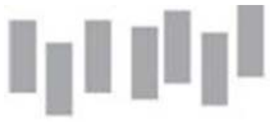


Legal Professional Privilege video part 01 - transcript

Slide 01

Welcome to the Office of the Information Commissioner's Short Video series on Legal Professional Privilege as it applies under the *Right to Information Act 2009*. My name is Sharron Harrington and I am an officer of the OIC Enquiries Service.

Slide 02

In this video, which is video 1 of 3 videos, we are going to be looking at access under the RTI Act, what that means looking at the pro disclosure bias and exempt information, the fundamentals of legal professional privilege, the elements and what you need to establish to exempt information on the grounds that it is subject to legal professional privilege.

In video 2, we're going to be looking at advice and litigation privilege the difference between them and what is required to establish that they apply, when non-privileged documents acquire privilege as a sort of contamination, third party communications that can attract privilege and when privilege gets waived.

In video 3 we're going to be running through practical examples of privileged documents, some of the tools that the Office of the Information Commissioner has available on its website that will help you with applying legal professional privilege and some of the things to look at when writing your decision exempting information on the grounds of privilege.

Slide 03

Under the RTI Act anyone can apply to access documents that are in the possession or control of a Queensland government agency or Minister. Now obviously people can apply under chapter 3 of the Information Privacy Act if they're applying for documents that contain their personal information. If those documents contain legally professionally privileged information, you can also refuse access to them, but access to them is refused under the Right to Information Act as well. In this video I am going to referring solely to the Right to Information Act on that basis, so do keep in mind that if you are dealing with an access application under chapter 3 of the Information Privacy Act, all of this info can apply to you as well.

Under the RTI Act, access is to be given unless it is contrary to the public interest to do so. Schedule 3 and schedule 4 of the RTI Act are the main players when you are looking at whether it is contrary to the public interest to give information and as the decision maker you have to have a pro disclosure bias when you are making those decisions. Schedule 3 of the RTI Act contains lists of exempt information, including legal profession privilege, and Parliament has already decided that it is contrary to the public interest to disclose exempt information, so if you do decide that information falls within one of the exempt information categories in schedule 3 there is no need to move on to schedule 4. Schedule 4 obviously contains the lists of public interest factors, which you then apply to information which is not exempt.

Slide 04

So what is legal professional privilege? Well, for a start, it is one of the classes of exempt information in schedule 3 of the RTI Act. Schedule 3, section 7 states *"Information is exempt information if it would be privileged from production in a legal proceeding on the grounds of legal professional privilege"*. Now that doesn't actually tell us what legal professional privilege is. So we'll have to move on to the common law to actually look at what privilege is.

Slide 05

Essentially privilege is something that attaches to confidential communications. That's going to be important, because privilege attaches to communications not documents, but obviously for the purposes of the RTI Act, one can't apply for communications, only documents. Now the communications must have been made in the course of a lawyer-client relationship. You'll find solicitor-client, barrister-client, or legal advisor-client used in a number of different places, but for the purposes of this I'm just going to use lawyer-client. The confidential communications must have been made in the course of a lawyer-client relationship and they must have been made in the *dominant* purpose of legal advice or to be used in legal proceedings. Legal advice is known as advice privilege. To be used in legal proceedings is known as litigation privilege. Keep those in mind, we're going to cover them in more detail in the second video. For the purpose of this video it's enough for you to know there can be two types of privilege, one for legal advice and one for legal proceedings.

Slide 06

So what does it do, what does privilege actually do? Basically it protects, I've said documents there because when we're looking at privilege as it applies under the RTI Act, but if you look at the common law, the case law essentially which is where privilege comes from, you'll see it uses the word communications, but what privilege does is it protects those communications from having to be produced in court proceedings. If something is privileged you can basically push back against an order that they be produced in a court proceeding or under some statutory powers as well. Obviously you'd be aware that some Acts do give regulatory agencies and some investigators the power to compel the production of documents. In some cases, if a document that has been ordered to be produced is subject to legal professional privilege you can use that as a basis for saying no I'm not going to give it to you. That's not always the case, some Acts will say even if that document is subject to privilege and in that case the fact that the documents is privileged is not going to be enough to say no. It's all going to depend on what the statute actually says. Privilege essentially, gives you the power to say, "no, I'm not giving it to you, that document is privileged."

