



# Cabinet Office Circular

CO (05) 5

Date: 15 April 2005

---

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

---

**Enquiries:**

*Sarah Kennedy-Good, Cabinet  
Office, Ph 471-9741*

*Tania Warburton, Crown Law  
Office, Ph 494-5643*

All Ministers  
Parliamentary Under-Secretaries  
All Chief Executives  
All Senior Private Secretaries  
All Private Secretaries

## Legal advice and legal professional privilege

### Introduction

- 1 This circular provides guidance on how legal advice should be treated in departmental documents and Cabinet papers, so that it is protected from disclosure. It also confirms the government's approach to the release of legal advice.

### Key points

- 2 The key points are:
  - 2.1 All persons involved in preparing documents containing legal advice for the government should adhere to the guidelines set out in this circular (see paragraph 6).
  - 2.2 If a Minister or government department considers that it is necessary to release any legal advice provided to the government, approval must first be obtained from the Attorney-General, via the Crown Law Office.

### Legal professional privilege

- 3 Legal professional privilege is a term that applies to the protection of confidential communications between a lawyer and a client. If legal advice is protected by legal professional privilege, it may be protected from disclosure under the Official Information Act 1982 (see section 9(2)(h) of the Official Information Act 1982) and the Privacy Act 1993 (see section 29(f) of the Privacy Act 1993), and will not be required to be produced for inspection during discovery in legal proceedings. It is therefore important that legal professional privilege in legal advice provided to the government is maintained, and not inadvertently waived.

- 4 There are two categories of legal professional privilege:
- 4.1 **Solicitor/client privilege** applies to communications between a lawyer and a client, where the lawyer is acting in his or her professional capacity, the communication is intended to be confidential, and the communication is for the purpose of obtaining legal advice.
  - 4.2 **Litigation privilege** applies to communications between the client and third parties made or prepared when litigation was reasonably apprehended or had commenced for the dominant purpose of enabling the lawyer to advise or act regarding that litigation.
- 5 All legal advice that is provided to Ministers or government agencies (whether it is internal advice from departmental legal advisers, advice from the Crown Law Office, or advice from outside legal firms to either Ministers or government agencies) will attract solicitor/client privilege. A document does not automatically attract solicitor/client privilege, however, merely because a lawyer prepared it or it is labelled “legally privileged”. Only those parts of a document that record legal advice (as opposed to other types of advice, such as policy advice) will attract solicitor/client privilege.

### **Guidelines for the presentation of legal advice**

- 6 It is sometimes necessary for government documents to include legal advice, so that Ministers and government agencies have all relevant information and advice before them when they make a decision. For example, a Cabinet paper may contain legal advice on a proposed transaction, or the government’s proposed strategy for settling or conducting legal proceedings.
- 7 To ensure that legal advice provided to the government is properly protected by solicitor/client privilege, all those involved in preparing documents containing legal advice are asked to follow these guidelines:
- 7.1 Legal advice should be clearly separated from policy advice, even if the two kinds of advice are provided in one document. Departmental lawyers are encouraged to consider carefully the role they are performing (i.e. whether they are providing legal or policy advice, or both), and the way in which their advice is given and will be used.
  - 7.2 Depending on its nature and extent, the legal advice should be either:
    - 7.2.1 contained in a separate section, and described in a way that makes it plain that it is legal advice from the Crown's lawyers (e.g. “The Crown Law Office advises that ...” or “Counsel from the Ministry advise that ...”); or
    - 7.2.2 attached as an appendix in the form of an opinion from a legal adviser (e.g. Crown Law Office, Solicitor-General, in-house counsel from the department).
  - 7.3 It is also useful if legal advice is marked as “legally privileged”. If the entire paper is legally privileged, a security classification and endorsement such as “Legal Privilege: In Confidence” may be appropriate.

## Waiver of legal privilege

- 8 The protection of legal professional privilege may be lost in two circumstances:
- 8.1 **Express waiver:** when a client chooses to waive privilege in the legal advice and release it; and
  - 8.2 **Implied waiver:** when a client refers to the legal advice in a way that would make it unfair to allow the privilege to be maintained. In this case, a simple statement by a client that legal advice has been received is unlikely to amount to an implied waiver of privilege. Partial disclosure of the actual legal advice received, or reference to the content of the legal advice, however, may result in waiver of privilege. For example, a statement such as “I have received legal advice and acted on it” may constitute a waiver.

## Release of legal advice

- 9 As part of the Attorney-General’s constitutional role, the Attorney-General represents the Crown in the courts and provides legal advice to the government. Day-to-day instructions to legal advisers are usually provided by agencies, departments or other Ministers under the authority of the Attorney-General. Nevertheless, the constitutional responsibility of the Attorney-General remains. It is the Attorney-General who has the right to obtain copies of all legal advice provided to the Crown (from whatever source), the right to determine whether to release that advice, as well as the right to instruct all lawyers acting for the Crown.
- 10 When determining whether to release legal advice that has been provided to the government, or refer to the content of that advice, and waive (or potentially waive) legal privilege, there is a need to ensure:
- 10.1 a coordinated government approach to release;
  - 10.2 that no release will have an adverse impact on current or potential legal proceedings; and
  - 10.3 that no single release will create an undesirable precedent.
- 11 Where either a Minister or government department considers that it is necessary to release legal advice or refer to the content of that advice, the matter must first be referred to the Crown Law Office (if applicable, counsel who provided the advice, if not, the Law Officer Team). The Crown Law Office will in turn refer the matter to the Attorney-General’s Office for approval.

Diane Morcom  
Secretary of the Cabinet