King & Spalding
Client Alert

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A Privileged Position

HR Managers and in-house lawyers frequently face the task of navigating and protecting legal privilege. Issues around privilege often arise during internal investigations, data subject access requests and discussions of sensitive matters at board level. There have been a few recent cases where an employer has been ordered to disclose documents in Employment Tribunal proceedings that they otherwise thought were protected by legal privilege. Our October Client Alert looks at typical scenarios where legal professional privilege arises, practical steps employers can take to maintain privilege and some recent legal developments.

WHAT IS LEGAL PROFESSIONAL PRIVILEGE?

Once established, privilege gives a party the right to withhold the disclosure of documents and to refuse to answer questions on their contents. This includes protection from disclosure in the course of litigation, in response to a data subject access request or from disclosure to a regulator or authority.

There are various categories of privilege. The most common category is '**Legal professional privilege'** which protects the confidentiality of certain legal communications. It is comprised of two different types of privilege:

- **'Litigation privilege'**: applies in limited circumstances where the communications are for the dominant or sole purpose of conducting litigation which is in progress or reasonable contemplation.
- **'Legal advice privilege'**: applies to protect communications between a client and its lawyers for the dominant purpose of giving or receiving legal advice.

This alert focuses on these categories of legal professional privilege. The third category of privilege that often arises for employers is '**without prejudice privilege**', which applies to protect the communications made between parties with a view to settling a dispute. Please see last month's Client Alert for an overview of how and when to use without prejudice privilege.

Legal Advice Privilege	Litigation Privilege
• **Confidential communications**, whether written or oral (e.g., emails, letters, phone calls and meetings). • **Between a client and their lawyer** (includes external and in-house lawyers, foreign lawyers and can extend to non-qualified employees - such as paralegals or trainees - acting under the supervision of a qualified lawyer). • Does not extend to other professionals who advise on legal matters (e.g., accountants). • **For the purpose of giving or receiving legal advice**. Privilege will not apply to communications with a lawyer (whether in-house or external) who is acting outside their capacity as a legal adviser (e.g., an in-house lawyer giving purely commercial advice). Privilege applies to legal advice which relates to the rights, liabilities, obligations or remedies of the client. • Available in contentious and non-contentious situations, even when there is no litigation in prospect. • Belongs to the 'client' - only those within the corporate entity who are authorised to instruct the lawyer and seek or receive legal advice are to be treated as the client (not the corporate entity itself).	• **Confidential communications**, whether written or oral (e.g., emails, letters, phone calls and meetings). • **Between a client and their lawyer or a third party** (e.g. an accountant or non-legal adviser). • For purposes of obtaining information or advice in connection with litigation. • Litigation must be in progress or 'reasonably contemplated' (i.e. more than a mere possibility but does not have to be a greater than 50% prospect of litigation). • Communications made with the sole or dominant purpose of **conducting** that **litigation** (even where advice is not sought or received). • Litigation must be adversarial in nature, not investigative or inquisitorial. • Issues about the identity of the 'client' do not arise.

It should never be assumed that all communications with lawyers will be protected by privilege. Whether or not a document is privileged is a question of substance and subject to the above tests. Simply marking documents as privileged and copying them to an external or in-house lawyer will not convert a non-privileged document to a privileged one.

LOSING PRIVILEGE

Privilege continues indefinitely unless it is waived or lost. The main ways in which privilege may be lost are through a loss of confidentiality, intentional waiver or inadvertent disclosure.

Confidentiality is a fundamental component of privilege. The loss of confidentiality will lead to a loss of privilege. It is important not to circulate privileged material too widely – only to a limited number of individuals where strictly necessary and on a strictly confidential basis. When you do share privileged material internally, the importance of treating the material as confidential should be emphasised and the document should be marked as 'confidential and privileged' and 'not for onward circulation'. Extracting particular aspects of a legally privileged note and circulating them internally will lead to a loss of privilege.

Privilege can be lost by inadvertent disclosure. In such cases, confidentiality will have been lost and the recipient may be entitled to assume that privilege has been voluntarily waived. The courts may intervene to restrain an individual from using a privileged document disclosed in error on the basis that there has been an "obvious mistake". A mistake is likely

to be obvious where the document is received by a solicitor and that solicitor appreciated that a mistake had been made, or where it would have been obvious to a reasonable solicitor in his or her position that a mistake had been made. It is important to immediately flag any mistaken disclosure and ask the recipient to delete all copies.

Sometimes a party will tactically choose to waive privilege to reveal a document or a part of a document which supports their case but is otherwise privileged. When this occurs, there is a risk that they might be forced to disclose the whole document or further connected privileged material.

A party is not entitled to "cherry pick" the privileged material it deploys in proceedings due to the risk of it being taken out of context or painting an unfair or partial picture. The party will be obliged to disclose other privileged evidence that forms part of the same "transaction".