Slide 07

So why does it exist? What sort of is the point of privilege? Basically, if you go right back to the beginning, it essentially encourages people to be up front with their lawyers. If you are going in to see your lawyer because, maybe you had a bit of a big weekend and maybe you got up to somethings you perhaps shouldn't have done and so Monday morning you're off to see your lawyer to find out just how bad it's going to be. If you didn't have a high level of confidence that what you said to your lawyer was going to be confidential, was going to be protected, you would not be frank with them. Privilege essentially is there to ensure full and frank disclosure of clients to their lawyers and that serves the public interest in the administration of justice. It allows clients to obtain legal advice in confidence. Now, the way privilege is set up, it strikes a balance between the need for

parties to a court matter to have relevant information and the need for clients to maintain confidential communication with their lawyer. So, if you were wondering why privilege? That is why it's there.

Privilege isn't absolute. It can be waived, it can be lost, and we're going to talk about that later on. Privilege isn't something that can be maintained forever and a day. It does require a certain amount of effort on behalf of the client to maintain that.

Slide 08

What do you need to establish privilege? We touched on this earlier. You need a confidential communication, you need a professional relationship and independence, and you need the dominant purpose to be established. Now, if you're looking at some of the old cases you might see that they refer to a sole purpose? That is no longer the relevant test, it only needs to be the dominant purpose. If you see sole purpose you are probably looking at old material and you might need to update that a little bit.

Slide 09

Confidential communication. As I mentioned before, privilege attaches to confidential communications not documents, but a lot of the time I'm going to be talking about documents, because the RTI Act applies to documents, so legal professional privilege exemption will apply to documents that record confidential communications - remembering the definition of documents is extraordinarily broad. The question to be asked is: will disclosing the document disclose the confidential communication? You as a decision maker, you're going through your files, you're going through your documents, you hit something you think might be privileged, that's the question you have to ask: if I disclose this document to the applicant, will I disclose the confidential communication?

The communication must have been confidential and it must remain confidential. Remember I said before the privilege is not an absolute, it can be lost? One of the ways it can be lost, and again we're going to talk about this later on, is if the confidentiality has been lost. In most circumstances, the presence of a third party will remove the confidentiality, but you're going to have to look at all of the circumstances. If the third party is the agent of the lawyer or the client, or the third party has been retained to provide something in relation to the legal proceedings or the legal advice, or has been bound up in a confidentiality agreement or something of that nature, then the confidentiality might not have been removed. You do have to look at all of the circumstances. That's the nature or privilege. The tests for privilege are quite simple, but the application of them in some circumstances can be quite grey.

Slide 10

There must also be a professional relationship, confidential communication and a professional relationship between a legal adviser and a client. The legal adviser must be acting in the capacity of a lawyer and the advice must of an independent character. Now, whether or not you're going to have difficulty the legal adviser is acting in the capacity of a lawyer can depend on whether you're a government agency dealing with in-house lawyers or you're dealing with matters briefed to outside lawyers or to Crown Law.

Slide 11

Communications with external private lawyers, Crown Law and in house government lawyers can all be privileged, no problems there. The person must be admitted as a lawyer, that again seems a little bit obvious, but it's important. They must be sufficiently independent from the personal loyalties, duties and interests of the client. If you're briefing to your legal services unit this is generally be going to be established and you don't need to worry about it too much. For external lawyers and Crown Law independence will rarely, if ever, be an issue; again, you don't need to worry too much about it. You will have to consider it for in-house government lawyers, but if you have a separate legal services unit that has been appropriately established as a separate legal services unit reporting to through a separate chain of command to a senior lawyer, it generally will be established. It's all going to come down to whether or not they have been set up as a separate legal services unit for the purposes of providing legal advice. If that is the case, generally that is going to be established and you don't need to be too concerned about it.

Slide 12

Obviously, in-house government lawyers should be appointed to a position involving legal work, which is again where a separate legal services unit will help with that. Look for titles that reflect this, such as a legal officer. This is not definitive, only helpful, because legal officers can be briefed to do non-legal work. If a title suggests no legal work: policy officer, technical officer, this will call any LPP into question. Plenty of people have law degrees and are admitted to practice as lawyers who are not actually doing legal jobs. As I mentioned before, in-house lawyers may also do policy or other work that is not legal in nature. Information is not privileged simply because it was breathed by a lawyer. You have to consider the nature of the work itself. Simply because something is placed on a legal file does not make it privileged. You absolutely must consider the nature of the work and obviously of the nature of the person who's doing the work. You do have to look at the content.

