information and privacy commission
new south wales

Fact Sheet **December 2018**

Legal professional privilege and release of government information

This fact sheet has been prepared for agencies and decision makers to assist them in the practical application of clause 5(1) of Schedule 1 to the *Government Information (Public Access) Act 2009* (GIPA Act). It is also designed to assist applicants in understanding the test that agencies should apply when relying on this clause to refuse access to information applied for under the GIPA Act.

Section 14(1) of the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the information described in Schedule 1.

Clause 5(1) and 5A of Schedule 1 - legal professional privilege

Clause 5(1) of Schedule 1 to the GIPA Act states that it is conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person subject to that privilege has waived the privilege.

Clause 5(2) of Schedule 1 provides that if an access application is made to an agency, in whose favour legal professional privilege exists in all, or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information under clause 5(1).

Clause 5A of Schedule 1 to the GIPA Act states that it is to be conclusively presumed that there is an overriding public interest against disclosure of 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.

What is legal professional privilege?

Legal professional 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.

The existence and maintenance of 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 legal professional privilege to apply, each element of legal professional privilege must be satisfied. The essential elements of legal professional privilege which derive from sections 118 and 119 of the *Evidence Act 1995* (NSW) are:

- the existence of a client and lawyer relationship
- the confidential nature of the communication or document, and
- the communication or document was brought into existence for the dominant purpose of either:
  - enabling the client 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 an 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 was performing their legal role include:

- whether the officer holds a current practicing 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.

Waiver of privilege

The privilege is the client's, not the lawyer's. The client can waive the privilege. The client will be deemed to have waived the privilege if the client does (or authorises) something which is inconsistent with the confidentiality which the privilege is intended to protect: *Mann v Carnell* (1999) 168 ALR 86.

It follows that not all voluntary disclosures to third parties necessarily waive 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 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.

For more information about legal professional privilege and waiver of privilege, you may refer to AGS Legal Briefing Number 87

For more information contact:

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.