a few principles on legal privilege

Does the presence of a lawyer at your meeting cloak those communications in legal privilege? Can a legal privilege exist even if a lawyer is not involved at all? What does it mean when a communication is privileged anyway?

If a party's communications are covered by a legal privilege, the party is legally entitled to refuse to disclose those communications to a requester.

This principle holds, with some exceptions, even if the request for those communications arises in the context of a statutory right of access to information or a legal proceeding, and even where those communications are relevant and could assist the court or other adjudicator find the truth. The law allows such restrictions on our right of access to information and our legal system's search for truth in order to serve an overriding public interest.

There are many different kinds of privilege and the justification for them varies depending on the overriding public interest they serve. Two of the most common privileges are solicitor-client privilege and litigation privilege. ***Solicitor-client privilege*** attaches to all communications, in any form between a client and their lawyer. The privilege enables clients to speak honestly and candidly with their lawyers so that they can receive quality legal advice.

The conditions required to raise the privilege are that the communication must be (a) between a client and their lawyer, who must be acting in a professional capacity, (b) given in the context of obtaining legal advice, and (c) intended to be confidential. Whether or not communications in a meeting with a lawyer are privileged depends on the lawyer's role at the meeting. If they are there in their professional capacity for the purpose of providing legal advice, then the communications are privileged.

By contrast, if the lawyer is solely there as, for example, a member of a committee or working group, the communications are likely not privileged.

Litigation privilege attaches to communications or other records made or created for the dominant purpose of preparing for anticipated or existing litigation. While litigation privilege includes communications between a client and their lawyer, it also includes communications between a lawyer, or client, and a third party (e.g. witnesses, investigators, other experts).

It also protects documents created by a client or a lawyer for their own use – again, so long as they were created for the dominant purpose of preparing for anticipated or existing litigation. Litigation privilege allows parties – represented or not – to investigate and prepare their case privately without interference from, or fear of having to disclose their case to, the "other side" before they are ready. As noted, this privilege can arise in the complete absence of a party's lawyer. Self-represented litigants, for example, are entitled to claim this privilege in respect of any records they create for the dominant purpose of preparing for litigation. However, unlike solicitor-client privilege, which endures beyond the termination of any dispute and endures regardless of any dispute, litigation privilege endures only for as long as the dispute or litigation continues. Once the dispute terminates, the privilege ceases.

The common law also recognizes claims of privilege in new situations on a case by case basis. The conditions required to raise a ***common law privilege*** are that (a) the communications between the parties must originate in a confidence that they will not be disclosed, (b) this element of confidentiality is necessary to maintain the relation between the parties, (c) the relation between the parties is one that should be deliberately and consciously fostered and protected in the public interest, and (d) if the parties' communications were disclosed, the injury to the relationship would be greater than the benefit the communications might have for the litigation.

Of interest to our University research community, a ***researcher-participant confidentiality privilege*** was recognized by the Quebec Superior Court in *R v. Parent*, 2014 QCCS 132 under the common law criteria. This decision relates to the high profile prosecution of Luka Magnotta, who was ultimately convicted of first degree murder. The issue in *Parent* was whether research data collected by University of Ottawa researchers, and seized under a search warrant, could be compelled for use in the prosecution of Mr. Magnotta or whether the research data was protected by a common law privilege and, therefore, was not compellable or admissible in the prosecution.

By way of background, researchers at the UofO conducted interviews of sex trade workers of which, Mr. Magnotta was one. All research participant-interviewees were assured of confidentiality and were assigned a different name to protect their identity. Mr. Magnotta was assigned the name "Jimmy" but later identified himself to a research assistant as Luka

Magnotta. The existence of Mr. Magnotta's interview was then disclosed to law enforcement .

A search warrant was executed and the interview of "Jimmy" was seized (though remained sealed). The UofO researchers then successfully applied to quash the search warrant on the ground that the seized research interview was protected by common law privilege – in this case, a researcher-participant confidentiality privilege.

However, because common law privilege is decided on a case by case basis with circumstance-specific facts, *Parent* cannot be regarded as a precedent for all researcher-participant relations.[1]

In assessing the third criterion (the relation between researchers and their participants is one that should be deliberately and consciously fostered and protected in the public interest), the court accepted the researcher's submission that

> 120…the relationship between an academic researcher and a participant, in general, ought to be deliberately and consciously fostered on the basis of the importance of academic research to society. Key components of academic research are at stake in this particular case: academic freedom, which in turn includes the pursuit of knowledge, and the free flow of ideas in our society.

and found

> 123 In other words, academic freedom and the importance of institutions of higher learning and academic research are key components of a democracy that values freedom of thought and expression.

The Office of General Counsel (OGC) advises the University on a variety of legal issues. Please feel free to contact kimberly.marchuk@ualberta.ca or jaxine.oltean@ualberta.ca in the OGC if you require assistance.

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[1] For those who are interested, the full text of this decision can be found at https://www.canlii.org/en/qc/qccs/doc/2014/2014qccs132/2014qccs132.html?resultIndex=1 which sets out the facts in this case that supported the finding of privilege.