

## Hong Kong Competition Law

### INVESTIGATION SERIES: PART 8

#### Legal Privilege

##### Protect Yourself

Legal Professional Privilege (LPP) protects documents which contain legal advice from disclosure to the Hong Kong Competition Commission (the “Commission”) in the event of an investigation.

LPP ensures that you can speak freely to your legal advisers about competition law concerns and ask for help without the fear of those communications being disclosed in an incriminating manner.



##### Asserting Privilege

Privilege only applies to confidential communications between a client and its legal advisers, made for the sole or dominant purpose of giving or receiving legal advice or in relation to contemplated or existing litigation proceedings.

It is therefore vital that you assert privilege appropriately to avoid privileged material being inadvertently made subject to disclosure during an investigation.

1. Label privileged communications “Privileged and Confidential” in a prominent position (e.g., the document title or subject line of emails) to help efficiently identify and ring-fence privileged materials.
2. Control circulation of privileged materials. Privilege may be inadvertently waived if sent to third parties.
3. Address privileged communications directly to your legal counsel. Copying legal counsel on communications may not be sufficient to support a claim of privilege.
4. Review the information provided as part of an investigation with your legal counsel to ensure that no privileged document is disclosed to the Commission.

##### What if There is a Disagreement During a Dawn Raid?

During a dawn raid the Commission may seek to seize or take copies of privileged documents.

In the event the Commission challenges the privileged status of certain materials, or where privilege is only claimed in relation to part of a document and that part cannot be readily separated, those materials will be placed in a sealed container for determination in the following manner:

1. Within seven days of the dawn raid, the entity under investigation must index the sealed materials, specify the type of legal privilege claimed in relation to each item, and prepare a supporting statement setting out the basis and factual context upon which privilege is claimed.

2. The Commission will then consider the statement and if there are claims that remain in dispute, an independent third party LPP lawyer may be appointed to assist in resolving the outstanding claims of privilege. If the Commission and the investigated party still fail to agree on the LPP dispute, the parties can apply to the court for determination of the matter.
3. If the sealed items are voluminous, the seven-day timeline may be extended upon agreement with the Commission. The seven-day timeline and any agreed extension must be strictly observed, as the Commission will proceed to inspect the sealed materials if claims of privilege are not duly substantiated upon the expiry of the deadline.

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