Slide 13

Look for lawyers applying their legal skills in a relevant legal framework in response for a request for legal advice. For example, look for them advising the agency on its legal obligations, or arranging for detailed evidence or witness statements, particularly in relation to anticipated legal proceedings, or giving the agency advice about what actions an agency should take in a specific legal context.

Slide 14

Obviously just because it has a stamp on it that says legal professional privilege does not make it privileged. I heard a story once of a situation where, this was quite some time ago back in the early, early days of the Freedom of Information Act being introduced, where a middling senior legal officer sent one of the juniors out to get a privilege stamp made to stamp everything on a whole series of files, because had been subject to an FOI application, thinking that that would be enough to automatically have those documents not released. And the FOI officer in that particular agency had to sit down and explain that, no, that would not be enough, that each document had to be examined on its own merits to determine whether or not it was privileged. I would not have wanted to have been the decision maker that was having to explain that. But anyway, moving on. So yes, it is important to remember that in-house lawyers, and certainly in some circumstances lawyers outside of government, may be briefed to do work that is not necessarily legal in nature, so you do need to look at all of the circumstances.

Slide 15

Which leads nicely into the dominant purpose. The reason the confidential communication was created is the key to legal professional privilege. The confidential communication must have been brought into existence for the purposes of giving or receiving legal advice (this is advice privilege) or for preparing for or for use in existing or reasonably anticipated legal proceedings (this is litigation privilege), and I'll talk about both of those later on. It must be the dominant purpose of the confidential communication.

Slide 16

The dominant purpose is determined at the time the document was created. You can't, this is not Doctor Who, you can't hop in the TARDIS and go back in time and say that “oh, the dominant purpose was absolutely legal proceedings” if at the time the document was created there was absolutely no possibility that legal proceedings were ever anticipated. It just can't be done. You have to look at what was the purpose of the creation of the documents at the time the document was created. You can't just ask the lawyer or the client, you have to look at the document itself—I mean, you can ask the lawyer and the client and take those submissions, for want of a better word, into consideration, but they aren't the be all and the end determining factor of why the document was created.

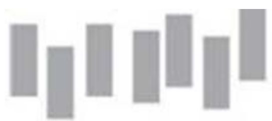
You have the look at the circumstances, look at any, perhaps emails or instructions around the creation of the document. Now the dominant purpose doesn't mean sole purpose. That used to be the test a long time ago, but it was overturned. It means the ruling, prevailing, or most influential purpose of the creation of the document. It can have more than one purpose and a lot of times it will have more than one purpose, particularly if you're dealing with in-house lawyers. But the dominant purpose does have to be the most important purpose, the ruling, prevailing, and most influential purpose behind the document’s creation.

Slide 17

If there are two or more equal purposes behind the document's creation, then obviously one of them cannot be said to be more dominant than the other. There's no Alpha purpose, so no dominant purpose, document might not be privileged, probably isn't, in fact. So you have to look at the evidence of the document's intended use, the nature of the communication and as I said, any submissions from the parties—they are relevant, but they don't have the final say. You're the decision maker; you have got the final say on whether or not it's privileged.

Slide 18

This is the end of video one. Moving on to video two in which we'll cover advice and litigation privilege, non-privileged documents becoming privileged, third party communications and of course waiver of legal professional privilege.


Office of the Information Commissioner
Queensland

Legal Professional Privilege video part 02 - transcript

Slide 01

Welcome to Part 2 of the Office of the Information Commissioner's short video series on legal professional privilege as it applies under the *Right to Information Act 2009*. I'm still Sharron Harrington and I'm still an officer of the Office of the Information Commissioner's Enquiries Service and if I didn't say it before, let me say it now, it's a privilege to be talking to you all today.

Slide 02

This is Part 2 and we're going to cover advice, litigation privilege, non-privileged documents requiring privilege (in certain circumstances), third party communications and when privilege can be waived. In the next video we're going to cover practical examples, some tools that the Office of the Information Commissioner has to assist you in applying legal professional privilege and some information about writing decisions. In video 1 we covered access under the RTI Act, pro-disclosure bias and exempt information and the fundamental basics of legal professional privilege.

