

## 2.2 Solicitor–Client Privilege Policy

### Policy Statement

Confidentiality of communications between a solicitor and a client, known as solicitor-client privilege, is a key element in the solicitor-client relationship.

This policy is intended to reduce the instances of waiver of solicitor-client privilege over legal opinions provided by lawyers to government departments (“clients”).

This policy also sets out the steps a department must follow to disclose legal opinions beyond the civil service.

### Definitions

#### **CIVIL SERVICE**

The positions in the public service of the Province to which appointments may be made by the Public Service Commission and such other positions as may be designated as positions in the Civil Service by the Governor in Council as defined in the *Civil Service Act*, R.S.N.S., c. 70, s. 1.

#### **DEPARTMENTS**

Department, office, and public service entities of the Government of Nova Scotia as defined in the *Public Service Act*, R.S.N.S., c.376, s. 1.

#### **DEPUTY HEAD**

Means the deputy of the member of the Executive Council presiding over a department and all others whom the Governor-in-Council from time to time designates as having the status of deputy head.

#### **LAWYER/SOLICITOR**

Includes Department of Justice lawyers as well as Crown Law Agents hired pursuant to the Approval and Acquisition of Private Legal Services Policy included as policy 2.1 of the Management Manuals.

#### **LEGAL OPINION**

Written or verbal advice to a client in which a solicitor provides their understanding of the law. Where “legal opinion” is referred to within this policy it includes any portion of or reference to the content of the legal opinion.

### **SOLICITOR-CLIENT PRIVILEGE**

Confidential communications which take place between a solicitor and a client for the purpose of obtaining legal advice are protected by solicitor-client privilege. This communication can be in the form of a legal opinion. For solicitor-client privilege to exist the following elements must be present:

1. there must be an existing relationship of client and solicitor
2. there must be communication between the client and solicitor engaged in that relationship
3. the communication must be made in confidence (or with the expectation of confidence); and
4. the communication must be for the purpose of seeking or providing legal advice.

### **WAIVER OF PRIVILEGE**

In most circumstances, waiver of privilege over a solicitor-client communication (such as a legal opinion or legal advice) takes place when the client knows of the existence of the privilege and demonstrates an intention to waive that privilege. However, waiver may also occur when the client does not intend to waive the privilege but where fairness and consistency require a finding that privilege was waived. Waiver of privilege over part of a communication will result in waiver of privilege over the entire communication. Departments do not have the authority to disclose legal opinions outside of the civil service without express written authority of the Deputy Head of the department or the appropriate delegate.

## **Policy Objectives**

The objective of this policy is to provide a framework to departments on the disclosure of legal opinions and the waiver of solicitor-client privilege over legal opinions. Through education and obligatory procedures, this policy will reduce the instances of waiver of solicitor-client privilege over legal opinions provided by lawyers.

## **Application**

This policy applies to all government departments who seek legal opinions from lawyers.

This policy does not apply to the disclosure of solicitor-client privileged records in the context of a FOIPOP application for access to information. When a FOIPOP application for access to information is at issue, consult applicable legislation and procedures.

## Policy Directives

All written legal opinions provided by Department of Justice lawyers will prominently display the following warning:

*This is a legal opinion provided by the Department of Justice. This legal opinion, or any portion of this legal opinion, is not to be disclosed or referred to outside of the Civil Service without the express written approval of the Department's Deputy Head or their delegate(s). **If this legal opinion, or any portion of this legal opinion, is shared or referred to, the solicitor-client privilege which currently attaches to this legal opinion may be found to have been waived.***

In order to disclose a legal opinion provided by a lawyer, beyond the Civil Service, express written authorization must be obtained from the Deputy Head of the department or the appropriate delegate.

If written authorization to disclose the legal opinion is obtained from the Deputy Head of the department or the appropriate delegate, the authorization must be included within the appropriate file and copied to the Department of Justice lawyer responsible for the file. If a department is looking for a standard form of authorization it may request assistance from the Department of Justice lawyer.

## Policy Guidelines

Departments may issue guidelines, to assist in the implementation and administration of this policy and to facilitate the application of this policy at departmental levels. These guidelines must be created and approved by the Deputy Head of the department and in all cases be consistent with and reflective of this policy. The department's guidelines must be reviewed by the Department of Justice in advance of being approved by the Deputy Head of the department. Only this policy shall apply where such guidelines are found to be in conflict.

## Accountability

The Deputy Heads of each department are responsible for policy implementation and compliance.

Departments should keep current any guidelines implemented to facilitate the application of this policy and periodically ensure compliance with this policy.

## Monitoring

The departments will monitor the policy's implementation performance and effectiveness.

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