Quickguides

Privilege

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Privilege

This guide provides an overview of the principles governing the ability of a party to keep communications with its lawyer confidential under the English law of privilege. It reviews the main heads of privilege which can be claimed, how privilege can be lost, and how to ensure that communications that are privileged, stay privileged.

In particular, this guide covers:

- Legal professional privilege
  - Legal advice privilege
  - Litigation privilege
- Other heads of privilege
  - Joint privilege
  - Common interest privilege
  - Without prejudice privilege
  - Privilege against self-incrimination
- Duration of privilege
- Loss of privilege
- Preserving privilege

The guide then goes on to look at privilege in practice and at the questions that frequently arise. It concludes with a table providing a brief overview of the categories of legal privilege.

Privilege

The concept of privilege, and the right of an individual to preserve the confidentiality of legal communications, is a fundamental human right long recognised by English common law. The rationale is that a client should be able to consult a lawyer in confidence without fear of having to disclose communications between them at a later date.

Privilege is especially important because it entitles a party to litigation, or other adversarial proceedings, to withhold documents from the other side. It can also be used to deny regulators access to documents. This guide summarises the rules relating to privilege under English law. In particular it looks at the main types of privilege, the communications covered, and the ways in which privilege can be lost. It also provides practical advice on how to preserve privilege and deals with issues that arise in practice. The table at the end of the guide gives an overview of the main categories of privilege.

1. Legal professional privilege

Legal professional privilege has two manifestations: legal advice privilege and litigation privilege. Although different in scope, the basic principles are the same.

Legal advice privilege

Legal advice privilege is designed to protect the confidentiality of the lawyer/client relationship and applies to:

- confidential communications;
- between lawyer and client;
- that are for the purpose of seeking or giving legal advice.

The leading judgments on legal advice privilege were delivered by the Court of Appeal and the House of Lords in the *Three Rivers* litigation.[1]

The requirement of confidentiality
Privilege can only be claimed if the communication in question is confidential. Once it ceases to be confidential, it is no longer privileged. However, while confidentiality is an essential ingredient of a privileged communication, just because a document is confidential does not necessarily mean it is also privileged.

The scope of "communications"
"Communications" is widely construed to include actual lawyer/client communications (e.g. phone calls, face-to-face discussions, letters, emails, faxes) and evidence of such communications (e.g. file notes of phone calls).

In any lawyer/client relationship there will be a continuum of communication between the lawyer and client. Where information is passed between the two as part of that continuum, aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[2]

Who is a lawyer for the purposes of privilege?

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1 *Three Rivers District Council -v- Bank of England (No. 5)* [2003] QB 1556 and *Three Rivers District Council -v- The Bank of England (No. 6)* [2005] 1 AC 610.

2 *Balabel and another -v- Air India* [1988] 2 All ER 246.

The definition includes all members of the legal profession including barristers, solicitors and trainee solicitors. Communications with non-lawyers advising on legal affairs only enjoy privilege in limited circumstances.[3]

The definition also includes in-house lawyers to the extent that they are providing legal advice. However, where they are providing business advice, or advice relating to administration or management, this will not be privileged. In addition, privilege cannot be claimed for communications with an in-house lawyer in the context of competition investigations by the European Commission.[4] This is on the basis that in-house lawyers are not regarded as being sufficiently independent from their employer.

Who is the "client"

In the case of individuals, the client is the individual instructing the lawyer. However, as a result of the Court of Appeal decision in *Three Rivers*, difficulties can arise where the legal advice is being given to a corporate entity. In *Three Rivers* the Court gave a restrictive definition of client to the extent that only those employees of an organisation responsible for obtaining or receiving legal advice could be classified as "the client" for the purposes of legal advice privilege.

While this judgment was very fact-specific, and gave little guidance as to its more general application, there is now a risk that a court will consider that the "client" consists only of those individuals who work most closely with the lawyers. Any employee who is not actively involved in instructing the lawyer will therefore fall outside the definition of "client" and be in the same position as an external third party. Consequently, unless litigation privilege applies (see below), any documents produced by those employees and sent directly to lawyers will not be privileged, even if they are necessary to provide information to lawyers to obtain legal advice.

As the law currently stands, the preferable option is for in-house counsel to be the "client" given that their communications within the organisation attract a separate legal advice privilege in any event. If that is not possible, the dissemination of legal advice should be restricted on a need-to-know basis.

What is "legal advice"?

