

# How to Keep OHS Investigators from Using Your Internal Safety Records to Prosecute You



Don't build the legal case against your own company when auditing your OHS programs.

One of your primary functions as OHS coordinator is to investigate workplace incidents and identify what and who caused them. This also happens to be the job of the government OHS officials who investigate the incident. But their interest isn't so much in correcting but gathering evidence to prosecute you for the things you did wrong. So, you want to ensure that while doing your own job, you don't end up also doing the investigators' job. But how can you do a thorough internal investigation without building the legal case against your own company'

You can escape the dilemma by relying on a legal doctrine called 'privilege.' Here's what OHS coordinators need to know about privilege and how to use it to shield incident investigation reports from government investigators, prosecutors and others that might use them against you in a legal proceeding.

# Defining Our Terms

Privilege can protect not only incident investigation reports but other potentially incriminating internal safety documents like reports of inspections, audits and hazard assessments. We'll refer to these materials collectively as 'incident investigation reports.'

## What Is Privilege'

Privilege exists to protect the confidentiality of certain communications and relationships that society considers important. For example, the so-called solicitor-client privilege enables clients to speak freely when seeking legal advice without worrying that the things they say to their lawyer will be used to incriminate them.

The reason privilege is crucial to companies and their OHS coordinators is that government officials have broad powers to enforce the OHS laws. They're allowed to enter and inspect workplaces, interview workers, company officials and others and access your internal safety records. But you don't have to disclose those materials if they're 'privileged.' Thus, privilege can be crucial in limiting your liability risks. But relying on privilege is easier said than done. Many have compared privilege to fine china: It's hard to make and easy to break. There are 2 types of privilege that OHS coordinators must know about.

## 1. Contemplated Litigation Privilege

The 'contemplated litigation privilege' allows individuals and entities who are at reasonable risk of being prosecuted to assess their risks and determine their legal strategy. In the OHS context, this may involve making a candid post-incident

assessment of what the company did wrong to decide whether to settle or fight OHS charges, for example, by mounting a due diligence defence. The privilege enables you to make such an assessment without having to disclose the results to government OHS officials, prosecutors or persons suing you for damages in civil court. For the privilege to apply:

- The prospect of litigation must be the primary reason for creating the document; and
- A legal proceeding must actually be underway or 'reasonably contemplated' at the time the report was created.

**What To Do:** Prepare the internal investigation report as part of your litigation preparation when it's 'reasonable' to expect that an incident will result in OHS prosecution or other legal proceeding. Be on the lookout for red flags indicating that you face the risk of prosecution:

- The incident involved or could have reasonably expected to have resulted in fatality or serious injury;
- You see OHS officials taking photos, statements and gathering other evidence at your workplace; and
- The OHS agency issues stop work, correction or other orders in relation to the incident.

## 2. Solicitor-Client Privilege

Unlike the 'contemplation of litigation' privilege, 'solicitor-client' (aka, 'legal advice') privilege applies only if you get your lawyer involved. Just doing a routine incident investigation and then showing the report to your lawyer isn't enough. To establish solicitor-client privilege. The document must be part and parcel of the confidential communication between lawyer and client for purposes of obtaining legal advice. Specifically:

- The document must be part of a communication between you

- and your lawyer;
- The communication must be made in confidence; and
- The purpose of the communication must be to seek legal advice'even if the communication isn't for the purpose of dealing with a specific lawsuit.

The simplest way to meet these conditions is to [specifically ask your lawyer to prepare or review the incident report for purposes of providing legal advice](#), preferably in writing. How you do that depends on who your lawyer is. Privilege is easier to establish if you use outside counsel, especially if you hire that counsel specifically in response to the incident. However, if you use in-house counsel who isn't just your company's lawyer but also one of its corporate officers, make it clear that you're asking them to don their legal 'cap' and provide advice in their capacity as your lawyer.

## Using a Third-Party Consultant

Be aware that you may be able to use solicitor-client privilege to shield incident investigation reports created by third-party consultants who aren't lawyers. How' **Answer:** By having your lawyer order the report and specifying that it's part of the legal consultation. Just make sure the consultant is instructed to keep the report confidential and submit it directly to the lawyer and that when it's distributed within the company it's not widely circulated but kept in a file marked 'privilege' (for reasons we'll explain below).

## Keeping the Privilege

Maintaining privilege can be just as challenging as creating it in the first place. What makes privilege so fragile is that you voluntarily 'waive' or forfeit it. The most common way to do this is to show the privileged document to a third party or post it in the workplace for all to see. Once the confidentiality is compromised, the privilege is gone and the

document is fair game for disclosure.

In some situations, it may make sense to do this deliberately, for example, when the privileged materials you voluntarily disclose to investigators show that the company took reasonable efforts to comply and prevent OHS violations. Having seen that your company is in a strong position to claim due diligence may persuade government officials not to lay charges. But what you don't want to do is waive the privilege accidentally. Here are 5 ways to avoid doing that:

## **1. Label Documents as Privileged**

To limit risk of inadvertent or unauthorized disclosure, privileged documents should be labeled 'Privileged and Confidential: Prepared in Contemplation of Litigation' and/or 'Privileged and Confidential: Solicitor-Client Communication.' Recognize that stamping a document 'PRIVILEGED' doesn't make it privileged. A document is protected only if it meets the anticipated litigation or solicitor-client privilege requirements.

## **2. Keep Privileged Documents Segregated**

Keep hard copies and electronic documents that you want to keep privileged separate from others. Consider not just separate files but separate rooms if the incident and investigation are big enough.

## **3. Keep Copies to a Minimum**

Limit the number of copies of privileged documents to the minimum necessary. The more copies floating around, the less control you have over where they end up. Make sure that the people to whom you give copies return or destroy the document after reviewing it. Since electronic documents are harder to destroy, try to limit distribution to paper copies.

## **4. Don't Disclose Privileged Document to JHSC**

OHS laws of some provinces require employers to disclose the results of internal incident investigation reports to the workplace joint health and safety committee (JHSC) or health and safety representative as a 'report concerning safety.' This is fine for routine incident reports. But lawyers say you can make the case that privileged reports don't count as 'reports concerning safety' that must be disclosed. 'The right of privilege is so established and important,' explains an Ontario OHS defence lawyer, 'that it most likely trumps the disclosure requirements contained in the OHS statutes.' You might, she adds, consider sharing some of the report's findings verbally and on a limited basis to ensure that hazard information is communicated. 'Just be aware that this is risky and that a creative prosecutor might argue that even this limited disclosure to JHSC members constitutes waiver of the privilege.'

## **5. Limit Disclosure to Need-to-Know**

You can disclose privileged information to third parties without waiving the privilege in limited situations, such as showing a privileged incident investigation report to an outside auditor or expert if the lawyer needs the report to give your company legal advice. The communication between lawyer and consultant thus becomes an extension of the solicitor-client privilege. The third party shouldn't get a copy of the entire document'only the portions needed to prepare the assessment. There should also be a written agreement:

- Stating the purposes of the disclosure;
- Specifying that the third party can use the information only for those purposes;
- Banning the third party from disclosing the information

to others; and

- Requiring the third party to destroy or return the information after the assessment.