



## REVENUE RULING

## TAA 2.1

# LEGAL PROFESSIONAL PRIVILEGE CLAIM DURING THE COURSE OF AN INVESTIGATION OR AUDIT

### INTRODUCTION

1. This revenue ruling concerns the effect of legal professional privilege on the Commissioner of State Revenue's ('the Commissioner') investigation powers under Part 8 of the *Taxation Administration Act 2003* ('TAA').
2. The purpose of this revenue ruling is to provide guidelines regarding the procedures to be followed where, during the course of an investigation or audit, a person claims that documents, information or relevant material in their possession are protected by legal professional privilege. In general terms, legal professional privilege protects certain confidential communications, including written communication, from disclosure. Ordinarily, such communication is between the legal adviser and client. For legal professional privilege to apply, the communication must have been made for the dominant purpose of:
  - (a) obtaining or giving legal advice; or
  - (b) use in existing or contemplated litigation.
3. This revenue ruling is not intended to provide an outline of the principles relating to legal professional privilege.
4. Any person who is subject to an investigation or audit by the Office of State Revenue ('OSR') and who considers that legal professional privilege may apply to relevant material in their possession, should seek legal advice.

### RELEVANT LEGISLATION

5. Section 103(1) of the TAA provides that an official document must be provided when so required by the Commissioner or an investigator, whether or not that document would otherwise be protected by legal professional privilege.
6. Sections 103(2) and (3) of the TAA outline the restrictions that must be placed on retaining, viewing, accessing or otherwise dealing with relevant material that is claimed to be protected by legal professional privilege or that is identified by the Commissioner or an investigator as, or as likely to be, protected by legal professional privilege. Section 103(7) provides for the return of, and access restrictions on, such relevant material.
7. In accordance with section 103(4) of the TAA, any relevant material already in the possession of the Commissioner or an investigator when a claim of legal professional privilege is made is subject to the restrictions identified in section 103(2) and is to be treated as if the claim had been made at the time when the material was provided or acquired.
8. Under section 103(5) of the TAA, the Commissioner may apply to the Supreme Court or a judge to determine whether legal professional privilege applies to relevant material, or to extinguish legal professional privilege where it applies.

Section 103(6) provides that a determination of legal professional privilege may also be applied for by a person who claims the benefit.

9. In accordance with section 103(8) of the TAA, a person may waive the application of legal professional privilege on relevant material.
10. It is an offence under section 103(9) of the TAA for a person to make a claim (either personally or on another's behalf) that legal professional privilege applies to relevant material where the person knows, or ought to know at the time the claim is made, that it is false, misleading or without substance.
11. The Glossary to the TAA defines:
  - (a) *document* to include information stored or recorded by any means;
  - (b) *relevant material* to mean an instrument, document or other record or anything else that is relevant to:
    - (i) ascertaining whether a tax liability exists; or
    - (ii) assessing the amount of a tax liability; or
    - (iii) deciding an application for a rebate or refund of tax, or an exemption from tax, or any other application under a taxation Act; or
    - (iv) auditing records relevant to the assessment of tax; or
    - (v) ascertaining whether a contravention of a taxation Act has occurred.

## **RULING**

12. Where an OSR officer wishes to obtain documents to which legal professional privilege may apply, they must inform the persons from whom such documents are to be obtained of that fact and provide such persons with a copy of this revenue ruling.
13. In relation to any relevant material that is provided to, obtained by or required by an OSR officer, whether or not during the course of an investigation or audit:
  - (a) where a claim is not made for legal professional privilege, but it is apparent on examination by an OSR officer that relevant material is, or is likely to be, protected by legal professional privilege, it becomes the duty of the OSR officer to proceed as if legal professional privilege had been claimed in relation to that relevant material; or
  - (b) where a claim is made for legal professional privilege, the relevant material will, immediately after the claim is made, be separated from any other documents or information for which no claim is made and will not be further viewed by any OSR officer.
14. Where a claim is made for legal professional privilege:
  - (a) if the Commissioner or OSR officer accepts that legal professional privilege applies, then the relevant material should be handed back to the person from whom it was obtained. If the relevant material has been taken away from that person, then it is to be placed in a sealed container and returned to that person; or

- (b) if the Commissioner or OSR officer does not accept that legal professional privilege applies to the relevant material, then the procedures outlined below are to be followed.

