

Part 13 - Privilege and immunities under the Act

Table of Contents

Table of Contents	2
Policy statement and principles	3
What	3
Why	3
How	3
Overview	4
Purpose of this chapter	4
Related information	4
References to "the Act"	4
What are recognised privileges?	5
Recognised privileges	5
Identifying privilege	5
Lawyers' trust account records not privileged	5
Appropriate court	6
Effect of privilege claim on search warrant and other search powers	7
What to include in an application for a search warrant or production/examination order	8
Duty of candour	8
Consider what you may find executing the warrant or other order	8
Paragraphs to include in application when privilege may be an issue	8
Conditions	10
Covert warrants	10
Procedures when executing search warrants and other search powers where privilege claim anticipated	11
Overview	11
Planning before the search	11
Reasonable efforts to contact the person	11
Contacting lawyers, ministers of religion, medical practitioners and clinical psychologists	11
Contacting other privilege holders (including journalists) in searches involving privileged material.	11
Treatment of legally privileged documents viewed during a search	12
Reasonable opportunity to claim privilege	12
Dealing with material not covered by privilege claim	12
When you cannot contact the person or their representative	12
If the person or their representative refuses or neglects to identify privileged material	12
Secure and copy the material for which privilege is claimed	13
Carrying out searches where privileged material is discovered during a search	14
Determination of privilege claim	15
Initiating a privilege claim	15
Application by the person claiming the privilege	15
Police application	15
Dishonest purpose or enabling an offence relevant to privilege determination	15
Admission of evidence when privilege claims are upheld	15
Privilege in the context of production and examination orders	17
Privilege against self-incrimination	17
Privilege against self-incrimination applies in production and examination context	17
Privilege claim and application to court	17
Determination by court	17
Other privileges in production and examination context	17
Privilege claim and application to court	17
Determination by court	17
Immunities under the Act	18
Immunities when obtaining or executing orders and warrants	18
Immunities when exercising entry, search and surveillance powers	18
Crown immunity	18

Policy statement and principles

What

The [Evidence Act 2006](#) sets out various privileges. Section [136](#) of the Search and Surveillance Act 2012 recognises those privileges that are subject to the rules and obligations in subpart [5](#) of Part 4 of the Act. The Act restricts the privilege against self-incrimination to examination orders and production orders.

This part of the '[Search](#)' chapter details procedures for Police employees to comply with the Act and enable a claim of privilege to be made and determined in respect of material that is the subject of search, examination or production powers.

Why

Compliance with the guidance and procedures in this chapter when carrying out search, examination and production powers will ensure privilege is appropriately preserved and mitigate against future challenges to the search.

How

When carrying out search, examination and production powers, Police will:

- before applying for a search warrant, or a production/examination order, consider whether recognised privileges might apply, e.g.:
 - is it likely that the premises may contain correspondence from a lawyer?
 - is the person whose premises are being searched someone whose communications may be privileged, e.g. a lawyer, doctor, journalist or minister of religion?
- if privilege may be an issue when executing a warrant or order include information in the application to:
 - identify the privilege that may apply and the nature of the potentially privileged information/communications
 - explain what will be done to prevent the search of privileged material, to facilitate a claim of privilege and to protect material seized.
- **before** conducting a search when privilege may apply, give the person or their representative a reasonable opportunity to claim privilege, or make an interim claim if they need further instructions. Usually this involves the person being present (and their presence is a statutory requirement in some cases).
- if there are reasonable grounds to believe that any thing discovered **during** a search may be privileged, give the person reasonable opportunity to claim privilege and if unable to identify or contact that person:
 - apply to a Judge to determine the status of the thing; and
 - do anything necessary to enable the court to make that determination.
- if receiving or expecting to receive a claim of privilege secure the thing subject to privilege but not continue to search it and should not undertake any other investigations in reliance on it unless no claim of privilege is made, or a claim is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege.

Note: It is the Court's function to independently determine whether a privilege claim is valid.

Overview

Purpose of this chapter

This chapter details:

- what are [recognised as privileges](#) under section [136](#) of the Search and Surveillance Act 2012 and when they apply
- [what to include in an application](#) for a search warrant or production/examination order when privilege may apply
- [procedures when executing search warrants and other search powers where privilege claim anticipated](#)
- what to do if privileged material is unexpectedly discovered during a search
- privileges applying in the context of production and examination orders
- [your immunities](#) from civil or criminal liability when obtaining or executing orders and warrants or exercising entry and search powers under the Act.

Related information

See also these Police Manual chapters:

- [Search](#) chapter:
 - [Carrying out search powers with or without a warrant](#)
 - [Production orders](#)
 - [Examination orders](#)
- [Surveillance](#) chapter:
 - [Surveillance device warrants](#)

References to "the Act"

All statutory references in this chapter are to the [Search and Surveillance Act 2012](#) unless otherwise stated.

What are recognised privileges?

Recognised privileges

These privileges are recognised under section [136](#) of the Search and Surveillance Act 2012.