Slide 03

Just to recap, legal professional privilege attaches to confidential communications that were made in the course of a lawyer-client relationship for the dominant purpose of legal advice or to be used in legal proceedings. As I mentioned in the previous video, there's 2 types of privilege: advice privilege and litigation privilege. As promised, in this video we are going to go into those in more detail.

Advice privilege is communications that were made for the dominant purpose of legal advice – so it's not just a clever name. Litigation privilege applies to communications that were made for the dominant purpose for the use in legal proceedings. Now those legal proceedings do not have to been on foot, they just have to have been reasonably anticipated. We'll talk a bit more about what that means in a minute.

Slide 04

So we'll look at advice privilege first. Advice privilege is probably the one that you're going to most commonly encounter and the one you're going to most commonly use. As we have said multiple times, it attaches to confidential communications made for the dominant purpose of legal advice. These communications can be made between lawyer and client or client and lawyer. Now they can also apply where a person directs a third party to make a communication on their behalf to a legal advisor for the dominant purpose for obtaining legal advice. Generally this will arise when a third party is the client's agent.

Slide 05

So there'll be some sort of relationship binding the third party to the actual client. It can also apply to certain third party communications where the third party is <u>not</u> acting on behalf of the client or lawyer. For example, where the third party is a specialist retained by the lawyer, but this is going to depend heavily on the circumstances. So you're going to need to look at any sort of agreements that have been put in place and the specifics of those agreements before you can decide whether or not privilege applies. So you'll want to tread very carefully in these circumstances and you are going to need to see or view any necessary documents there. I guess one of the things we need to look at

too, is exactly what legal advice is. It basically covers any sort of professional advice as to what a party should do in the relevant circumstances. It doesn't extend to any sort of advice that is prepared for the dominant purpose of financial, personal, commercial, public relations matters. It doesn't apply to policy or administrative advice. As we touched on when we were talking about the dominant purpose test, it must be prepared for the dominant purpose of legal advice. It can cover or touch on other issues but legal must be the dominant purpose of the advice. Some specific examples of communications that will obviously be made for the dominant purpose of giving or seeking legal advice:

- The client's instructions to a lawyer to provide them with legal advice. There's absolutely no doubt that that is going to be subject to legal professional privilege (unless it's been waived but we'll touch on that later).
- The advice provided by the lawyer back to the client in response to those instructions. They are clearly going to fall within the advice privilege limb of legal professional privilege – there can be no doubt about that.

Slide 06

So litigation privilege, depending on which agency you work for, this might or might not come up more commonly. Litigation privilege attaches to confidential communications between lawyer and client for the dominant purpose of use in, or in relation to, litigation. Litigation must have begun or have been reasonably anticipated at the time of the communication. It is an objective test. There must be a real prospect that it will happen but it does not have to be more likely than not. It's one of those grey areas that I mentioned in the first video. It's easy to define but in some circumstances might not be that easy to apply. Obviously, it'll be easy to apply if proceedings are on foot or documents have been filed to start proceedings but you'll need to have a look at all the circumstances to determine if there is a chance that litigation is going to happen.

For the purposes of litigation privilege it can include both judicial and quasi-judicial proceedings and it can also extend to actual or anticipated litigation in tribunals as long as they're sufficiently similar to a court proceedings. Again, it's going to depend on the circumstances and you may have to look at what specific tribunal is involved.

Slide 07

Examples of documents that you're likely to find on a file that could be subject to an RTI application are:

- A brief to a lawyer asking for advice about the chances that litigation will be successful and the lawyer's advice back
- Any sort of advice about a specific stage of litigation. For example, seeking an injunction
- Information that could lead to evidence being obtained for use in litigation. Obviously that's going to be a key part of any sort of proceedings.

Slide 08

Litigation privilege can also apply to communication with third parties if the communications are connected with the lawyer-client relationship and they meet the dominant purpose test. For example, a communication between a lawyer and a potential witness for the purpose of the lawyer

obtaining evidence to use in a prosecution. Obviously, potential witnesses don't just spring fully formed from the ground outside the lawyer's office (as convenient as that would be). The lawyer has to seek them out, arrange for their testimony, identify whether they do have any useful evidence to contribute to the proceedings. So the communications between the lawyer and those potential witnesses as part of the acquiring that information could also attract litigation privilege, again, as long as it meets all the relevant tests. When you're looking at a file in relation to a prosecution and you do see those sort of communications on the file, don't dismiss them out of hand. Apply the test to them and look at what the purpose of those communications were to determine if they do potentially attract privilege.

