



### Over privileged and under investigation: SFO challenges use of privilege

#### The SFO's position

The SFO has expressed its dissatisfaction with businesses that use legal privilege as a defence against disclosing documentation while under investigation. It says that overly liberal use of the "privilege exception" is obstructing its investigations. The SFO has promised to challenge in the Courts such use of the privilege exception. We review below the SFO's powers and the privilege exception, and offer tips to our clients on how best to deal with the issue of privilege.

#### The question

It is worthwhile re-examining the specific provisions that businesses, and the SFO, are required to comply with in this area. The Criminal Justice Act 1987 (the "Act") provides in summary that the SFO may require by notice:

- the person under investigation, or any other person that the SFO has reason to believe has relevant information, to **answer questions or otherwise provide information** with respect to any matter relevant to the investigation (Section 2(2)); and
- the person under investigation, or any other person, to produce any **specified documents** which appear to the SFO to be relevant to the investigation (Section 2(3)).

These investigative powers are extremely wide-ranging, and any person who without reasonable excuse fails to comply with a request will commit an offence and can be imprisoned for up to six months and/or fined.

#### The shield of "privilege"

However, a person under investigation is able to withhold from the SFO material that is "privileged."

Section 2(9) of the Act states that a person will not be required to disclose any information or document "*which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court.*"

There are two types of "legal professional privilege" that a document can benefit from.

#### Legal advice privilege

All confidential communications passing between a party and its lawyer(s) are potentially privileged provided they are:

- written by or to the lawyer in their professional capacity; and
- for the primary purpose of seeking or giving legal advice.

#### Practical points to remember

"Legal advice" can include commercial advice in a relevant legal context.

"Lawyer" can include an in-house solicitor, but only where they are communicating in their capacity as a lawyer and not in any other capacity, for instance that of manager or administrator.

Importantly, a document cannot be privileged if it has ceased being confidential. Confidentiality will be lost when, for example, a document has been leaked or deployed in open court.

Whilst legal advice is capable of being disseminated to a board of directors under cover of privilege, the privilege in a document will weaken the wider it is circulated within an organisation. Similarly, notes of internal communications regarding legal advice may not be privileged.

Privilege may not apply to any internal communications preparing to request legal advice.

#### Litigation privilege

Litigation privilege is wider than legal advice privilege and can be relied upon where a party, or its lawyers, communicate with a third party in a bid to seek evidence for the purpose of litigation. In order to be protected by litigation privilege, confidential documents must be:

- a communication between a lawyer and their client, or a lawyer/client and a third party;

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- made for the primary purpose of litigation; and
- created when litigation is pending, reasonably contemplated or existing.

### Practical points to remember

For litigation to be “pending or contemplated”, it must be a real likelihood and not just a possibility.

A document created in unprivileged circumstances will not become privileged merely because a situation subsequently becomes contentious.

Documents made for two purposes are unlikely to be protected as they are not made for the primary purpose of litigation.

### The outcome

The SFO’s dissatisfaction with the use of privilege as a basis for refusing to disclose documentation places it in a difficult position. On the one hand, the SFO encourages a culture of openness and cooperation, advocates self-reporting, and is willing for businesses to carry out their own internal investigations. This is of course in part motivated by the severe pressures on the SFO’s investigation and enforcement budget.

On the other hand, it complains about the fact that such internal investigations will necessitate (if properly conducted) the use of legal advisers and that any advice provided by those legal advisers in respect of the investigation will by its nature be subject to legal privilege.

### Recommendations

We will continue to recommend that our clients rely on the privilege exception where appropriate and to advise on how to ensure this exception remains available. In particular, we recommend the following in the event of any potential SFO or other regulatory investigation.

#### Preservation

- Do not delete or destroy any relevant documents. Any routine document destruction process should be suspended.
- Identify all sources of potentially relevant documents, in both physical and electronic form. Isolate and image all sources of potentially relevant electronic documents, for example IT servers, computer hardware and back-up tapes. Discuss with your legal adviser whether an IT forensic services provider is required to assist with this.

#### Establish an investigation team

- Establish a defined team tasked with dealing with the investigation. This is because privilege is more easily applied

to a defined group of individuals within an organisation.

- The team should normally be comprised of the business’ in-house lawyer(s) (if available), key business decision makers, the appointed legal advisers and any appointed IT forensic services provider.
- Communications regarding the investigation should be restricted to the investigation team and should not be circulated more widely to other employees or other third parties since this may result in a loss of privilege in the communications and also other connected communications/documents. The investigation team can of course report to the board of directors as required with input from legal advisers.
- Bear in mind that advice and communications from an IT forensic services provider will not by themselves be privileged because they do not form legal advice, nor are they communications with a lawyer in the context of litigation.

#### Establish secure systems

- Consider establishing a secure email address with which to communicate with external lawyers in order to minimise the risk of discovery or a leak of sensitive information regarding the investigation.
- Consider also establishing a secure document depository for a copy of all relevant documents to be kept without the risk of identification, alteration or destruction.

#### Communications

- Expressly ask your lawyer for advice or state that any information provided is in connection with advice. This will support any claim made for privilege at a later date.
- Mark all communications regarding advice “Strictly Confidential and Subject to Legal Privilege”.
- Always keep legal advice separate from other content. Where a document contains mixed content (e.g. board minutes), separate the legal advice into a clearly sub-headed section.
- Remember to also do this when forwarding on an email. Separating the legal advice from the rest of a communication will help it remain privileged.

#### Document creation

- Apply a mental “would I be happy to read this to the investigating authority/the Court” test to the tone and content of any document you are creating or amending. Do not create any documents that you are not comfortable having on the record. Take care with manuscript amendments in particular; they can change the tone of a document and could end up being disclosed.

- Remember to check an email chain's content before you forward it on. Always apply the test described above and be wary of accidentally forwarding on legal advice.

### Investigation interviews and meetings

- Ensure that these are carried out with lawyers present and expressed to be confidential and legally privileged.

### Investigation reports

- Any report on the investigation and its findings must be drafted with the input of lawyers (in-house and/or external) so that it will attract privilege and the report should of course be stated on its face to be "Confidential and Legally Privileged – Not for Circulation."
- The report may be made available to the board for their consideration. However, great care needs to be taken before it is provided to any other third party, including an investigating authority.
- Instead, it may be preferable to provide the investigating authority with a letter summarising the findings of the investigation, or hold a meeting to explain those findings, rather than providing the full report itself.

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