

# Legal Guidelines - Legal Professional Privilege

## Section 1 - Purpose

(1) Legal professional privilege protects the confidentiality of certain University communications between a lawyer and their client.

(2) Legal professional privilege is important. This guideline describes when the privilege may be claimed and the circumstances in which it may be lost.

## Section 2 - Policy

(3) This guideline is made under the [Legal Policy](#).

## Section 3 - Procedure

(4) This guideline supports [see drafts on bulletin board]:

- a. Legal Procedure – Court Orders, Claims and Investigations
- b. Legal Procedure – Legal Records
- c. Legal Procedure – Requesting Legal Advice

## Section 4 - Guideline

### What is legal professional privilege and why is it important?

(5) Legal professional privilege is a rule of law intended to preserve the confidentiality of communications between a lawyer and a client. In litigation, parties to legal proceedings are generally required to disclose to other parties and to the court all documents in their possession power and control which are relevant to a matter in issue in those proceedings.

(6) If a communication is subject to legal professional privilege, it does not have to be produced in legal proceedings.

(7) If the University does not adequately protect its ability to claim legal professional privilege over communications, then its prospects of success in legal proceedings may be significantly adversely affected.

### When does legal professional privilege apply?

(8) For legal professional privilege to apply in respect of a communication between a lawyer (including a University lawyer) and a client (such as an employee of the University acting on behalf of the University) or third party (e.g. expert witnesses):

- a. the communication, whether oral, written or recorded manually or electronically, must be confidential and must be treated as confidential, so merely marking a document 'confidential' or 'privileged and confidential' is not

sufficient to maintain privilege

- b. in communications with University lawyers the lawyer must be acting in their capacity as the University's legal adviser (and not in a non-legal role), and
- c. the communication must be for the 'dominant purpose' of legal advice or in relation to actual or anticipated litigation.

(9) Legal professional privilege applies to 'communications.' Legal professional privilege may apply to the contents of a confidential document if it was prepared by a client, lawyer or another person for the dominant purpose of giving or obtaining legal advice or in connection with existing or anticipated legal proceedings. Legal professional privilege can apply even if the communication was not sent. Confidentiality and the purpose at the time of creation are pivotal (see discussion of the dominant purpose test below).

(10) There are some exceptions to legal professional privilege, including waiver, statutory exclusions and illegal or improper conduct (see clause 14 for more information).

(11) It is often not possible to refuse to provide documents when requested by a regulator. If documents comprising confidential and privileged communications need to be produced, it should be done together with an express statement (or if possible an agreement) that the documents are confidential and comprise legally privileged communications and the provision of the documents does not amount to any waiver of legal privilege.

### **Dominant purpose test**

(12) Legal professional privilege attaches where the communication between the University and its lawyer (internal or external) is made for the dominant purpose of giving or obtaining legal advice (referred to as advice privilege) or in connection with existing or anticipated legal proceedings (referred to as litigation privilege).

(13) The purpose for which a communication is made or brought into existence is a question of fact that is determined objectively. A 'dominant' purpose has been held to mean a 'ruling, prevailing or most influential' purpose.

### **Exceptions to legal professional privilege**

(14) There are a number of exceptions to legal professional privilege, even when the dominant purpose test is satisfied. These exceptions apply in circumstances where:

- a. the privilege has been waived
- b. it is in the public interest
- c. a statute modifies or removes the privilege where the legislature affords a competing public interest a higher priority, or
- d. the communication was for the purpose of facilitating a fraud or crime.

### **Waiver (loss) of legal professional privilege**

(15) Legal professional privilege can be lost by deliberate or inadvertent or partial waiver.

(16) A client will be deemed to have waived legal professional privilege if they act in a way which is inconsistent with the confidentiality which the privilege is supposed to protect. A waiver may occur either explicitly or implicitly.

(17) Legal professional privilege can be lost if, for example, legal advice is given by a lawyer and that advice is passed on by the recipient to another person outside the University, or may even be lost if the advice is disclosed to other persons within the University who have no need to see the advice (this will be determined on the facts on a case by case basis, but highlights the risks of forwarding legal advice in an email chain where the dominant purpose of the communication is no longer the giving or obtaining of legal advice). It is important to treat all communications to and

from lawyers with care.

(18) If legal professional privilege is waived, the communication will no longer have protection and may have to be disclosed in legal proceedings. Once waived, privilege cannot be regained.

### **Who can waive legal professional privilege?**

(19) As stated in the [Legal Policy](#), only the Vice-Chancellor or the University Secretary has authority to waive legal professional privilege on behalf of the University.