In *Three Rivers*, the House of Lords confirmed that "legal advice" is not confined to telling the client the law, but includes advice "as to what should prudently and sensibly be done in the relevant legal context".[5] Lord Rodger used a simple but useful test to determine whether the lawyer was providing such advice: whether they had "put on legal spectacles when reading, considering and commenting on the drafts".[6] Consequently, if a lawyer acts as the client's "man of business" the advice may lack the relevant legal context and therefore not be privileged.

Litigation privilege

Litigation privilege allows a litigant to prepare for litigation without fear that any documents produced for that purpose will subsequently have to be disclosed. It is wider in scope than legal advice privilege but only arises once litigation or other adversarial proceedings are reasonably in prospect, or commenced. From that moment it covers:

- confidential communications;
- between any of a client, its lawyer and a third party;

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3 There are certain statutory exceptions under which advice given by non-lawyers may be privileged, such as patent and trademark agents.

4 *AM&S Europe -v- Commission of the European Communities* [1983] QB 878. This point has been the source of much legal debate but the European Court of Justice confirmed that privilege does not extend to in-house lawyers in Commission investigations in *Akzo Nobel Chemicals and Akcros Chemicals -v- Commission*, case C-550/07 P.

5 Per Lord Justice Taylor at page 330.

6 Para. 60 of the judgment.

- which are for the sole or dominant purpose of preparing for or dealing with the litigation.

The paragraphs under legal advice privilege relating to the requirement of confidentiality, the scope of communications and the definition of lawyer, also apply in relation to litigation privilege.

What is litigation?
Litigation privilege can normally be claimed in proceedings where judicial functions are exercised by the court or tribunal, e.g. proceedings in the High Court, county court, employment tribunal and, where it is subject to English procedural law, arbitration. In proceedings which are merely fact-gathering (such as a Banking Act inquiry, public inquiries or statutory investigations) or before administrative tribunals, the generally held view is that litigation privilege cannot be claimed. [7]

When is litigation reasonably in prospect or contemplated?
In order for litigation to be reasonably in prospect or contemplated, there must be a real likelihood rather than a mere possibility of adversarial legal proceedings commencing, although the chance need not be greater than 50 per cent.[8] Mere apprehension of what might happen is not enough. However, it does not matter if the particular litigation (or indeed any litigation) never in fact commences.

Communications with a third party
Unlike legal advice privilege, litigation privilege attaches to communications with third parties and so the concerns outlined above in the discussion of legal advice privilege relating to the identity of the "client" do not arise.

Dominant purpose test
Communications are often created for more than one purpose. Provided that the sole or dominant purpose for which the communication is created is the conduct of the litigation or contemplated litigation, it will come within the scope of litigation privilege. The court will look at the purpose of the document objectively, taking into account all the circumstances.[9]

2. Other heads of privilege

Joint privilege

Joint privilege arises where more than one party retains the same solicitor to advise them (and so have a joint retainer) or where they have a joint interest in the subject matter of a privileged communication.

It will be a question of fact whether a solicitor is acting under a joint retainer. The test for whether a joint interest exists is whether the parties could have instructed the same solicitor. Relationships where a joint interest can arise include: beneficiaries and trustees; a company and its shareholders; partners; and parent company and subsidiaries.

Key characteristics:

- The parties must share the joint interest at the time the communication is created.

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7 In *Three Rivers*, one of the criteria for establishing litigation privilege was said to be that the litigation must be "adversarial", not investigative or inquisitorial. This principle derives from the House of Lords decision in *In re L (A minor)* [1997] AC 16. That decision has been criticised and the House of Lords in *Three Rivers*, in particular Lord Scott, considered that the law in this area requires review. This issue was considered in the context of a Competition Act investigation in *Tesco Stores Limited -v- Office of Fair Trading* [2012] CAT 6. Although the case was decided on its facts, the CAT considered that once proceedings were confrontational (in that case Tesco had been accused of wrongdoing by the regulator and was contesting that finding) then it could be said that the investigation was "adversarial" and therefore litigation privilege applied.

8 *USA -v- Philip Morris Inc. and British American Tobacco (Investments) Ltd* [2003] All ER (D) 191 (Dec), approved by the Court of Appeal, [2004] All ER (D) 448 (Mar).

9 See *Guinness Peat Properties -v- Fitzroy Robinson Partnership* [1987] 1 WLR 1027. The leading authority on the dominant purpose test is *Waugh -v- British Railway Board* [1980] AC 521.

