

WHAT IS LEGAL PROFESSIONAL PRIVILEGE?

Legal professional privilege, also known as client legal privilege, is a legal right that protects confidentiality of certain communications between a lawyer and their client. If a communication is privileged, then the client (here the University) may be able to resist its disclosure to other parties or the public. This could be particularly relevant for:

- litigation or anticipated litigation
- freedom of information applications
- requests for disclosure by a government body or regulator (e.g. the ACCC).

The privilege helps ensure open communications between a client and legal adviser, so that relevant facts and legal issues can be openly discussed and appropriate legal advice given.

WHAT COMMUNICATIONS ARE PROTECTED?

Privilege will usually be claimed over written documents, but *communication* is a broad term and can include oral and written communications, electronic or otherwise. This might include a written document, email, report, photograph, recorded conversation, data, voicemail or interview record.

A communication will not be protected if:

- the requirements for protection are not met
- privilege has been “waived” or surrendered
- disclosure is found to be in the public interest
- it was created to facilitate the commission of a crime or a fraud.

WHEN DOES THE PRIVILEGE APPLY?

A communication will only be privileged where it is shown to meet certain criteria. Essentially, the privilege will only apply to confidential communications between the University’s lawyers (or engaged external lawyers) and University staff, if the communication is for the *dominant purpose* of either *obtaining or providing legal advice*, or *use in actual or anticipated legal proceedings* (generally court proceedings).

Determining if a particular communication is privileged can be very complex and will depend on the surrounding circumstances. It is therefore important that you seek legal advice *before* creating any communications on a potentially sensitive or contentious issue.

MAINTAINING CONFIDENTIALITY

Confidentiality is essential to maintaining legal professional privilege and privilege will be waived if the University’s *conduct is inconsistent with the maintenance of that confidentiality*. The right to claim privilege belongs to the client (the University), but can easily be waived or surrendered, whether or not this was actually intended at the time.

This article provides general information only. It is not a complete or definitive statement of the law on the subject matter. Formal legal advice should be sought in relation to particular matters. Please email legalservices@latrobe.edu.au.

Disclosing a privileged communication or its content to a person outside the University, or widely circulating advice within the University, could result in waiving the privilege. Summarising or rephrasing legal advice, or even referring to the gist or conclusion of advice has also been held by courts in some cases to waive legal professional privilege.

Note communications with any third parties including University contractors or consultants can also in some circumstances waive legal privilege. You should seek advice from Legal Services before disclosing any confidential communications.

CHECKLIST:

1. Legal professional privilege will only apply in certain circumstances. Marking a document as ‘privileged’ will not necessarily make it privileged.
2. Don’t assume that all communications with a lawyer are privileged and be careful what you record when creating a document.
3. Where privilege does apply it can be easily waived, even inadvertently. Maintain confidentiality and control access to any privileged communications.
4. Contact Legal Services for legal advice *before*:
 - creating any document on a sensitive or contentious issue, or
 - disclosing the content of any legal advice or communications to another person.
5. Prominently mark any privileged communications as “*Confidential and subject to legal professional privilege*” and take steps to ensure it is not disclosed.
6. Avoid summarising or referring to the content of legal advice to other parties. This may not be privileged, and could also waive privilege in the original advice.
7. Avoid circulating privileged communications within the University unnecessarily and take particular care when using ‘cc’ or ‘bcc’ in internal emails.
8. Do not include privileged communications in minutes or agenda papers for University boards or committees, and contact legal services before making reference to such communications.
9. Do not disclose legal communications to third parties, including contractors, consultants or collaborators, without first consulting with Legal Services.