



# 4directors

Director's Briefing: October 2007

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## The role of Privilege in Accident Investigation.

**No matter how hard we try, the amount of resources, training and general endeavours we put into protecting our employees and those affected by our work activities, sometimes things do go wrong and someone or something may be injured or damaged as a consequence of the incident. When this unplanned or unforeseen event occurs and it is serious in nature, a detailed investigation can help organisations understand why the incident happened and hopefully enable measures to be put in place to prevent the incident occurring again.**

**Before investigating an incident which is "serious" in nature, we would always recommend seeking legal advice in relation to Legal Professional Privilege (LPP) which can help your organisation protect itself from future litigation; after all as a Director you have a legal obligation to protect the interests of your company. In this 4directors we have jointly produced a briefing note with Pinsent Masons, to discuss the benefits of obtaining LPP.**

## Background

Privilege is a long standing legal right which means that privileged documents do not have to be disclosed to anyone – this includes the police and HSE inspectors investigating health and safety incidents.

There are two main types of privilege:

- Legal advice privilege – this protects confidential communications between a lawyer and his client (and evidence of those communications) provided that the communications are for the dominant purpose of seeking and receiving legal advice. It does not apply to communications with third parties.
- Litigation privilege - this protects confidential communications between a lawyer and his client and/or a third party or between a client and third party, in each case provided that such communications have been created for the dominant purpose of actual or pending litigation (criminal or civil proceedings).

This note sets out practical steps to try and ensure as far as possible that communications relating to an accident investigation (including the resulting investigation report) remain private and confidential and covered by Litigation Privilege

## Why is privilege important?

Certain incidents are reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR). Health and Safety Executive (HSE) guidance states that such incidents (and others) should be investigated in order to determine the root causes and steps to be taken to prevent reoccurrence.

The HSE and personal injury claimants have the right to obtain documents produced in relation to health and safety incidents (including investigation reports). These documents must be preserved (i.e. they cannot be deliberately destroyed).

The experience of Pinsent Masons' specialist Health and Safety Team is that, often inadvertently, many Incident Investigation Reports, Briefing Notes etc., set out in clear terms what the company has done wrong. These can amount to an unambiguous admission of liability. Very often such damaging reports are produced soon after an incident has occurred, when the full facts have not been identified and analysed.

If these documents are disclosed (companies often disclose them voluntarily to the HSE in the spirit of co-operation), they can seriously hamper a company's ability to mount defence and mitigation arguments when facing HSE prosecutions and/or civil compensation claims. At worst they can inadvertently identify culpable individuals who may then face personal prosecution by the HSE, or even manslaughter charges.

If the Report is covered by litigation privilege, then it need not be disclosed to either the HSE or police.



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## How do I get privilege?

Incident investigations usually have two purposes. The first is to identify the root causes and recommend action to prevent reoccurrence; the second is to assist in the defence of a subsequent criminal prosecution or personal injury claim/other civil claim (e.g. for contractual damages).

Litigation privilege will only apply to a document whose **dominant** purpose is the potential legal proceedings.

In our experience the best way to do this is to have a **Policy or Protocol** in place for dealing with incidents. This should include:

- Identifying the individuals who will have responsibility for investigating incidents and dealing with external regulators, insurers etc.
- Train such individuals to carry out investigations thoroughly and understand the powers of regulators/police and the corresponding rights of companies and individuals.
- Having access to specialist legal advice (either in-house or from external solicitors) who can advise promptly on the likelihood of legal proceedings resulting from the incident. This can be done speedily by using pro-forma requests for legal advice.
- Ensuring, if legal proceedings are likely, that the resulting investigation is conducted predominantly for legal purposes and a report for lawyers is prepared.
- Identifying the individuals who will have responsibility for investigating incidents and dealing with external regulators, insurers etc.
- Ensuring that all documents, including emails and the Incident Investigation Report itself are correctly headed.
- Ensuring that the Report is reviewed by solicitors and is only circulated (including by email) to those who need to see it and are aware of its privileged status.
- Ensuring that legal advice is taken regarding any requests from any third party – including the HSE, police and personal injury claimants – to see a copy of the Report.

## Frequently Asked Questions

### **I have recently completed an Investigation Report – can I now claim privilege over it?**

Possibly – but only if you can demonstrate that your dominant purpose in preparing the report was to assist in contemplated legal proceedings. In practice, this will be very hard to do unless you have an Investigation Policy in place like the one outlined above.

### **All our reports are headed Privileged and Confidential – does this count?**

Not on its own – the header is not proof of privilege, but it can help to prevent unauthorised circulation of the report by making people think twice about attaching it to an email or handing it over to an Inspector.

### **Can I lose privilege?**

Yes. Even if you can prove a document was covered by privilege, it is very easy to lose it. The most common way is wide circulation, e.g. using large email circulation lists or posting the document on an intranet site. However, circulation to just one unauthorised recipient can mean privilege is lost.

Another way to lose privilege is to draft non-privileged documents which discuss the issues raised, or even meeting minutes. Also watch out for manuscript notes on a privileged report – these are generally not privileged.

### **Our insurance company has asked for a copy of the Report – can I send it to them?**

Yes. Your insurers are entitled to see the Report. Sending them a copy will not lose privilege, but you should ensure that they realise that the Report is privileged and should not be disclosed to anyone else without your consent.

### **I have drafted a Privileged Report but I now want to give it to the HSE?**

In some circumstances voluntary disclosure to the HSE is helpful. However, think about your decision carefully and ask someone else (preferably a solicitor) to review the wording of the Report before you hand it over. Once you have disclosed it, privilege will be lost entirely.

Think about whether you can draft a short form report which covers all the issues the HSE are interested in whilst retaining privilege over your full Report.

Should you require further guidance on this issue, or wish to discuss specific issues that you face as a Board, please feel free to contact 4See on **01908 263336** or [enquiry@4seerisk.com](mailto:enquiry@4seerisk.com).

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