PART 2C LEGAL PROFESSIONAL PRIVILEGE

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Corresponding provision in LGOIMA

Section 9(2)(h) OIA = section 7(2)(g) LGOIMA

What is *"Legal Professional Privilege"*?

Legal professional privilege is a public policy privilege designed to protect confidential communications between solicitor and client. It is based on the impossibility of conducting legal business without professional assistance and the need for full and unreserved confidence between adviser and client in order to receive that assistance effectively.[1]

There are two aspects to the law relating to legal professional privilege:

❖ *"solicitor/client privilege"* which extends to all communications between a solicitor (acting in that capacity) and the client for the purposes of seeking or giving legal advice or assistance, irrespective of legal proceedings; and,

❖ *"litigation privilege"* which extends the privilege to communications with third parties where that communication has, as its dominant purpose, the object of enabling a legal adviser to advise a client on the conduct of litigation (whether current or anticipated).

Legal professional privilege is a privilege held by the client. Accordingly, even if information is subject to legal professional privilege, it is always open to the client to decide whether to waive that privilege and release the information at issue.

When does section 9(2)(h)[2] apply?

Section 9(2)(h) provides good reason for withholding official information if, and only if,

❖ the withholding of that information is necessary to *"maintain legal professional privilege";* and

❖ this interest is not *"outweighed by other considerations which render it desirable, in the public interest, to make that information available."*[3]

Both of these elements must be satisfied before section 9(2)(h) provides good reason for refusing a request.

Is it necessary to withhold the information to *"maintain legal professional privilege?"*

In order to answer this question, an agency will need to take the following steps:

(i)   Decide whether the information at issue is covered by legal professional privilege.

It is well established that agencies and Ministers have the same rights as private organisations to obtain legal advice. For the purposes of the application of legal professional privilege, it is immaterial whether the lawyer providing the advice is in independent practice or is employed in-house.

A document does not become the subject of legal professional privilege merely because it is signed by a legal adviser or includes a claim to being privileged. Consideration must always be given to the content and substance of the specific

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[1] *Rosenberg* v *Jaine* [1983] NZLR 1
[2] Section 7(2)(g) LGOIMA
[3] Section 9(1) OIA, section 7(1) LGOIMA

information at issue and the purpose for which it was provided. For example, it must be established that the information at issue is a communication from a professional legal adviser, retained in that capacity for the purpose of providing confidential legal advice to a client.

A succinct statement is given in *Re Merit Finance and Investment Group*, where the High Court stated: [4]

> *"The essential question in any consideration of whether or not a document is privileged is, was it brought into existence for the purpose of 'getting or giving confidential legal advice or assistance?'"*

(ii)   Decide whether it is *"necessary"* to withhold that information in order to *"maintain"* legal professional privilege.

In answering this question, consideration will need to be given to the issue of whether legal professional privilege has been waived. Where waiver, either express or implied, has occurred, it cannot be *"necessary"* to withhold the information at issue in order to *"maintain"* legal professional privilege.

Section 9(2)(h) also allows for the possibility that, in certain circumstances, withholding information may not be *"necessary"* to *"maintain"* legal professional privilege, irrespective of whether that privilege has been expressly waived. In assessing whether section 9(2)(h) applies, the purpose is not to determine the legal issue of whether waiver has occurred, but to form an opinion, in light of all the available facts, whether withholding the information is *"necessary"* for the maintenance of the privilege.

The view traditionally taken has been that it would not be *"necessary",* for the purposes of section 9(2)(h), to withhold information in circumstances where, if legal proceedings were issued, a Court would be likely to hold that the privilege had been waived. A detailed discussion on the issue of implied waiver can be found in the *12th Compendium of Case Notes of the Ombudsmen*.[5]

If the agency is satisfied that it is necessary to withhold the information at issue in order to maintain legal professional privilege, then section 9(2)(h) is likely to apply.

Before section 9(2)(h) provides "*good reason*" for withholding information, the agency must go on to consider whether the interest in withholding the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

<u>Assess whether the interest in withholding the information is *"outweighed by other considerations which render it desirable, in the public interest, to make that information available"*</u>

In order to answer this question, an agency will need to take the following steps:

(i)   Identify any considerations that may favour disclosure of the information in the public interest.

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[4] [1993] 1 NZLR 152, 158
[5] (2000) 161-163

(ii)   Consider whether disclosure of the actual information requested would in fact promote these considerations.

(iii)   Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information requested to maintain legal professional privilege.

Legal professional privilege has long been regarded as *"a fundamental element in the administration of justice."*[6] As such, the public interest in ensuring the maintenance of the privilege is very high. Given the strength of the public interest in ensuring the maintenance of legal professional privilege, any public interest consideration, in terms of section 9(1), which might outweigh the interest which section 9(2)(h) is designed to protect would need to be particularly strong.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Part 2D.

A discussion of the application of section 9(2)(h) in particular cases can be found in the *12th Compendium of Case Notes of the Ombudsmen.*[7]

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[6] *Beecroft* v *Auckland District Court* [1999] 3 NZLR 672, 677
[7] (2000) 156-163

Summary Sheet
Section 9(2)(h) OIA and Section 7(2)(g) LGOIMA

Maintaining Legal Professional Privilege

Always proceed on the basis that the information requested *"shall be made available unless there is good reason for withholding it."*

1.   Is the information at issue covered by legal professional privilege?

2.   Is it *"necessary"* to withhold that information to *"maintain"* legal professional privilege?

If you have answered "yes" to questions 1 and 2 above, section 9(2)(h) may apply. You should then consider the application of section 9(1) and decide whether, in the circumstances of the particular case, the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make the information available.

3.   Identify any considerations favouring disclosure of the information.

4.   In light of such considerations, is there a public interest in disclosure of the specific information requested.

5.   Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information, in whole or in part, outweighs the need to withhold the information to maintain legal professional privilege.

If so, release sufficient information to meet the public interest in disclosure.

If not, advise the requester of the decision to withhold.