THE DANGERS OF CHERRY PICKING

The 2019 case of ***Kasongo v Humanscale*** is a reminder of the dangers of cherry picking. In that case, the Employment Appeal Tribunal (**EAT**) held that an employer had waived privilege in redacted parts of a draft dismissal letter setting out its solicitor's comments, as a result of its decision to rely on other privileged material relating to the employee's dismissal.

As part of disclosure in the Employment Tribunal proceedings, the employer had deliberately disclosed (1) a privileged attendance note of a phone call with its solicitor regarding the dismissal; and (2) a privileged email sent from the HR Manager to the in-house legal team explaining the reasons for dismissal ("*tardiness, attendance and quality of work*") and summarising the advice from the solicitor. These documents were provided to support the employer's position that the employee was not dismissed due to her pregnancy, as alleged.

The employer had also disclosed a draft dismissal letter with the external solicitor's comments redacted. The employee was somehow able to read the redacted comments and sought to rely on them at the hearing. The employer argued that the letter was not part of the same transaction and was not caught by the rules on cherry picking, as there was a six-day gap between the solicitor's advice in the first two documents and the draft letter. The EAT held it was all part of the same transaction – giving advice about the dismissal – irrespective of the length of time in between the documents.

LEGAL PRIVILEGE IN INTERNAL INVESTIGATIONS

Legal professional privilege is always the first issue to consider in any internal investigation. Does the process need to be open and 'on the record' for the purposes of fact gathering for a disciplinary or grievance process or are there details which you would rather not share with external authorities, regulators or need to disclose in any subsequent litigation? Do keep in mind that not all regulators respect legal privilege. However, it is best to set up an investigation so employer can at least have grounds to assert it in the first instance.

If the investigation is to be conducted on a privileged basis, in-house or external lawyers should be involved at an early stage and any reports should be drafted by lawyers in the form of legal advice to attract legal advice privilege. If non-lawyers assist with the investigation, ensure that any materials they create are drafted as communications to lawyers to seek legal advice and that they are prepared by someone who falls within the definition of the 'client'.

Even where external counsel is retained to investigate under legal privilege, it is vital to make the nature of the lawyer's role very clear to relevant employees. At the outset of any privileged interview, the employee should be informed of the following:

- The role of the lawyer and specifically, that the lawyer is there to advise the employer and not the employee in any personal capacity (an "Upjohn warning").

- The interview and follow up are confidential and privileged, and the privilege belongs to the employer – not the employee. The employer may choose to waive the privilege including, for example, by disclosing the matters discussed to the authorities or regulators.

In an Employment Tribunal decision published last year, a major bank was obliged to disclose an investigation report prepared by its external legal counsel for failing to make the nature of the lawyer's role clear. An external law firm had been appointed to investigate how an employee's historic complaint had been handled at the time and to make recommendations to future improvements on HR processes. The Tribunal ruled that the report was not privileged as the law firm had been brought in to investigate, not advise on the bank's legal position (i.e. its legal rights, liabilities, obligations or remedies). Interestingly, the Tribunal did not accept that advice on how HR processes could be improved amounted to giving legal advice in the specific circumstances.

The Tribunal also considered whether, had the report been privileged, privilege would have been waived by the bank providing a summary of findings and cherry picking extracts to share with the employee. Ultimately, had privilege applied, it would not have been waived because the bank was not seeking to rely on the report in the proceedings (and therefore fairness did not require the full report to be disclosed). However, the Tribunal noted it would have concluded differently, if the bank was seeking to rely on the report.

When undertaking a privileged investigation, it will be important to set out a written record of the scope and purpose of the investigation.

LEGAL PRIVILEGE CANNOT BE ATTACHED RETROSPECTIVELY

In a decision issued last month, the EAT ruled that an original version of a grievance investigation report did not attract legal privilege retrospectively by sending it to a lawyer for legal advice after its preparation.

An internal investigation had been conducted into an employee's grievance. By the time the investigation report was finished, the employee had brought claims of race discrimination and harassment. Before sharing the report with the employee, the employer asked its external legal advisers to review the report. The lawyers made a number of amendments, which were accepted in the version disclosed to the employee. The employee made an application for the original version of the grievance report.

The employer argued that whilst the original report was not privileged at the time of its creation, it retrospectively acquired privilege once amended because a comparison of the two versions could allow conclusions about the legal advice received by the employer. The EAT dismissed this argument. The report had not been created for the purpose of litigation nor to seek legal advice. It had been created as an investigative response to an employee's grievance. Whilst the lawyer's advice about the original report would be covered by legal advice privilege, it would not be possible to infer advice simply by a comparison, as the author could have made further unconnected changes.

BOARD MINUTES

Board minutes will only be privileged if they satisfy the tests set out above. A board minute which records or summarises legal advice provided to the board will be privileged, but commercial discussions resulting from the advice may not. Caution should be exercised when drafting and circulating board minutes. Ideally, any legally privileged part of the minutes should be in a separate minute or at least a separate part of the minute that can be easily redacted. The relevant section of the minutes should be titled "confidential and subject to legal professional privilege".

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