

Guideline 6 - Document preparation and legal privilege

This is general reference material for your guidance in specific circumstances

Why do I need to be careful with documents?

Any document you create or modify, anything you write or any email you send, might expose the university to legal liability. Sometimes it can expose you personally to liability as well.

Problems can arise even with internal communications and even private communications between colleagues.

How can problems arise?

Any **external** communication you make can have the effect of a promise or representation on behalf of the university that we will do certain things or that a certain state of affairs exists. If that communication proves to be incorrect, we could be sued.

Any **internal** communication you make (including emails) which deals with a dispute or potential dispute with a customer, student, research partner, competitor, supplier or anyone else may damage the university if the dispute ends up in court.

If we are involved in any legal proceedings, the court can force you to give those documents to the other side in the court case unless the document is 'privileged'. This applies to all documents you create even if they are private and even if you have not shown them to anyone else.

When is a document privileged?

When we are in dispute or potentially in dispute with someone, internal documents are likely to contain information about the causes of the dispute. In certain circumstances those documents may not be 'privileged' (ie protected from discovery in legal proceedings).

If you are about to make a document which deals with a dispute or potential dispute you **must** contact the General Counsel, Legal and Governance or the Trade Practices Compliance Officer to ensure that our right to claim Legal Professional Privilege over documents is protected.

Documents which are or may be privileged must not be given to people outside the university, other than our external lawyers unless the General Counsel, Legal and Governance or the Trade Practices Compliance Officer says it is OK to do so. If you do, the documents may lose their privileged status.

You should also be careful about telling people outside the university about legal advice you may have given or received. If you tell an external person about legal advice, it may lose its privileged status. This can happen even if all you do is summarise the general effect of the advice.

So which documents must I be careful with?

You should take care with any method of recording any information in a material form, including:

- Letters
- Emails
- memos and internal reports
- incident reports and complaint forms
- spreadsheets
- handwritten notes and
- any other way of recording information in a material form.

Communications about competitors

You should take care in making internal communications about competitors. The ACL prohibits anti-competitive conduct and arrangements. Severe penalties (being the greater of \$10 million, three times the gain to the corporate group from the anti-competitive conduct, or 10% of the annual turnover of the organisation) can be imposed. Careless references in documents about dealings with competitors or arrangements which may damage competitors may be misinterpreted when discovered in legal proceedings.

But what if it is just a private joke or gossip?

Private jokes, for example emails which make fun of a person or which admit or suggest that the university has messed something up and caused loss to someone, can be devastating in court. You can be forced by the court to disclose them.

What if I delete it from my desktop?

Even deleting emails from your desktop will not prevent a court getting access to them. They remain on your hard drive until they are overwritten. This can take years.

You should **never** delete or destroy any material which is relevant to a court case once the litigation has commenced or is even being contemplated.

Communications which are not in writing

You should also take care when talking to a person about an incident for which we may be liable. Also you should avoid an unintended admission of liability in file notes or internal memoranda summarising the outcome of such discussions. You are required to provide the Officer with such assistance (including use of facilities) as is reasonable and necessary in the circumstances.

- The Officers may ask you or another staff member questions about the subject matter of the warrant. Failure to comply with this request is an offence. This does not mean that you should freely volunteer information to the Officers that is not in response to a direct question by them and that does not relate to the subject matter of the warrant. If you are unsure of whether you should or can answer any question or comply with any request of the Officers prior to the arrival of your legal adviser, courteously advise the Officers that you wish to assist them in any way that you can, but that you wish to obtain the assistance of your legal adviser to be able to help them in the manner required. All responses should be brief, and factual. Do not volunteer your opinion.

- No staff should speak to any media. A media strategy (which may include a press release), will be prepared as necessary.
- Supervising staff should ensure that:
 - general notes are made of the conduct of Officers during the investigation. Particular notes should be made of any behaviour that appears generally unreasonable or unfair, and specifically behaviour which appears beyond what has been authorised
 - notes are made of all questions and requests made by Officers, and of responses given
 - Officers are not given unlimited access to files. They should only be allowed to examine those documents relevant to their investigation, as specified in the authorisation or search warrants. Supervisors should seek to exclude parts of documents that fall outside the scope of the investigation
 - privilege is claimed where appropriate
 - Officers are advised of the confidential nature of particular documents. If copies are taken of confidential documents they should be marked as such, and
 - all documents/records examined, copied or seized are carefully recorded and receipted. This should include a note of their files of origin.

Before the Officers leave

Prior to the Officers' departure, legal staff should ensure that we have:

- a copy of all the documents copied by the Officers
- a copy of and receipt for all the original documents taken from your offices (note that not all regulatory agencies have the power to seize documents without a search warrant, including the Australian Taxation Authority)
- a note of all documents that were merely examined by the Officer
- claimed privilege in relation to any documents that are protected by legal professional privilege, and marked as confidential any documents taken or copied by Officers that are confidential.
- notes pertaining to any questions the Officers asked, and the responses given by employees (including copies of notes taken by the Officers)
- made a note of any act of an Officer that appears unreasonable, unfair or beyond authorisation, and
- made a note of all issues in dispute (including any obvious errors in the Officers' notes).

After the Investigation

- Hold a meeting of all personnel involved in the investigation. A list of all documents examined, copied and taken must be compiled.
- A detailed factual report of the investigation should be prepared, including written statements from all persons in contact with the Officers. This should include a transcript of the questions posed by Officers and the responses given by employees. The report should be concise and contain all relevant facts. The author should not insert any of their own thoughts or comments when compiling the record.
- The company's external lawyers should be given the report and then asked to advise on what steps should be taken next. They should also follow up any incomplete matter or rectify any inaccuracies, with the relevant Officer's office. Taking pro-active measures should be a top priority.

What you should *not* do if there is a valid search warrant

Do not:

- be forced by the Officers to deviate from these procedures.
- obstruct any Officer in any way. Be pleasant, but firm.
- leave any Officer unattended in any room or area where records, books and documents are kept.
- attempt to remove any Officer from the premises.