Slide 09

We've established throughout this at the time at which privilege is determined is at the time of creating the document. The document must be created for the dominant purpose of either advice privilege or litigation privilege. However, non-privileged documents – ordinary documents created for ordinary things – can become privileged in certain circumstances. It's important to keep in mind that only the specific copy of the document that has become privileged attracts privilege. It doesn't radiate back through time and affect all copies of the document including the original. In some circumstances, you'd need to not just brief a lawyer to give you advice, you'd need to give them copies of documents. Whether that might be copies of titles documents, witness statements, policy manuals, whatever they might be. If you specifically copy a non-privileged document for the purpose of giving it to a lawyer as part of seeking legal advice or for use in legal proceedings it is highly likely to become privileged and access to it can be refused. It's almost like it becomes contaminated with privilege. For example, if you had to give copies of land title documents to a lawyer as part of determining whether or not, based on the history of the property, it was leasehold or freehold now, those copies of the land title documents would become privileged but *only* those copies. All of the other copies of the land title documents and all of the originals would still not be privileged documents. So when you're looking at a file from legal and it's got copies of ordinary documents on it, it's quite possible depending on how and why those documents were provided to legal that they could in fact be privileged documents. So you'd need to have a look at that and that can be very important because it's not just what you brief the lawyer on to provide advice; the copies of documents you might have provided about that brief could reveal information about what you were seeking advice on. So it's really important to be aware of the potential for otherwise non-privileged documents to acquire privilege based on those circumstances.

Slide 10

As I said back at the beginning, privilege is not absolute; it can be lost. It belongs to the client and the main way that privilege is lost is if a client deals with the confidential communication in a way that is not consistent with its confidential nature. It can be lost accidentally, it can be lost deliberately or where there exists an improper purpose. Now, when privilege is lost accidentally or deliberately this is called waiver. If you don't deal properly with your confidential communications you can wave goodbye to privilege.

Slide 11

As I said before privilege belongs to the client not the lawyer. Only the client can choose to waive privilege. It can be waived intentionally by deliberate disclosure of the privileged communication

and this is called express waiver. It can be waived through implication because of the circumstances in which the communication has been dealt with – this is called implied or imputed waiver. I'm going to refer to it as implied waiver.

Slide 12

Privilege is expressly waived when the client deliberately and intentionally discloses the confidential communication without taking steps to maintain its confidentiality. The lawyer can do this only with their client's instructions or if the client has passed away with the executor's instructions. Reading privileged communications in open court will waive privilege which is a good reason to resist production of privileged communications to the Court.

Confidential disclosure to the client's witnesses or expert to prepare an opinion will not generally waive privilege because that is not dealing with it inconsistent with the confidentiality. Taking steps to bind a recipient in a strict obligation of confidentiality may allow disclosure to an outside party without waiving privilege – it will all depend on the circumstances. If you are dealing with a file and you believe that it's possible that privilege document may have been communicated with a third party, you will have to look very closely at the circumstances of that communication to determine whether or not there were obligations of confidentiality surrounding the communication and to a lesser extent what the purpose was of that communication to determine if privilege has been waived.

Slide 13

Privilege is impliedly waived where the actions of the client are inconsistent with the confidential nature of the privilege. Legal privilege applies to confidential communications between lawyer and client or communications as part of the lawyer-client relationship. If you don't deal with those confidential communications in a confidential way, privilege can be wiped out.

Disclosing documents containing the advice will waive privilege. Merely referring to the existence of a legal advice will generally not waive privilege. But referring to the content of the advice can definitely be sufficient to waive privilege. There's a case *"Switchcorp Pty Lt & Ors v Mutilmedia Ltd [2005] VSC 425"* and it has a statement in it that I really like to use as an example of how easy it is to waive privilege, because it's a statement you can imagine hearing all of the time: *"The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff's claim will not succeed."*

It seems like such as simple statement, something you can see almost anyone involved in a conflict saying, but that was enough to waive privilege. In that case, Switchcorp sought access to all documents constituting or recording legal advice referring to Multimedia's announcement to the Australian Stock Exchange that the Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff's claim will not succeed. Legal professional privilege was denied on the basis that there had been a clear and deliberate disclosure of the gist or conclusion of legal advice received by Multimedia from its lawyers about the outcome of the proceeding and the inconsistency between the statement and the confidentiality of the advice to which it refers. So you need to look at all of the circumstances to determine if privilege has been impliedly waived.

