

Client legal privilege and release of government information

Who is this information for?

Public sector agencies and decision makers.

Why is this information important?

This Fact Sheet will assist in the practical application of sch 1 cl 5(1) of the *Government Information (Public Access) Act 2009*.

Relevant legislation

This Fact Sheet provides a summary of the following legislative provisions:

Government Information (Public Access) Act 2009 (GIPA Act) sch 1

Evidence Act 1995 ss 118, 119

issue in detail and are often faced with unique or complex situations in determining whether client legal privilege applies to a particular document.

Client legal privilege protects confidential communications and confidential documents between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client, or for use in current or anticipated litigation.

Keep in mind that the privilege is the client's, not the lawyer's, hence it is properly called 'client legal privilege'. Your agency is the relevant client in this context.

Overview

The object of the GIPA Act set out in s 3(1) is to create a right to access government information and there is a general public interest in favour of disclosure: s 12(1). However, s 13 provides that there is an 'overriding public interest *against* disclosure of government information' if there are public interest considerations *against* disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

Section 14(1) then provides that it is to be *conclusively presumed* that there is an overriding public interest against disclosure of any of the information described in sch 1. Clause 5 includes legal professional privilege. The *Evidence Act 1995* (NSW) refers to legal professional privilege as '*client legal privilege*'. We use that term in this fact sheet.

This Fact Sheet summarises the concept of client legal privilege and how it operates in the context of an access application under the GIPA Act, in terms of the 'conclusive presumption' of 'an overriding public interest in disclosure'.

What is client legal privilege?

Firstly, it is important to note that client legal privilege is a highly technical issue and is often not straightforward. Courts and NCAT have considered the

How do I assess client legal privilege?

The existence and maintenance of client legal privilege must always be considered in light of all the facts and circumstances that apply to the information and the people involved in that communication.

In order for a claim of client legal privilege to apply to government information, you will need to satisfy each element of the privilege as set out in the *Evidence Act 1995* (NSW):

- the existence of a client and lawyer relationship
- the confidential nature of the communication or document
- was the communication or document brought into existence for the dominant purpose of either:
 - enabling the client (your agency) to obtain, or the lawyer to give legal advice or provide legal services, or
 - for use in existing or anticipated litigation.

Mere reference to the existence of 'legal advice' is not inconsistent with the maintenance of privilege attaching to that advice. Where legal advice is provided by your in-house lawyer, it must be shown that the document was brought into existence in the course of the performance of the lawyer's professional role.

Some factors relevant to the question of whether the author of the document was performing their legal role include:

- whether the officer holds a current practising certificate
- whether the subject matter of the advice is such as to engage the personal loyalties, duties and interests of the in-house lawyer
- whether the supervision of the legal adviser impacts upon the independence of the relevant advice
- the role of the legal area within a department or agency, including whether the legal area provides independent advice and does not alter legal views to meet policy or administrative objectives.

Particular communications/documents may combine a number of different purposes. For example, an in-house lawyer may prepare a document containing both legal advice and commercial advice. In this case, the privilege attaches to the portion of the document containing the legal advice, but does not attach to the commercial advice.

If you are deciding an access application under the GIPA Act and are unsure about whether client legal privilege attaches to a particular document, consider seeking legal advice.

When does the conclusive presumption apply?

The presumption applies to information that would be privileged from production in legal proceedings on the ground of client legal privilege, unless the person subject to that privilege has waived the privilege.

Schedule 1 cl 5A further applies the conclusive presumption to information contained in a document that, in response to a court order, subpoena or otherwise:

- was a document a person objected to producing during those proceedings on the grounds that the document was a privileged document, and
- was not compelled by a court to be given or produced on the grounds of privilege.

If a document contains both privileged and non-privileged material, you may need to remove the privileged material from that document and provide the access applicant with an edited copy.

In considering an access application for information that may attract the privilege, you are required to consider whether it would be appropriate for your agency to waive that privilege before refusing to provide access to government information: cl 5(2).

Again, if you are unsure about whether it is appropriate for your agency to waive privilege over a document, consider seeking legal advice.

Waiver of privilege

Your agency, as the client, can waive the privilege. You will be deemed to have waived the privilege if your agency does (or authorises) something which is inconsistent with the confidentiality which the privilege is intended to protect: *Mann v Carnell* [1999] HCA 66.

It follows that sometimes voluntary disclosures to someone else does not amount to waiver of the privilege. Disclosures which would not waive the privilege include confidential disclosures to a prospective expert witness and to a co-plaintiff or co-defendant.

In *Mann*, the ACT Chief Minister disclosed to a member of the ACT Legislative Assembly legal advice received by the ACT Government regarding the settlement of a claim. The disclosure was made on a confidential basis for the purpose of satisfying the member (who was pursuing a complaint by the other party to the settlement) that the settlement did not involve a waste of public funds. The High Court held that privilege was not waived by the disclosure.

What if the conclusive presumption does not apply?

If your agency cannot rely on client legal privilege under s 14 of the GIPA Act, you must undertake the public interest balancing test in s 13 in deciding whether to disclose or refuse access to the information. See IPC Fact Sheet – What is the public interest test.

Other useful resources

Other resources that may be useful on this topic include:

- [AGS Legal Briefing Number 117](#)
- [IPC Fact Sheet – What is the public interest test?](#)

For more information

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au

NOTE: The information in this fact sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.