- The privilege belongs to all parties who joined in retaining the solicitor or who share the joint interest. The parties together are entitled to maintain the privilege as against the rest of the world.

- The joint nature of the privilege means that all to whom it belongs must concur in waiving it. This is a key difference between joint and common interest privilege.

- If the parties subsequently fall out and sue one another, neither can claim privilege against the other for documents that are caught by the joint privilege (i.e. documents which were created at the time the joint interest subsisted).

Common interest privilege

The law regarding common interest privilege is still developing. Analysis and interpretation of this concept has given rise to much academic debate and some inconsistent case law.

However, in brief, common interest privilege extends the privilege enjoyed by a party to adversarial proceedings or a recipient of legal advice to others with the same interest, so that a privileged communication passed to a person with a recognised common interest will not lose privilege in the way it would do if it had been disclosed to a third party. While there is some debate on the point, it appears likely that the common interest must exist at the time of disclosure of the communication.

Who has a common interest?
Historically, the test for establishing a common interest has been high. The leading case on common interest privilege is *Buttes Gas and Oil Co -v- Hammer (No. 3)*,[10] which states that the court will treat parties with a common interest "as if they were partners in a single firm".[11] However, while there is still limited authority on this point, more recent judgments appear to indicate that the boundaries of the concept are widening.[12] For example, parties may establish a common interest despite having differing views or divergent interests. Examples of persons who may have a common interest include companies in the same group, insurer and insured, agent and principal or neighbours with the same complaint. In practice it is prudent for parties to document the extent of the common interest before sharing privileged material.

Disputes between parties
As with joint interest privilege, if the parties subsequently fall out and sue one another, neither can claim privilege against the other for documents that were disclosed pursuant to the common interest privilege.

Without prejudice privilege

Often described as a quasi-privilege, the purpose of the without prejudice rule is to encourage parties to a dispute to try and reach a settlement by allowing them and their legal advisers to speak freely and make concessions knowing that the communications cannot be disclosed later in court if the negotiations fail to achieve settlement. The protection is not absolute and there are exceptions. It is covered in more detail in the Ashurst Quickguide: Without Prejudice.

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10 [1981] QB 223.

11 See also *The Good Luck* [1992] 2 Lloyd's Rep 540 at 542 which required the identity of interest to be so close that the parties could have used the same solicitor.

12 See for example *Svenska Handelsbanken -v- Sun Alliance and London Insurance Plc (No. 1)* [1995] 2 Lloyd's Rep 84.

Privilege against self-incrimination

The rule of privilege against self-incrimination states that no person is bound to answer any question, or release any document, in civil proceedings, if the answer or document would have a tendency to expose him or his spouse/civil partner to any criminal charge or penalty under the law.[13]

The test

The test is whether the relevant criminal charge or penalty is reasonably likely to be pursued, and whether the answer would have a tendency to incriminate the accused or his spouse/civil partner. There must be a "real and appreciable" danger of incrimination rather than a mere possibility for the privilege to apply.[14]

Who can claim privilege against self-incrimination?

The person at risk of incrimination can claim the privilege.[15] The privilege can also be claimed by a spouse or civil partner of the person at risk of incrimination so that they cannot be required to answer questions where the answer would tend to incriminate their spouse or partner. It can be claimed by a company/undertaking but it has been left open by the courts whether directors, employees or agents of a company can invoke the privilege where their answers would tend to incriminate the company.[16]

In addition, certain statutes have been held to abrogate the privilege so as to allow investigating authorities to require answers to their questions. Examples include section 174 of the Financial Services and Markets Act 2000, which deals with investigations into the business of persons authorised under that Act, and section 2 of the Criminal Justice Act 1987, which deals with investigations by the Serious Fraud Office.

When does privilege against self-incrimination apply?

The privilege can be claimed when refusing to produce documents or information, whether at or before trial. It is particularly relevant where disclosure orders are sought as part of interim emergency applications, such as search orders and freezing injunctions where the respondent has limited opportunity to take legal advice.[17] The privilege can also be claimed in civil competition investigations by the Competition and Markets Authority or European Commission.[18] The privilege will not, however, apply to independent/incidental material found during the course of the exercise of legal process, as opposed to material required to be produced directly pursuant to it.[19] A prolonged failure to claim the privilege runs the risk of it being lost.[20]

3. Duration of privilege

The general rule is "once privileged, always privileged". This means that once a communication becomes privileged, the party to whom the privilege belongs may continue to claim privilege over that communication albeit in different circumstances. This right continues indefinitely, unless the privilege is lost or waived.

