



Frequently asked questions on legal professional privilege

1. What is legal professional privilege?

Legal professional privilege (LPP) is a privilege claimed by a client to withhold information or documents that would reveal **confidential communications** between lawyer and client made for the **dominant purpose** of:

- giving or obtaining legal advice; or
- providing legal services, including representation in legal proceedings that have actually commenced or are anticipated by the person claiming legal professional privilege.

The privilege applies to communications as well as documents. It will prevent access to oral communications and records of communications in any form.

LPP serves the public interest, and underpins the rule of law, by facilitating free communication between the client and the legal adviser. LPP protects communications, not documents per se, still less the information given by or obtained in the document¹.

There is no application of LPP to information itself that witnesses can provide under compulsory interview, about what they have observed or what conclusions they can draw from those observations. The witness must answer the questions. The communication must be confidential, made in a confidential manner and confidentiality must be preserved. If the communication, or the

record has been disseminated or made public it would not be confidential.

Privilege extends to communications with a third party for the benefit of the lawyer's client, provided the dominant purpose is legal advice. For example, a confidential opinion from an engineering consultant or a witness statement obtained for the dominant purpose of actual or anticipated legal proceedings would be privileged.

It also prevents the disclosure of documents that record legal work carried out by the lawyer for the benefit of a client, such as notes or research memoranda.

Documents such as contracts, accounting records, internal reports and memoranda that were not created for the dominant purpose of legal advice or litigation will not be covered by legal privilege, even if they have been lodged with the lawyer for the purpose of obtaining legal advice.

The test for whether a confidential communication is privileged focuses on the purpose for which the communication was made, not the information in the communication. Where there is more than one purpose, the communication will not be privileged unless the claimant (client) demonstrates that the dominant purpose was legal advice or litigation. If there is an equally valid reason for the creation of the communication then it is not privileged.

2. What is the test for legal professional privilege?

The test for whether a confidential communication is privileged focuses on the purpose for which the communication was made, not the information in the communication. Where there is more than one purpose, the communication will not be privileged unless the claimant (client) demonstrates that the dominant purpose was legal advice or litigation. If there is an equally valid reason for the creation of the communication then it is not privileged.

A document or other form of confidential communication will be protected by legal professional privilege if it has been created for the dominant purpose of obtaining legal advice or preparing for, or conducting, court proceedings. This is called the "dominant purpose test".

If the communication was created for more than one purpose, then the person claiming legal privilege must establish that the dominant purpose was to seek or give legal advice or to conduct litigation. For example, a report produced for the purpose of obtaining legal advice may also provide an evaluation of a particular procedure. The report would still be privileged. If, however, it was created primarily to evaluate particular operating procedures of the organisation, it would not be privileged.

¹ Esso Australia Resources Ltd v The Commissioner of Taxation (1999) 201 CLR 49 at 79, 82

3. How is legal professional privilege applied to an investigation?

Interviewing witnesses

When an investigation is required, an inspector will generally attend a site shortly after the incident or occurrence takes place.

That the employer has obtained a statement from any person will not affect the inspector's investigation. The inspector has the power to interview any person who he or she believes can provide information about the incident or occurrence.

Privileged documents

Only confidential communications between a lawyer and client, brought into existence for the dominant purpose of obtaining legal advice, or for use in actual or contemplated legal proceedings, are privileged.

Documents such as contracts, employee records, maintenance records and work systems will not be privileged, even if they have been given to the company lawyer for the purpose of providing legal advice or for litigation.

Communications with the company lawyer seeking advice about the legal position of the company may have been made immediately after the accident or occurrence. These communications will be privileged, but are unlikely to be relevant to the conduct of the investigation.

Documents produced by the company following its own investigation will only be privileged if they are confidential communications between the company and its lawyer for the purpose of obtaining legal advice, or for litigation. For example, an investigation carried out by a safety and health representative would not be privileged.

All other corporate documents should be available to be produced upon request.

Claim of legal privilege in a document

Adequate opportunity to make a claim

The inspector is required to give adequate opportunity for the company representative to claim legal professional privilege for particular documents, unless there is no possibility of privilege being applicable.²

The claim

A claim of privilege to resist the production of documents should be made clearly and precisely. An assertion that a document is protected by privilege will not, on its own, be enough.

The claim must be made and justified for individual documents. A blanket claim for a group or bundle of documents is not valid.

The person claiming legal professional privilege has the onus of proving that the claim is valid. They must provide sufficient information to enable the inspector to determine whether the particular document will be privileged.³

² Federal Commissioner of Taxation v Citibank Ltd (1989) 89 ATC 4268 at 4293

³ Re: National Crime Authority v S (1991) 29 FCR 203; (1991) 54 A CRIM R 307

The following information is required to make an informed decision:

- a clear description of the communication including the date on which it was made (e.g. fax from... to...regarding...dated...)
- justification of the claim for privilege. Each document must satisfy all the elements of privilege to justify the claim for non- disclosure:
 - there must be a lawyer–client relationship
 - the privilege must be claimed for a confidential communication between a client and lawyer, or with a third party for the benefit of the client
 - the communication must have been made for the dominant purpose of obtaining or giving legal advice, or for providing legal services in respect of actual or anticipated legal proceedings.

Where a communication has been brought into existence for more than one purpose, the person claiming the privilege must establish that the dominant purpose is for legal advice or litigation.

The person claiming privilege does not have to give information that would reveal the content of the document, but should provide sufficient evidence to demonstrate objectively that the claim is valid.

Disputes or uncertainties

Where there is a claim made that a document or communication is subject to legal professional privilege, the inspector needs to inform the manager of investigations and the Legal Services Branch.

The material in this information sheet is provided for general information only and should not be relied upon for the purpose of a particular matter. You should seek legal advice from your own lawyer before taking any action or decision on the basis of this material.

Comprehensive work safety and health information provided by the Department of Mines and Petroleum can be found at:

www.dmp.wa.gov.au/ResourcesSafety

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