

## **NISG – Legal Update Sponsored By Carson McDowell**

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### **The Importance of Legal Privilege in Health & Safety Investigations**

When a serious workplace accident or fatality occurs, employers want to understand what went wrong, support their employees, and take steps to prevent future incidents. However, it is crucial that legal advice is obtained at the earliest opportunity to ensure that legal privilege is protected.

Without the protection of legal privilege, employers may be compelled to disclose internal investigation reports, witness accounts, emails, correspondence, drafts, and any other material generated during the investigation. Regulatory authorities are entitled to request such documents unless privilege applies. Preserving privilege allows an organisation to investigate candidly and thoroughly without fear that sensitive findings will later be disclosed.

This article outlines the different types of legal privilege and explains why they are so important in the context of health and safety investigations.

#### **Legal Advice Privilege vs Litigation Privilege**

Unless legal privilege can be properly established, there is a significant risk that documents generated in the early investigatory stages may have to be disclosed during subsequent civil claims or regulatory investigations.

When a document is legally privileged, a company cannot be compelled by any regulator, investigator or third party to disclose it. This enables a full and frank assessment of the incident.

There are two key types of privilege:

##### **1. Litigation Privilege:**

Litigation privilege applies where adversarial litigation is pending, has commenced, or is reasonably contemplated to allow a party to begin preparing their case. This privilege can extend to confidential communications involving not only lawyers and clients but also third parties, such as experts or witnesses, provided the dominant purpose test is met.

##### **2. Legal Advice Privilege**

Legal advice privilege is limited to confidential communications exchanged between a lawyer and their client for the purpose of giving or receiving legal advice.

This form of privilege does not require litigation to be contemplated. However, it only covers communications between the lawyer and the client (not with third parties) and therefore is narrower in scope.

## Practical Steps to Protect Privilege

To maximise the likelihood that privilege will apply, employers should:

- Seek legal advice immediately following a serious incident.
- Label all relevant documents as: “Legally Privileged and Confidential – Prepared in Contemplation of Litigation.”
- Maintain strict confidentiality over all privileged documents.
- Establish a small, clearly defined investigation team responsible for liaising with solicitors.
- Limit circulation of correspondence, notes, draft reports, and especially the accident investigation report itself.
- Ensure internal communications reflect that the dominant purpose of the investigation is to obtain legal advice and prepare for anticipated litigation or regulatory action.

Privilege is a question of substance, not form. Simply marking documents as ‘confidential and privileged’ or forwarding them to a solicitor does not automatically make a non-privileged document a privileged one. The question to ask when someone is creating or sharing a document is: Why are they doing it? What is the purpose?

## Conclusion

Early legal involvement is essential in the aftermath of a serious workplace incident. Properly establishing and preserving legal privilege enables organisations to conduct a thorough investigation while safeguarding sensitive information from disclosure. By taking practical steps to protect privilege, employers can ensure they are best placed to manage subsequent regulatory scrutiny or litigation.

**If you would like any further information or advice relating to health and safety law, please contact Declan Magee or Eilis Maguire from the Health & Safety team at Carson McDowell LLP.**



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