



# PRIVILEGE IN INTERNAL INVESTIGATIONS

## What is Privilege?

Privilege in internal investigations is an area that clients often have to grapple with and in which the consequences of getting it wrong can be severe. Privilege is also not something a client would necessarily immediately consider when conducting an internal investigation. This Client Guide sets out the position in English Law, and gives guidance on how best to protect privilege.

Legal professional privilege (LPP) is a fundamental right enabling a party, whether an organisation or individual, to withhold certain documentary evidence from third parties e.g. the court, an opposing party during the course of litigation, or regulatory bodies. To read about the general principles and application of legal professional privilege, please see our HFW Client Guide on Privilege.<sup>1</sup>

English law recognises **two iterations of legal professional privilege**: legal advice privilege and litigation privilege. Both may be relevant to investigations.

	Definition	Notes
<b>Legal Advice Privilege (LAP)</b>	Confidential communication between lawyers and their clients made for the purpose of seeking or giving legal advice.	LAP is narrowly construed by the courts; the communication in question must have been prepared for the <b>dominant purpose</b> of obtaining or giving legal advice and <b>communicated only</b> between the lawyer and the narrow client group <sup>2</sup> , which may include in-house counsel, senior management, and the Board.  See more on the importance of the <b>dominant purpose</b> in our recent briefing: Legal Advice is Dominant. <sup>3</sup>
<b>Litigation Privilege (LP)</b>	Confidential communication between lawyers and their clients, or the lawyer and a third party, which came into existence for the dominant purpose of being used in connection with actual or contemplated litigation.	In order for litigation privilege to apply, investigatory proceedings must be adversarial. The courts will take into account the likelihood of subsequent legal proceedings commencing as a result of the investigation when determining its application. They will question whether litigation flowing from the internal investigation was in <b>“reasonable contemplation”</b> when the communications occurred.  More recently, the courts have taken a commercial approach and looked at <b>the context of the relationship between the parties</b> to assess whether litigation is likely.  In relation to pure internal investigations, LP is unlikely to apply, however, it will depend on the circumstances.  In relation to regulatory investigations, much depends on the stage of the investigation i.e. if early in the process, and more akin to a fact finding exercise, then LP is unlikely to apply (e.g. when the regulator has made clear that criminal proceedings may apply).

1 <https://www.hfw.com/Client-guide-privilege>

2 *Three Rivers District Council and others v Bank of England* [2003] EWCA Civ 474

3 <https://www.hfw.com/Legal-Advice-is-Dominant-Jan-2020>

## Will privilege relate to internal investigations?

Irrespective of the reason for the investigation, information and documents will need to be gathered to determine the course of action.

Internal investigations may be covered by either LAP or LP, the circumstances of the investigation will denote which form of LPP will apply.

Investigations most often arise in three situations:

- in response to allegations of wrongdoing within the organisation (LAP may apply);
- after an event which triggers the need for investigation e.g. litigation (LAP and LP may both apply); or
- where the organisation is being investigated by a regulator (LAP and LP may both apply).

In-house counsel will wish to identify the relevant form

of privilege (if any) and devise a strategy to ensure the organisation can take advantage of privilege and protect itself from making unnecessary or damaging disclosures, before embarking on the search for documents and evidence.

There is a balance to be struck between a full and proper investigation, and the need to protect legal rights through privilege, and this can pose difficulties and present hard choices when faced with an investigation.

## How to structure employee interviews and communications to preserve privilege

In-house counsel will need to be aware of the best ways in which to organise their internal investigations in order to maintain privilege, without flouting the principles established in recent case law.

This table sets out the privilege position for the two key stages of an investigation:

Issue	May be privileged	Will NOT be privileged where...	Note
<b>Employee Interviews</b>	A lawyer's interview notes may be privileged, in so far as they contain opinion or the lawyer's views.	...the interview is just a factual summary or verbatim account.	The privilege will reside with the organisation and not the employee.
<b>Documentation</b>	If the documentation came into being for the dominant purpose of the litigation or legal advice, and that privilege has not since been lost.	....the privilege is lost e.g. by disclosure to third parties (in the case of LAP). .....the dominant purpose is not that of legal advice, the investigation is not adversarial, or the litigation is not the dominant purpose for the document coming into existence.	Ensure documents are correctly drafted and labelled "privileged and confidential", or "privileged and confidential solicitor client legal advice". Merely marking the documents privileged, won't however make them so - it is the content rather than the label that matters. Separate the privilege and non-privilege documents. Avoid circulating privileged documents too widely. If sharing the documents, use a limited or non-waiver agreement to try and preserve the privilege.