### **Tips to ensure legal professional privilege is maintained**

(20) These tips should be followed by all employees to ensure that legal professional privilege is maintained in communications with Legal Services:

- a. Requests for legal advice should be in writing (including email).
- b. Communications to Legal Services should be marked 'Confidential'.
- c. All legal advice is to be considered confidential unless stated otherwise.
- d. If you receive legal advice from a University lawyer or external lawyer, do not copy or forward the legal advice or disclose or paraphrase the contents of the legal advice to persons outside the University (unless you have consent from Legal Services to do so), as doing so may waive privilege. On occasion, Legal Services may also forward legal advice to third parties (e.g. to external legal advisers or other external experts engaged by the University).
- e. If you receive legal advice from a University lawyer or external lawyer do not send a summary, comments on or the conclusions of that advice to another person. Avoid paraphrasing legal advice to other persons or saying that you have made a decision based on legal advice (eg. by saying 'I sought legal advice and legal have advised that ...' or 'I sought legal advice and based on that legal advice I have decided that ...') as such references may inadvertently waive the privilege of that advice. Try not to provide commentary on any legal advice that you receive as such commentary is unlikely to be protected by legal professional privilege.
- f. Limit access to legal advice to those employees who are directly involved in the issue which is the subject of legal advice or who have a need to know. If in doubt as to whether you can forward legal advice to another employee, check with Legal Services
- g. If you are dealing with a high risk or contentious matter, seek advice from Legal Services about implementing a communications and document management protocol so that those involved in the matter are clear on what they can and cannot do when communicating about the matter.
- h. Briefing of external lawyers may only be undertaken in accordance with the [Legal Policy](#), and generally requires approval of the General Counsel (see the Legal Policy and [Legal Procedure - Requesting legal advice](#) (from both University lawyers or external lawyers), including in relation to agreements, for exceptions to that approval requirement). Legal Services should generally be copied in on communications with external lawyers
- i. If you receive a request for documents from an external agency such as a regulator, seek advice from Legal Services about whether privilege may apply to any legal advice (and see clause 11 for more information).
- j. If sensitive legal advice is included in agenda papers for Council or committees, it should be kept separate and marked 'Confidential and subject to legal professional privilege'. Notes made about what non-lawyers may have said at the meeting about the legal advice may not be privileged, so attendees should exercise caution when taking notes. Whilst privilege is not usually lost by Council or a committee receiving confidential legal advice, caution should be exercised when referencing any legal advice in minutes (generally it is good practice to specifically note that the Council or committee has considered the legal advice when making a decision, but not to describe or paraphrase the legal advice).
- k. To best maintain privilege, a lawyer should attend in person at any meeting of Council or a committee which discusses complex legal advice to discuss the legal advice and provide any further advice to the attendees, and

if a record of any legal advice that was discussed is needed that lawyer should prepare the record to give directly to the attendees to confirm any advice provided.

(21) The University's lawyers also have responsibilities to ensure legal professional privilege is maintained. Further to the tips in clause 20, these additional tips should be followed by all University lawyers to ensure that legal professional privilege is maintained in legal advice:

- a. When giving verbal advice, make sure that only those people who are necessary are present to ensure that there is the necessary confidentiality for privilege to apply.
- b. Do not merge legal advice with comments about strategic or operational matters.
- c. All advice given by in-house lawyers must be independent and impartial of their employer to be privileged.
- d. Unless an expert is formally retained by a lawyer for the express purpose of assisting a lawyer to give advice, it should be assumed that any communications between University employees and experts, and any documents created by such experts, may not be privileged (this is a reason to involve lawyers early in investigations - where a lawyer is engaged to investigate for the purpose of potential litigation the investigation is more likely to be privileged).
- e. Exercise extreme caution when corresponding with clients in email chains or in group emails, and when referring to, or disclosing, material over which legal professional privilege may exist. For example, where an email has a mixed purpose (e.g. to instruct a lawyer and to obtain input from a commercial person), the dominant purpose test might not be satisfied and privilege may not attach. Often, while it may be less efficient, sending multiple separate emails to separate recipients, or detaching legal advice from an email chain and providing it separately, may be safer and should avoid inadvertently waiving privilege.

## Section 5 - Glossary

(22) This guideline uses terms defined in the [Legal Policy](#), as well as the following:

- a. Correspondence - may be formal (letters) or informal (emails, texts and instant messages).
- b. Documents - include electronic or hard copy, handwritten or typed, internal and external correspondence, notes of meetings, notes of telephone calls or conversations, discussion notes, briefing papers, minutes and drafts of those documents.

## Status and Details

<b>Status</b>	Current
<b>Effective Date</b>	24th July 2023
<b>Review Date</b>	24th July 2026
<b>Approval Authority</b>	University Secretary
<b>Approval Date</b>	24th July 2023
<b>Expiry Date</b>	Not Applicable
<b>Unit Head</b>	Kylie Bennetts General Counsel +61 2 63657660
<b>Author</b>	Kylie Bennetts General Counsel +61 2 63657660
<b>Enquiries Contact</b>	Legal Services