Slide 14

In circumstances where a document has been partially disclosed that may not be enough to waive privilege over the entire document. You have to look at the substance of what has actually been revealed. If the document in question deals with multiple subjects, say it deals with dogs and cats and ponies, and the partial disclosure was only about ponies then all of the information about dogs and cats may still be privileged. If you can sever the ponies (that sounds terrible, doesn't it?) but if you can sever the information about ponies from the information about dogs and cats then the dogs and cats may still be protected. However, if the document only deals with ponies and the information about ponies has been disclosed then privilege has likely been lost over the whole document. All related communications may lose their privilege through implied waiver of associated material. So it might not be that document, as in the Switchcorp case, it might be that all of the documents that deal with ponies (all related communications) could lose their privilege, not just the document that has been disclosed but all of the documents that relate to that document. It all comes down to what's been disclosed. So you're going to have to look at all the circumstances if you think that implied waiver may have occurred.

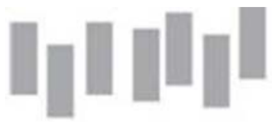
Slide 15

I mentioned, an illegal or improper purpose before. I perhaps was a bit cheeky putting it in where I did because an illegal and improper purpose isn't really a waiver as such. Essentially if an illegal or improper purpose applies, privilege never actually came into being. It is pretty unlikely that you're ever going to encounter it, but you should be aware of it because it is occasionally raised by applicants. The illegal/improper purpose exception to privilege essentially states that privilege won't attach to a confidential communication if that confidential communication was created to commit or further crime, fraud or an improper purpose. Obviously this doesn't apply where a lawyer is assisting a client with a previous crime, fraud or improper purpose. The reality is that many lawyers have clients who have commits crimes, frauds or improper purpose – that is why they are going to see a lawyer in the first place. This is about the situation where the confidential communication is part of assisting a client with a current or ongoing crime, fraud or improper purpose.

The lawyer didn't need to know about the existence of the illegal or improper purpose for this exception to apply which make sense if you think about it because privilege doesn't belong to the lawyer – privilege belongs to the client. So the lawyer's state of mind about the existence of the illegal or improper purpose, it makes sense that it's really irrelevant for the application of this exception. There must be reasonable grounds to believe the illegal or improper purpose exists. So there has to be some objective test to be applied here. That's probably all I'm going to say about it, just to know that it exists because it is possible that applicants may raise that at internal review if you do run privilege on documents.

Slide 16

That's the end of video 2. In video 3 we are going to cover some practical examples in legal professional privilege, look at privilege tools available on the Office of the Information Commissioner website to assist you as decision makers and we are going to look a little bit at writing a legal professional privilege decision.



Legal Professional Privilege video part 03 - transcript

Slide 01

Welcome to part 3 of the short video series on legal professional privilege as it applies under the *Right to Information Act 2009.* I'm sure this will come as a complete surprise, but I'm still Sharron Harrington and I'm still an officer of the Information Commissioner's Enquiries Service.

Slide 02

In this video, which will be much shorter than the other two, we're going to be looking at a couple of practical examples of documents that a generally covered by privilege, some of the tools available on the Office of the Information Commissioner's website that will help you with applying privilege and looking briefly at writing your decision if you decide documents are exempt on the grounds that they are covered by legal professional privilege.

In video 1 we covered access under the RTI Act, pro disclosure bias and exempt information and the fundamental basics of legal professional privilege. In video 2 we covered advice and litigation privilege, non-privilege documents becoming privileged, third party communications and waiver of privilege.

Slide 03

Just a quick overview – legal professional privilege attaches to confidential communications made in the course of a lawyer-client relationship for the dominant purpose of seeking legal advice or for use in on foot or anticipated legal proceedings. Legal professional privilege belongs to the client not the lawyer. It can be expressly or impliedly waived. Documents which are subject to legal professional privilege are exempt from release under the *Right to Information Act 2009* and also exempt from release under chapter 3 of the *Information Privacy Act 2009*.

Slide 04

The legal professional privilege status of certain documents that do tend to come up in applications for documents in applications under the Right to Information Act has been previously decided and I'm just going to run through them. We have previously touched on expert reports, but generally confidential communications between a lawyer and a third party expert will attract privilege where the communications are made for the dominant purpose for use in existing or reasonably anticipated litigation.

