be added:

*\* This document may contain information that is protected by solicitor client privilege. Prior to any disclosure of this document outside of government, including in response to a request under the Freedom of Information and Protection of Privacy Act, the Ministry in possession of this document must consult with the lawyer responsible for the matter to determine whether information contained in this document is subject to solicitor client privilege.*

### **Background:**

Lawyers in Legal Services Branch are frequently called upon to advise on, and sometimes to prepare "issues notes" for ministries or agencies of government. Frequently, though not exclusively, these requests come from Public Affairs Bureau. These notes are usually about a legal issue - often a matter that is or could be before the courts, or an administrative tribunal. Some portion of these notes often contains or reflects legal advice provided by the lawyer who has been called upon.

Some of these "issues notes" have been the subject of requests for disclosure, including requests under the Freedom of Information and Protection of Privacy Act. Ministries or agencies that have received these requests have on occasion failed to appreciate that these notes may contain legal advice, and have not considered questions of solicitor - client privilege, before determining to release them.

In an attempt to ensure that these issues are considered, the Deputy Attorney General and the Deputy Minister of the Public Affairs Bureau have agreed upon the policy outlined above.

<b>TITLE:</b>	Statements to the Press – Policy		
<b>REVIEWED:</b>		<b>POLICY NO:</b>	00STPP.00
<b>OWNER:</b>	ADAG		
<b>APPROVED BY:</b>			
<b>COMMENT:</b>	<u>Policy Feedback Blog</u>		

### **Purpose:**

This policy outlines how to respond to inquiries from members of the press.

### **Policy:**

The primary responsibility for dealing with press inquiries rests with the Ministry Communications and Public Affairs Division. Any exceptions must be approved by a member of the Management Committee.

All legal staff should be aware that the Canon of Legal Ethics and Code of Professional Conduct (copies attached) prohibit the expression of personal opinions about the merits of a case.

### **What to do when a member of the press calls**

When contacted by a member of the press, staff should:

- (i) establish the name and phone number of the press member initiating contact;
- (ii) clarify the nature of the inquiry;
- (iii) advise the individual concerned that the inquiry will be referred immediately to the Ministry Communications and Public Affairs Division for response. The phone number of that office would also be provided (387-9548);

### **Dealing with the Ministry Communications and Public Affairs Division**

The Ministry Communications and Public Affairs Division will often receive requests from the press and other parties concerning issues affecting Legal Services Branch. The objective of directing press inquiries affecting the Branch to that office is to ensure that there is consistency in Ministry communications in a timely fashion. Accordingly, if contacted by that office for information, or if you have initiated contact concerning a press inquiry that has been received by Legal Services Branch, you should proceed as follows:

- (i) provide the Communications and Public Affairs Division with:
  - (a) the name and phone number of the press contact, if appropriate;
  - (b) details of the inquiry received by Legal Services Branch, if appropriate;

- (c) any relevant Legal Services Branch information concerning the inquiry;
- (d) appropriate cautions on the release of any Legal Services Branch information, such as solicitor/client privilege or confidentiality commitments;
- (e) other sources of information relevant to the inquiry, such as, client contacts, etc.

<b>TITLE:</b>	Waiver of Solicitor-Client Privilege		
<b>REVIEWED:</b>	Apr 2011	<b>POLICY NO:</b>	09WSCP.01
<b>OWNER:</b>	ADAG		
<b>APPROVED BY:</b>	BMC Apr 2011		
<b>COMMENT:</b>	<a href="#">Policy Feedback Blog</a>		

### **Policy:**

1. Solicitor/client privilege is enjoyed by all emanations of the Province and governs all communications and legal advice between Legal Services Branch lawyers and their client ministries. LSB lawyers are not to waive solicitor/client privilege on behalf of clients unless expressly given instructions to do so by their client and after consultation with their immediate Group Supervisors, and with approval of the Deputy Attorney General.

In the event that the client and the Attorney General are unable to agree on whether privilege should be waived:

- a. in the conduct of litigation, the ultimate decision rests with the Attorney General;
  - b. in all other circumstances, if the client Minister and the Attorney General do not agree on the issue of waiver, the ultimate decision regarding waiver of solicitor/client privilege rests with the Executive Council.
2. When meeting to determine whether advice should be given to clients to waive solicitor/client privilege, LSB lawyers and Group Supervisors should be guided by [Audrey Lieberman's memorandum of law entitled "Waiver of Privilege"](#), and endorsed by the LSB Professional Standards Committee. This memorandum includes a description of circumstances in which LSB lawyers have waived privilege on behalf of their clients.