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13 *Blunt -v- Park Lane Hotel* [1942] 2 KB 253 at 257. Civil Evidence Act 1968, s.14 and Article 6 of the European Convention on Human Rights incorporated into English law by the Human Rights Act 1998.

14 This risk must be apparent to the court. The fact that the party concerned believes that the information would incriminate him is not relevant though the court will err on the side of caution in its assessment. See *Lamb -v- Munster* (1882) L.R. 10 QBD 110.

15 *Triplex Safety Glass Co. Ltd -v- Lance Gaye Safety Glass (1934) Ltd* [1939] 2 KB 395, CA.

16 *Rio Tinto Zinc Incorporation -v- Westinghouse Electric Corporation* [1978] AC 547 HL.

17 Part 25 of the CPR.

18 *Rio Tinto Zinc Incorporation -v- Westinghouse Electric Corporation* [1978] AC 547 HL.

19 *C Plc -v- P and Another* [2007] EWCA Civ 493 concerning the discovery of criminal material on the defendant's personal computer during the execution of a search order.

20 See *Compagnie Noga -v- Australia and New Zealand Banking Group* [2007] EWHC 85 (Comm) as an example.

4. Loss of privilege

Privilege can be lost inadvertently or can be waived by the holder of the privilege. Once privilege has been lost or waived, it cannot be reclaimed. It is therefore important to take care to maintain privilege.

Loss of confidentiality

As noted above, privilege only attaches to confidential communications. Therefore, if a document is circulated widely, or is made publicly available, privilege will be lost. For example, if an advocate refers to a document in open court, or a document is available for inspection on the court file[21] or included in the trial bundle by a party, the document enters the public domain and privilege in the document is lost (unless included by obvious mistake – see Mistaken Disclosure below).

However, if a document is disclosed to a third party then, while a claim to privilege cannot be maintained as against that party, it does not necessarily mean that a claim to privilege is lost as against the rest of the world. The crucial consideration is "whether the document and its information remain confidential in the sense that it is not properly available for use". [22] Therefore, if a privileged communication is disclosed to a third party for a limited purpose and on strict terms as to confidentiality, it may be possible to maintain a claim to privilege in that document as against the rest of the world.[23]

Waiving privilege

A party may choose to waive privilege in a document or part of a document which is helpful to his case. However, this can be risky as it can result in the party having to disclose other privileged documents or the whole document, and so any such waiver should be carefully considered.

The general rule is that where privilege is waived in respect of one document in a sequence of documents (or one part of a document), then the class of documents (or rest of the document) will have to be disclosed unless the document (or part of the document) disclosed deals with an entirely different issue or subject matter.[24] This is to prevent parties unfairly indulging in selective disclosure or "cherry picking" among the privileged material.

Disclosure through improper means or mistake

Where a document is obtained by the other party by improper means or through an obvious mistake, the court may prevent use of the document.

Documents obtained through improper means

Where privileged documents have been obtained by the other side by improper means, the court will usually grant an injunction preventing use of the documents.

Mistaken disclosure

Where a party mistakenly allows a privileged document to be inspected, the court will examine whether it was obvious that the disclosure was mistaken in deciding whether to allow the recipient to use the document.[25] If it was either obvious to the recipient, or alternatively would have been obvious to a reasonable solicitor in the same circumstances, the court will prevent use of the document. The courts

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21 *Goldstone -v- Williams, Deacon & Co.* [1899] 1 Ch 47, see Stirling J at p. 52. The rules governing access to documents on the court records are set out in CPR Part 5.

22 *Bourns Inc -v- Raychem Corp* [1999] 3 All ER 154, 167-8, CA.

23 As was the case in *B -v- Auckland District Law Society* [2003] UKPC 38.

24 *Great Atlantic Insurance Co. -v- Home Insurance Co.* [1981] 1 WLR 529; *Dunlop Slazenger International Ltd -v- Joe Bloggs Sports Limited* [2003] All ER (D) 137.

25 The leading case on this is *ISTIL Group Inc -v- Zahoor* [2003] EWHC 165 (Ch). See also *Al Fayed and Others -v- Commissioners of Police for the Metropolis and Others* [2002] EWCA Civ 780.

have sometimes gone further and granted an injunction barring the solicitors who received the privileged documents from acting, on the basis that they would be unable to put the contents of the documents out of their minds.