Lawyers briefing instructions to an expert will also constitute confidential communications made for the dominant purpose for use in litigation and will, on their face, attract legal professional privilege. However, you will have to look at all of the circumstances surrounding those instructions to determine if privilege applies. If you're looking at drafts of material prepared by the expert as opposed to the file report – it's possible that they could attract privilege. Again, you are really going to have to look at all of the circumstances surrounding it. There is opposing legal view points out there as to whether or not drafts of expert opinions and expert material can attract privilege so I cannot give you a definitive view point. All that I can say is that if you do for some reason find that you have drafts of a briefed expert on your file to be aware that it could go either way and to really look at the circumstances.

Lawyers working documents that is draft materials, if the final would have been privileged then the drafts can be privileged as well. Drafts and notes, memos of research conducted, collations and summaries of documents and notes or recordings of conversations with the client can definitely be privileged. It's not uncommon, particularly where you're dealing with in-house lawyers, to find significant numbers of drafts on files.

Billing documents – that is bills for services provided by Crown Law or outside, external legal providers, generally will **not** attract privilege. The amount charged for the services, including the final amount, won't be privileged. If the itemised lists of costs reveals the nature of the advice given or nature of the privileged communications that may be privileged. But as a general rule, the actual amount charged for the services will not be privileged.

Cost agreements or client agreements will generally not be privileged. While it's true that they generally are a requirement they exist before there can be any sort of a relationship that's going to give rise to the existence of privileged documents. The client or cost agreement themselves will not be privileged. There can be exceptions to this if there is something in the client or cost agreement that does contain something that could constitute the giving of legal advice. However, as a general rule, client and cost agreements are fairly standard between clients and there would not be anything in them that would generally be subject to privilege.

Slide 05

You would be aware that some regulatory agencies and investigatory bodies do have the power to compel the production of documents from agencies, even where those documents are subject to legal professional privilege. Generally, there will be some sort of statement in the Act that says that doing so does not in fact waive privilege. If you do have a file and there are documents - privileged documents - showing that they've been provided to an agency in response to such a power, privilege will still be maintained on those documents unless it's been waived in some other way. So you don't need to be too concerned about that. If you do have evidence that they've been provided to a regulatory agency or an investigatory body or a commission of some kind in response to the exercise of such power but the privilege is still maintained on them then you can still refuse access to them under schedule 3, section 7 on the grounds that they're subject to legal professional privilege.

Slide 06

We have a number of tools on the Office of the Information Commissioner website which are likely to be of assistance to you when you're making you're privileged decision. This is the Office of the Information Commissioner website: www.oic.qld.gov.au. The first thing I want to show you is the Information Sheet. Now this is an Information Sheet that's prepared for members of the community that explains legal professional privilege to them and why they would have been refused access in very plain English. So you'll find this under - Guidelines, for Community Members, Access and Amendment and honestly the fastest way to find it regardless of what browser you're using is going to be hitting "Ctrl F" and typing "legal professional privilege". You'll see it comes up here "legal professional privilege – a guide for applicants".

Now this is intended to do double duty as many of our Information Sheets for applicants are. It's an Information Sheet for applicants to inform them about an exempt information provision but it's also intended to be utilised by agencies who might have an applicant who's making enquiries about seeking access to documents that they simply are not going to be granted. It's the sort of thing that

you might be able to give them in order to explain to them why they simply are not going to get access to the documents they are enquiring about. This way, if they are inclined to have a slight amount of mistrust with you as an agency, maybe having something from a third party that they might not have a relationship with or might not yet have any issues with, might help them to understand or to trust, perhaps, is a better word, why they are not going to be given access to it.

So you'll see it runs through the basics – what is legal professional privilege, does it apply to government lawyers, does it apply to current legal proceedings, what if the proceedings are finalised, will I be able to access this information as part of my RTI application – essentially "no" if the elements are satisfied.

You can access this on the website, download it as a PDF, email the link or include it in the letter if you think it might be of use. That's the Information Sheet - simple, plain English, written for members of the community who might not have much exposure to or much experience with the concept of legal professional privilege.

There's also a Guideline. The easiest way to find the Guideline is to use the search box and type "Legal Professional Privilege" and it should be one of the top results. The Guidelines are intended for agency decision makers and other people in agencies and they're more complicated than the Information Sheets for community members. They go through the elements of the exempt information provision. Notice there's footnotes throughout so they cite relevant case law for the provisions. Also available as a PDF or as a print function.