## Further key issues

### Use of external, internal or non-lawyers?

From a privilege perspective there is little difference between the investigation being conducted by internal counsel (in their legal capacity) or external counsel (except for competition investigations carried out by the European Commission). There are however commercial considerations that might arise, for example:

- **Resources** – often external counsel will have access to a greater number of lawyers to assist;
- **Knowledge of the regulator or issue** – external counsel may have greater experience of the legal issue or regulator involved;
- **Independence** – helpful, if reputation is at risk; and
- **Clarity of roles** – useful to separate out where in-house counsel has a business as well as legal advisory role.

The use of non-lawyers can result in a loss of privilege. It is well established that LAP only applies as between

lawyers and their clients, and will not apply where, for example forensic accountants or other professionals are used. In the case of LP, this will only apply where these non-lawyer professionals are involved for the dominant purpose of the litigation.

### Clearly define "the client"

Only communications between the lawyer and their client are protected by LAP. The courts have narrowly construed the definition of the "client"<sup>4</sup>. It is therefore important to ensure employees or officers and directors of the company involved in the giving of instructions and receiving of legal advice are identified as the "client", and preferably referenced in the articles of association as having that level of authority.

When external lawyers are involved, the retainer letters should identify those who are deemed to be the "client".

Where multi-jurisdiction offices are involved, consideration should be given to using separate retainers, and confidentiality agreements with a common interest privilege clause.

<sup>4</sup> *Three Rivers DC v Bank of England (No 5)* [2003]

## Multi-jurisdictional issues

Where the organisation under investigation has an international presence, it is important to consider the ramifications of an internal investigation across the various office locations. Where, for example, the investigation has been undertaken by a UK regulator, it may go on to share the evidence provided to it, to a regulator in another jurisdiction, where the same rules of privilege may not apply. This information may then be used to support investigations in that jurisdiction to the detriment of that local office, and also the UK entity and its employees potentially causing issues for directors and staff who travel to that jurisdiction, and who may then become subject to further investigation by local regulatory authorities on the basis of information, which might be deemed privileged in this jurisdiction.

## Tension between legal advice and commercial advice

If using in-house counsel, it is important to keep in mind that where they have an investigative role which spans both legal and an administrative/business focus, it is only where they act in their legal capacity that the privilege protection extends.

### In order to clarify the position, consider:

- Parallel investigations. One addressing the legal aspects of the internal investigation, the other addressing the wider business concerns, enabling the communications and documentation with a legal focus to be distinguished from the other and so remain privileged.
- Identify and note the dominant purpose linked to the element of the investigation.

**This client guide was produced by the HFW Knowledge Management team, should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them at [KM@hfw.com](mailto:KM@hfw.com) or your usual HFW contact to discuss.**



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## TOP ten things to know about privilege in investigations:

1. Privilege may apply, identify which applies (LAP or LP) to understand how best to proceed.
2. Privilege can be lost e.g. through loss of confidentiality - avoid wide dissemination.
3. The 'client' group needs careful consideration and definition - consider identifying in the retainer.
4. Mark all relevant correspondence and documentation as such e.g. "Privileged and Confidential: solicitor - client legal advice", and separate out from non-privilege materials. Avoid loss of privilege due to privileged documents being attached to open letters.
5. Non-waiver or limited waiver agreements will help protect privilege when disclosing documents to e.g. a regulator, but there are no guarantees that a regulator in the UK will not share with a regulator in another jurisdiction, where the privilege laws may differ, and so issues may arise.
6. The use of lawyers in the investigation will help attract privilege (unless in-house counsel in an EU competition investigation), non-lawyers will not attract LAP and may not attract LP.
7. A lawyer's views or comments in an interview note may attract privilege, the verbatim note will not however be privileged.
8. The privilege resides in the organisation not the witness.
9. Documents or correspondence themselves are not the subject of privilege, rather the advice given within them i.e. the content can be in part protected/separated out.
10. Documents or advice obtained illegally, or to further a crime, will never be subject to privilege.