### ***Scheduling Documents***

15. Once a claim of legal professional privilege is made, an OSR officer will prepare a schedule (acting on information from the claimant) or ask the claimant to prepare a schedule containing the following details in respect of each item of relevant material to which the claim applies:
  - (a) the exact number of items of relevant material affected;
  - (b) the nature and number of pages of each item of relevant material (e.g. a letter);
  - (c) the physical description of each item of relevant material (e.g. typed or handwritten, number of pages etc);
  - (d) the date each item of relevant material was prepared or executed;
  - (e) the identity of the person(s) who prepared and/or signed each item of relevant material;
  - (f) whether each item of the relevant material is an original, photocopy or carbon copy; and
  - (g) where the relevant material in question is in an electronic form, such as an email, it is to be printed onto a paper format and certified by the claimant to be a true copy of the electronic document.
16. The schedule should be signed and dated by the OSR officer and the claimant, where possible. The original schedule should be held by the OSR officer and two copies prepared, one for the claimant and one to be kept with the relevant material.

### ***Control of Documents***

17. Where appropriate, claimants should be permitted, under any necessary supervision, to take a copy of any items of relevant material before they are placed into a container to be sealed.
18. The OSR officer will then require the claimant to seal the relevant material in the container. The sealed container must have affixed the name, address and contact details of the person making the claim and of the person on whose behalf the claim is made, along with a statement that the contents are, or may be, subject to legal professional privilege. The OSR officer and the claimant should each sign their names and the date across the seal.
19. Subject to the claimant accepting the State Solicitor's storage terms, the OSR must then lodge the sealed container and a copy of the schedule with the State Solicitor for storage until the question of privilege is determined. If the container is not or cannot be lodged with or stored by the State Solicitor for any reason, it will be lodged with and stored by some other party agreed by the claimant and the OSR officer and, in default of agreement, by an independent party nominated by the Commissioner.

20. Where the quantity of relevant material renders the process under paragraph 15 unmanageable at the time the claim is made, the OSR officer will require the claimant to seal the relevant materials in a container, and the steps referred to in paragraphs 15 and 16 will be carried out at a later time after the relevant material has been lodged in accordance with paragraph 19 with the State Solicitor (or other party).

### ***Determining Legal Professional Privilege***

21. Following lodgment of the sealed container under paragraph 19, the OSR officer will advise the claimant that the Commissioner will be applying to the Supreme Court or a judge within 14 days to have the question of legal professional privilege determined as quickly as possible and that any person who claims the benefit of the privilege is also entitled to initiate such action.
22. During an investigation or audit, if a person wishes to obtain legal advice about whether legal professional privilege applies to relevant material or wishes to consult their client as to whether they wish to waive the privilege, the OSR officer will allow a reasonable time for the person to do so. During this time the relevant material in question will not be removed from the OSR officer's control and must not be removed, or otherwise accessed, by the OSR officer.
23. Where it appears that obtaining the legal advice or consulting the client will not occur within a reasonable time, then the relevant material will be placed in a sealed container and lodged in accordance with paragraph 19 with the State Solicitor (or other party) until such time as the advice can be obtained or the person can be consulted.
24. Following lodgment of the sealed container with the State Solicitor (or other party) and prior to the question of legal professional privilege being determined, the Commissioner, the State Solicitor, any member of their respective offices or any person on their behalf shall not open the sealed container or view the relevant material in the container unless authorised to do so:
  - (a) by the person who claims the benefit of legal professional privilege; or
  - (b) by an order of the Supreme Court or a judge.
25. If the claimant requires access to the relevant material after it has been lodged with the State Solicitor (or other party) and before the question of legal professional privilege has been determined, both the claimant (or their representative) and an OSR officer must be present when the material is accessed.

### ***Validity of Claims***

26. If a claim for legal professional privilege is made during the course of an investigation or audit and an OSR officer considers that the claim is false, misleading or without substance (for example, a blanket claim made over all documents without consideration of their content), the OSR officer will advise the claimant of:
  - (a) the reason for forming that view; and
  - (b) the penalty for making a claim of legal professional privilege that is false, misleading or without substance.

**RULING HISTORY**

Revenue Ruling	Issued	Dates of Effect	
		From	To
TAA 2.0	03 July 2009	3 July 2009	13 September 2015
TAA 2.1	14 September 2015	14 September 2015	Current