Now this will run you through essentially the basics of legal professional privilege and much of what we've discussed already in these videos. Common law principles, advice and litigation privilege, running through the basics here, the various elements, some excerpts from relevant cases, a couple of examples, all the things we've discussed here today. So if you're wanting to write your decision and you're looking to learn more about legal professional privilege, the Guideline is definitely the next step up there. So we've got more cases here, how to apply it, particular issues, types of documents and then down here we've got all of the relevant citations for the relevant case law. This can also be very useful when you're writing your decision as you should, of course, feel free to utilise text directly from the Guidelines if you find it useful when you're preparing your decision to send out to the applicant.

The other thing you might find useful is the annotated legislation. If you're not familiar with the annotated legislation, what it essentially is the entire *Right to Information Act* that is, for want of a better description, annotated with additional information including information from case laws and commentary from the Office of the Information Commissioner. It's essentially the next step up from a Guideline. Legal professional privilege is an exempt information provision. Exempt information provisions are contained in schedule 3. If you like down the border here, you'll see "Schedule 3, Exempt Information" and we can go straight to it. Now it's section 7, *Information subject to legal professional privilege* and if you click into there, you'll see on the right hand side a number of links through to all the various information about legal professional privilege. Now this is, as I said, the next level up from the Guideline so more complicated but if you're looking for something specific about an element of legal professional privilege the annotated legislation is going to be the place to go. It also has key published decisions applying schedule 3, section 7 of the RTI Act. As you would be aware, there is a significant number of decisions on the Office Information Commissioner website and if you're looking for one that's about legal profession privilege there are a lot of those as well.

Now this tells you what basically the key decisions are about legal professional privilege and gives a brief run down of what they actually look at here. Those are just three tools on the OIC website that are going to be useful for you if you're wanting to know more about legal professional privilege, if you need to know about a specific element of it or if you're wanting to write your decision. The annotated legislation, the Guidelines and the Information Sheets for community members.

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When you as the decision maker are satisfied that the documents that have been applied for are subject to legal professional privilege and as such they are exempt from release, you're going to need to communicate that to the applicant. When you're refusing access to documents or to information contained in a document because it is subject to legal professional privilege, you should set out that the RTI Act allows you to refuse access to legal professional privilege information because it is exempt information. It's very good to refer to the relevant sections of the Right to Information Act or if you are dealing with an Information Privacy Act application to explain why it is that you're referring to the sections of the Right to Information Act.

Set out the elements of legal professional privilege that need to be established and set out how the documents or information that has been applied for meets those elements. It's very important that you not refer to the specifics of the communications that would waive the privilege that you are trying to protect. You can speak in general terms, *"in a communication between business unit and legal service*", you wouldn't say *"communication between business unit and legal services seeking advice on how to get rid of barking dogs*". You would not going into that level idea because that right there would probably waive the privilege you are attempting to protect.

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It's very important to remember that despite the fact that legal professional privilege can be a relatively complicated area of the law at times, there is no need to use complicated language or to quote huge paragraphs of case law. Use plain English and short sentences. Don't quote case law unless it's absolutely necessary. Reword wherever possible to make it simpler. Please feel free to use the words from OIC's Guidelines, OIC's annotated legislation and OIC's own decisions. State the relevant principles in your own words or, as I said, use OIC's words and simply cite the case in a footnote.

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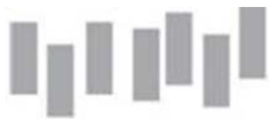
So that's the end of the video series. I hope that you found it at least a little bit useful. One thing to keep in mind is that legal privilege can be a complex area of the law. Hopefully it won't be too complex for you when you're applying it and you'll have nice simple files that are clearly request for legal advice and the legal advice being delivered back. But sometimes it can get really complicated and it is constantly developing. This video series was recording in November 2016 and I've made every attempt to keep it at a high enough level that it should age fairly well. If you have any doubts about its currency please check the OIC Guidelines and annotated legislation or you can contact us on the Enquiries Service. Remember, whether or not privilege attaches to documents for which an applicant applies is always going to depend on the circumstances of each particular case. You're always going to have to look at the documents, look at the purpose for which it was created, look at who created it and look at all the circumstances surrounding it before you make your decision.



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If you do need to contact the Enquiries Service this is how you can get hold of us - myself or a member of the team will be more than happy to assist you with any of your enquiries.