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Know-how

Private corre spondence

Kevin Elliott *and* Paul Verrico *set out the rules for legally privileged documents after an accident*

THE phone rings; Big Plc are on the line. They've had a machinery incident which resulted in a serious injury to an employee: the Health and Safety Executive (HSE) is investigating and has requested that the company attend an interview under caution. It's all in a day's work for a health and safety lawyer. We ask about the extent of the injuries, the insurance position, the HSE's attitude and then ask the standard question: "Is there an internal investigation report?"

"Yes," is the reply. "But I have to warn you that the person writing the report had a bit of a gripe with site management so the report is a bit personal in places."

And so it is. The report includes the following assessment: "The current safety team leader rubs people up, overcomplicates everything and is far below the standard required on a large and complex site."

We call our contact back and ask if the HSE has seen the report. "No" is the answer. We then explain that if they make a proper request for the report, the company must disclose it. Stunned silence. The inevitable counter arguments of "It's marked confidential" and "We'd never have written that if we had known the HSE could get their hands on it" are followed by "Can't you claim it's privileged?"

This is a true story and it illustrates the kind of difficulties health and safety lawyers see large organisations get into over the issue of privilege.

What is privileged?

If an accident report is legally privileged, an organisation can refuse to disclose it to anyone, including the HSE and police. There are two main categories of privilege:

- Legal advice privilege is recognised as a fundamental right which precedes the public interest in all relevant material available to regulators or courts when disputes arise. In essence, it means that confidential communications between solicitor and client are sacrosanct and can never be required by a court or regulator as part of a case. If a lawyer advises a client that their position is hopeless and identifies weaknesses in a case, the regulator or court cannot demand to see a copy of the advice.
- Litigation privilege differs from legal advice privilege. It covers communications when litigation is pending or being considered, and only contact for the sole or main purpose of obtaining legal advice or conducting that litigation. Litigation privilege was summarised in the 2006 case of Winterthur Swiss Insurance Company v AG (Manchester) Ltd as "extending in time, to information (which must include information stored in electronic form as well as in documentary form) which is produced either during the course of adversarial (as opposed to inquisitorial or investigative) litigation, or when such litigation is in contemplation. The privilege obviously covers legal advice given by a lawyer to his client for the purposes of such existing or contemplated litigation. It also extends to communications between the lawyer and his client and the lawyer and third parties and the client and third parties, provided that those communications are made for the sole or dominant purpose of obtaining legal advice or conducting that litigation. In deciding whether a communication is subject to 'litigation privilege', the court has to consider objectively the purpose of the person or authority that directed the creation of the communication."

Regulators' rights

If a client wants to stop any regulator (such as the HSE or the Environment Agency) from seeing the contents of a document, it is not enough to claim a report is confidential. Each regulator has specific powers to seize documents — the HSE's are granted by Section 20(2)(k) of the Health and Safety at Work Act. These powers override standard "confidentiality".

The default position is that any document created by a client for the purposes of their internal investigation is *not* privileged. Instructing lawyers part-way through the process does not enable you to claim retrospective privilege over anything which has already been written.

In determining litigation privilege, the following tests will be considered by the court. First, at the time that the communications were created, was litigation contemplated? Second, were the communications created for the main purpose of obtaining legal advice for that litigation or in aid of that litigation? Third, under whose direction, were the communications created?

This means that any report into an incident must have litigation in mind to be privileged. In our view, any serious incident poses the prospect of either civil or criminal litigation, either from the victim or the regulator. The question then is what is the main purpose of the report? If it is for you, as client, to evaluate how to defend a claim or prosecution, then it could be privileged. If the purpose is either to fulfil a reporting requirement or to learn lessons to stop a repeat event occurring, then the report can't be privileged. Finally, the report must be required and instructed by your lawyers. To reiterate, if a report is written before you instruct lawyers, it will not be privileged.

Forwarding an emailed version of an accident report to recipients beyond those originally intended could see privilege lost

In the family

In September 2010 the European Court of Justice handed down its decision in a case involving Akzo Nobel Chemicals, concluding that in-house lawyers are not protected by legal professional privilege in competitive investigations by the European Commission. The rationale behind this decision is that in-house lawyers do not have the required level of independence from their employer to obtain legal privilege. While the decision is restricted only to European Commission Competition investigations, the rationale is a sound one and could be extended to other areas of the law. This means you need to tread carefully when using in-house counsel to commission privileged reports.

Another area where caution is called for is in ensuring privilege is not lost to your accident investigation report. Wide circulation of the report by email, or forwarding an emailed version of the report to recipients beyond those originally intended could see privilege lost. Annotations to a privileged report are also not likely to be privileged.

Once a privileged report has been obtained, there may be circumstances where it would be appropriate for you to disclose it voluntarily to the HSE. But you need to remember that once a report is disclosed all privilege is lost immediately. With that in mind, some organisations draft a short report for disclosure to the HSE while drafting and retaining privilege over a full report.

Proceed with caution

The vulnerability of documents without legal privilege means that if you have a serious incident and you think your lawyers will be involved at some point, get them in early.

Before anyone starts writing an accident report after this kind of serious incident, get clear written instructions from your lawyers setting out that the dominant purpose of the report was potential litigation. Ensure the privileged report (and any accompanying emails) is correctly headed with something along the lines of "solicitor/client privilege — prepared in contemplation of litigation".

Make sure the report is only sent to those who need to see it and are aware they must not forward it to anyone. Finally, if the regulators request a copy of the privileged report, take legal advice. If the report has been commissioned correctly, you will almost certainly not be obliged to disclose it. ■

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