Criminal or fraudulent purpose

Both legal advice privilege and litigation privilege may be lost if the communication or document in question was created for the purpose of furthering a criminal or fraudulent purpose.[26]

5. Preserving privilege

There are a number of practical steps that may be taken to preserve privilege.

Limit dissemination of legal advice

Circulation of legal advice and other communications with lawyers should be restricted so far as possible and on a need-to-know basis (i.e. it should only be sent to those persons who need to know as part of the instruction/decision-making process). In addition, if advice is circulated, forwarded or repeated by the client internally and any additional comment is added, this additional comment may not be privileged and could give rise to waiver of privilege over the whole advice.

Use of "Privileged" labelling

Privileged communications should be marked "Privileged". While the presence or absence of such a label is not determinative of a communication's privileged status, it makes this clearer to the recipient and may also add weight to an argument that the communication is privileged.

In-house lawyers: separate legal advice from other advice

Under English law, in-house lawyers are in the same position as lawyers in private practice for the purposes of claiming privilege. However, their advice will only be privileged to the extent that they are giving legal advice; where they are providing business advice or advice relating to administration or management affairs, their advice will not be privileged. Therefore, it would be prudent for in-house lawyers, so far as possible, to make sure that their communications containing legal advice are kept separate from their other communications to avoid the risk of inadvertent waiver of privilege.

6. Privilege in practice: frequently asked questions

Is privilege in legal advice lost when it is disclosed to the board?

The answer is no. A company can only act through its directors and disclosure to them is not treated separately from disclosure to the company itself. Equally, the involvement of a third party, for example the company secretary, in collating the advice for circulation to the board will not affect the privileged status of the advice. However, any additions made to the advice by that third party may not be privileged and should therefore be avoided. If comments are made, they should always be separate from the advice itself.

If board minutes record legal advice are they privileged?

Care should be taken with board minutes. A board minute solely summarising or attaching a copy of legal advice received will be privileged. However, if the board minutes record discussions which go

[26] See *Kuwait Airways Corporation -v- Iraqi Airways Company* [2005] EWCA Civ 286 for a summary of this principle.

beyond repeating the legal advice then those minutes (or at least that part of those minutes) may not be privileged. So, for example, a discussion of the commercial issues arising from the legal advice received will not be privileged. Caution should always be exercised when recording discussions of the legal advice. In addition, care should be taken not to circulate or copy board minutes which record privileged discussions or attach/summarise legal advice to anyone who does not need to see them for the purpose of acting on the advice.

What about providing privileged communications to third parties, for example auditors and insurers?

Sharing privileged information is risky as it can give rise to claims that privilege has been waived. However, it may be possible to disclose privileged communications to a third party without losing privilege as against the rest of the world if the communication is provided for a limited purpose and on a confidential basis (also known as a "restricted waiver" of privilege).[27] In order to reduce the risk of loss of privilege, any privileged communication sent to a third party should be sent with a covering letter stating that:

- the communication is privileged;
- provision of the communication does not amount to any waiver of privilege;
- the communication is provided only for a limited purpose (and state what that purpose is); and
- the documents are to be held in complete confidence and are not to be disclosed to any other person without the disclosing party's prior consent (unless required by law or regulation).

In addition, it is helpful to require that the communication be destroyed or returned to the disclosing party once the matter is concluded.

Is this the same if the third party is the parent company or another company within the group?

Yes. In addition, it may also be possible to argue that the companies share a joint or common interest (see above) and that there is therefore no risk of waiver of privilege. However, the safest course is to provide the advice under terms as to confidentiality in case no joint or common interest is found to exist.

Will legal advice provided by in-house counsel employed by the parent to other subsidiaries be privileged?

Generally speaking, provided the requirements of legal advice privilege are met (see above), legal advice provided by in-house counsel to other companies within the group should be privileged. In those circumstances, each of the subsidiaries or group companies receiving the advice will be regarded as the "client" for the purposes of any legal advice privilege that can be claimed. As a matter of best practice, the in-house lawyer's employment contract should record the fact that the in-house lawyer is employed to advise both the parent and any other companies in the group. However, the absence of such a provision should not be a bar to claiming legal advice privilege.

Do I have to disclose privileged documents if requested to do so by a foreign court?

