



Legal Professional Privilege: What is privileged in day-to- day communications?

Quick Guide

Whether a communication will be privileged is a question of **substance**, not form.

A communication will only be protected by legal professional privilege *if* it is both **confidential** and it can be objectively shown that its **dominant purpose** was for **legal advice** or existing or reasonably anticipated **legal proceedings**. The dominant purpose is the prevailing purpose. If an equal or significant purpose is not one of these purposes (e.g. to obtain commercial input, or for broader operational risk and compliance reasons), then it is unlikely that privilege will apply.

This makes applying legal professional privilege in day-to-day business communications complex. There are often multiple purposes for communications, and multiple senders and recipients of single communications.

This summary provides a snapshot of how privilege may apply in day-to-day business communications, however, each email or document must be assessed within its particular context. Legal advice should be sought as needed.

Practical tips

- 1 When dealing with **communications that serve multiple purposes**, the safest approach is to assume that the communications could ultimately be produced in litigation or regulatory investigations.
- 2 **Check with lawyers before distributing potentially privileged communications**, particularly to recipients outside your organisation. Privilege will be lost if confidentiality of the communication is lost.
- 3 Where **in-house lawyers** have multiple roles or functions (e.g. General Counsel and Company Secretary), ask whether you are communicating with them in their **legal or non-legal capacity**. Communications with them in their non-legal capacity will likely not be privileged. This might include a role of collating Board papers or taking minutes of Board meetings.
- 4 **Internal emails**
 - (a) Emails **sent to both lawyers and non-lawyers** for input / advice carry a higher risk that privilege will not apply to the whole communication.
 - (b) Emails **copied to lawyers** will not necessarily be privileged, particularly if they are **directed to non-lawyers** for some purpose other than obtaining legal advice or for litigation.
 - (c) Emails **between non-lawyers actioning legal advice** may not be privileged.
 - (d) Marking an email as “Privileged” or “LPP” does not mean that privilege applies.
- 5 It is common for **commercial documents** to include summaries of legal advice or comments provided by lawyers, as well as material on other non-legal topics. Only the portions of such documents which record legal advice will be privileged and not the whole document. Examples of common **mixed purpose documents** where care should be exercised include:

- (a) **Records of commercial negotiations** with a third party. If these are not for the dominant purpose of litigation or provision of legal advice, they will not be privileged.
- (b) **Board papers and presentations**, which include legal advice as well as other non-privileged material.
- (c) **Internal investigation** findings, unless for the dominant purpose of the business obtaining legal advice. Documenting the purpose and scope of an internal investigation from the outset is essential.

Please reach out to your usual Herbert Smith Freehills contacts with any queries you might have on Legal Professional Privilege.

Find a range of Legal Professional Privilege guidance and materials at www.hsf.com/legalprofessionalprivilegeau.

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