

## Legal Professional Privilege – A Valuable Asset

Legal professional privilege is a rule of law that preserves the confidentiality of certain communications, whether oral or written, between a lawyer and a client.

In the event of an investigation or audit by a statutory authority, such as the Environmental Protection Authority, the availability of a claim of legal professional privilege may ultimately prevent a prosecution or other adverse action being taken against the party under investigation, by reason of denying investigators access to materials and information that would otherwise be used as evidence.

As well as being a shield, legal professional privilege can also be utilised to improve and monitor the operations of an organisation, by allowing full and frank internal investigation and discussion of organisational practices, without fear that the results may have to be disclosed to a third party, including an investigating authority, in the future.

### **What communications are protected by legal professional privilege?**

In order for a communication to be protected by legal professional privilege, it must have been brought into existence for:

- the dominant purpose of seeking or providing legal advice; or
- use in existing or anticipated legal proceedings.

If no lawyers are involved in the investigation and/or management of an environmental investigation or audit, it will be very difficult to claim that any internal reports produced as a result are subject to legal professional privilege. As such, anything uncovered during this type of internal investigation is potentially liable to be disclosed to an investigating authority. This may result in such internal investigations either not being undertaken, or being of a whitewash in nature, making it difficult for

an organisation to monitor and improve its practices. Alternatively, if undertaken properly, but in a manner that does not attract legal professional privilege, the results may incriminate the organisation and provide authorities with the evidence needed for a successful prosecution.

### **Loss of legal professional privilege.**

The right to claim privilege belongs to the client who receives the confidential legal advice, not the lawyer who provides it.

Client legal privilege can be lost or waived expressly or by implication. Implied waiver happens when a party's conduct is inconsistent with the maintenance of confidentiality which the privilege is intended to protect. For example, if advice from a lawyer was provided by the lawyer's client to third parties without an express requirement that the advice be kept confidential, privilege is likely to be found to have been impliedly waived.

### **Legal professional privilege and in-house counsel.**

The Courts closely scrutinise claims of legal professional privilege in relation to communications between in-house counsel and their employers. This is because in-house counsel will often work for their employer in more than the capacity of a legal advisor and lack the necessary independence from their employer.

Generally, communications between in-house counsel and their employer will only be protected by legal professional privilege if:

- they are made for the dominant purpose of providing or receiving legal advice or carrying on actual or anticipated litigation;
- an independent professional relationship exists between the legal adviser

and the

employer i.e. the in-house lawyer acts solely in the capacity of legal advisor, and acts independently in that capacity; and

- the in-house counsel is qualified to practice law i.e. holds a current practising certificate.

Where in-house counsel fulfils more than one role in an organisation, including playing a managerial or quasi-managerial role, satisfying the above requirements will be problematic. If, for example, the in-house counsel is also acting as company secretary, there is a risk that the in-house counsel's interests will mirror the commercial interests of the organisation and the in-house counsel may therefore be regarded as lacking the requisite degree of independence in the provision of legal advice.

### Conclusion.

Whether or not legal professional privilege attaches to a communication can determine whether or not an organisation is prosecuted or faces other adverse action from investigating authorities, or whether a litigant is successful in a claim against it.

Organisations should therefore establish and observe protocols for:

- the immediate instructing of external lawyers at the first suggestion of an external investigation or audit by an investigating authority, or other legal action against it; and
- the appropriate handling of privileged communications to prevent the inadvertent waiver of legal professional privilege, including limiting internal access to the communications subject to privilege.

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