Foreign courts have their own rules on privilege and disclosure. Documents that are privileged under English law will not necessarily be privileged in a foreign court. Therefore, if you are party to foreign

[27] *B -v- Auckland District Law Society* [2003] UKPC 38.

proceedings and are ordered to disclose documents, it will be no defence in those proceedings to argue that they are privileged as a matter of English law. However, if a request is made by a foreign court for documents in England (for example where a third party is asked to disclose documents), the recipient of the request will be entitled to claim privilege.[28]

What about data rooms and privileged documents?

Data rooms are often made available to third parties, for example, potential purchasers of a company. As discussed above, it is possible to disclose voluntarily privileged documents on a restricted basis (i.e. for a limited purpose and on strict conditions as to confidentiality), although caution has to be exercised due to the risk that in doing so, privilege will be waived. However, data rooms are likely to hold commercially sensitive information in addition to privileged documents and so it is preferable to permit the other party to inspect the documents only after they have entered into an appropriate confidentiality undertaking. Any notes taken by the other party will not be privileged.

What should I do if a regulator requests access to privileged documents?

Unless statute provides an exception, disclosure to a regulator can be withheld on grounds of privilege. In exceptional circumstances it may be in a party's best interests to disclose voluntarily privileged documents to a regulator. In order to reduce the risk of disclosure leading to a general waiver of privilege or waiver of privilege over other privileged communications, the communication should be provided under cover of a letter which makes it clear that: (i) the communication is privileged; (ii) the provision of the communication does not amount to a waiver of privilege; (iii) the communication is being provided only for a limited purpose and on strict terms as to confidentiality; and (iv) the communication be destroyed or returned to the disclosing party once the matter is concluded. This should help to ensure that privilege is not waived against anyone apart from the regulator although this cannot be guaranteed.

[28] *In Re Sarah C. Getty Trust* [1985] Q. B. 956 and section 3, Evidence (Proceedings in Other Jurisdictions) Act 1975.

7. The categories of legal privilege

Heads of privilege	Application	Key points
Legal professional privilege		
Legal advice privilege	• Confidential communications • Between lawyer and client • For purposes of seeking or giving legal advice.	Third party communications excluded. Broad definition of "legal advice" includes advice as to what should prudently and sensibly be done in the *relevant legal context*. Post *Three Rivers (No. 5)*, an issue remains as to who is the client.
Litigation privilege	• Confidential communications • Between any of a client, its lawyer and a third party • Created where litigation is reasonably in prospect or commenced • For the sole or dominant purpose of preparing for or dealing with the litigation.	Wider in scope than legal advice privilege and covers communications with third parties. Covers all adversarial proceedings but does not currently extend to fact finding investigations, e.g. regulatory investigations. Mere apprehension of possible litigation is insufficient; litigation must be "reasonably in prospect".
Joint privilege	• Where one or more parties retain the same solicitor or • Where one or more parties share a joint interest in the subject matter of a privileged communication to the extent that they could have instructed the same solicitor.	Privilege belongs to all parties. All parties must concur in waiving the privilege.
Common interest privilege	Communications between parties who share a "common interest".	May include group companies, insured and insurer and agent and principal. May apply even if they have different views and divergent interests.
Privilege against self-	Documents or oral statements	Must be a real and appreciable

incrimination	that would have a tendency to expose a person to a criminal charge or penalty.	danger of incrimination as opposed to a mere possibility. Can be claimed only in civil proceedings, e.g. civil litigation and civil competition investigations by the Competition and Markets Authority or European Commission.

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If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.

Simon Bromwich
T: +44 (0)20 7859 1572
E: simon.bromwich@ashurst.com

David Capps
T: +44 (0)20 7859 1397
E: david.capps@ashurst.com

Tom Connor
T: +44 (0)20 7859 1638
E: tom.connor@ashurst.com

Tom Cummins
T: +44 (0)20 7859 1051
E: tom.cummins@ashurst.com

Lynn Dunne
T: +44 (0)20 7859 3242
E: lynn.dunne@ashurst.com

Jon Gale
T: +44 (0)20 7859 1630
E: jon.gale@ashurst.com

James Levy
T: +44 (0)20 7859 1810
E: james.levy@ashurst.com

Angela Pearson
T: +44 (0)20 7859 1557
E: angela.pearson@ashurst.com

Tim Reid
T: +44 (0)20 7859 1548
E: tim.reid@ashurst.com

Matthew Saunders
T: +44 (0)20 7859 1339
E: matthew.saunders@ashurst.com

Edward Sparrow
T: +44 (0)20 7859 1573
E: edward.sparrow@ashurst.com

Iain Travers
T: +44 (0)20 7859 1618
E: iain.travers@ashurst.com