Description	Evidence Act 2006 (section)	Applicability to power exercised	Appropriate court for determining claims of privilege (s 136 (3))
Legal professional privilege, to the extent that it forms part of the general law	53 (5)	Search, examination and production	District Court
Privilege for communication with legal advisers	54	Search, examination and production	District Court
Privilege for preparatory material to proceedings	56	Search, examination and production	District Court
Privilege for settlement negotiations or mediation	57	Search, examination and production	District Court
Privilege for communication with ministers of religion	58	Search, examination and production	District Court
Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists	59	Search, examination and production	District Court
Privilege against self-incrimination, but only to the extent provided in section 138 of the Search and Surveillance Act	60	Examination and production only Note: This privilege does not apply to thing(s) seized under a search power (s136(1)(g))	District Court
Privilege for informers	64	Search, examination and production	District Court
The rights conferred on a journalist to protect certain sources	68	Search, examination and production	High Court

Identifying privilege

Before applying for a search warrant, a production order, or an examination order, (or undertaking a warrantless search), consider whether any of the [recognised privileges](#) might reasonably apply in the circumstances. For example:

- is it likely that the premises may contain correspondence from a lawyer?
- is the person whose premises are being searched someone whose communications may be privileged, such as a lawyer, a doctor, a journalist or a minister of religion?

Lawyers' trust account records not privileged

The privilege for communications with legal advisers (s[54](#) of the Evidence Act 2006) does not extend to books of account or accounting records kept:

- by a solicitor in relation to any trust account money that is subject to section [112](#) of the Lawyers and Conveyancers Act 2006; or
- by a nominee company that:
 - is subject to practice rules made by the Council of the New Zealand Law Society under section [96](#) of the Lawyers and Conveyancers Act 2006; and
 - is operated by a barrister and solicitor or an incorporated law firm as a nominee in respect of securities and documents of title held for clients.

That privilege does not prevent, limit or affect:

- the making of a production order, issuing of a search warrant, or exercise of any other search power in respect of those books of account or accounting records, or
- the obligation to comply with that production order, search warrant, or other search power in respect of those books of account or accounting records, or
- the admissibility, in a criminal proceeding for an offence described in the production order, search warrant or for an offence in respect of which any other search power was exercised, of any evidence that relates to the contents of a document obtained under the production order or search warrant, or as the result of the exercise of any other search power.

(s137)

Appropriate court

The **appropriate court** for the purposes of Subpart 5, Part 4 of the Act (Privilege and confidentiality) when privileged material has to be delivered to the court; or an application is to be made to the court for determination of a privilege claim is:

- the High Court in any case that involves the applicability of the rights of journalists under section 68 of the Evidence Act 2006 to protect sources
- in any other case, the District Court.

Effect of privilege claim on search warrant and other search powers

A person who claims privilege in respect of anything that is seized or sought to be seized has the right to:

- prevent the search under the Act of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding, pending determination of the claim to privilege and later, if the claim is upheld
- require the return of a copy of, or access to, any such communication or information to the person if it is seized or secured by a person exercising a search power pending determination of the claim to privilege.

(s [142](#))

Once privilege has been claimed, you cannot search the material that is the subject of that claim further and it is for a court to determine the privilege claim.

Further details on how to manage a privilege claim follow, including guidance on how to provide a copy to the material (see, for example, **Secure and copy the material for which privilege is claimed; Determination of privilege claim**)

Note: A person cannot claim privilege against self-incrimination for a thing seized under a search power. That privilege only applies when an examination order or production order is being executed. (s [136\(1\)\(g\)](#) and 138)

What to include in an application for a search warrant or production/examination order

Duty of candour

Applicants for search warrants and other orders made without notice owe the court a duty of candour. The issuing officer is entitled to expect full and candid disclosure of all facts and circumstances relevant to whether the warrant or order should be issued, including whether the material covered by the warrant or order may reasonably be anticipated to be the subject of a claim of privilege and, if so, proposed processes for dealing with that.

The issuing officer needs to be satisfied that:

- Police are aware of the privilege issue; and
- there are appropriate procedures in place to facilitate any anticipated claim of privilege and to ensure protection of materials seized.

Consider what you may find executing the warrant or other order

Think about what information/communications you may find while executing the warrant or other order, and whether any of the information/communications may be subject to a claim of privilege. For example whether the premises being searched are occupied by a person who is a lawyer, minister of religion, journalist or other person referred to in section [136](#) of the Search and Surveillance Act.

Note: Particular care is also required when seeking call associated data or the content of telecommunications where one of the parties to those communications may have a claim of privilege. It is possible that some of this information may be privileged and the organisation complying with the warrant or order may not be aware of that. As below, the Judge will need to be informed of the potential for a claim of privilege and what processes will be followed to ensure that any privilege issues are appropriately addressed, with particular reference to the relevant provisions of the Search and Surveillance Act. For example, for a production order seeking text communications of a journalist from the telco, you will need to plan a process for sorting the data (without searching it) or perhaps have an independent person conducting the sorting process, before the potentially privileged material is delivered to the court and tell the court about that plan.

Paragraphs to include in application when privilege may be an issue

If you reasonably believe that privilege may be an issue, include paragraphs in the application addressing the following:

Step	Action
1	<p>Identify privilege</p> <p>Identify the privilege that may be an issue (preferably by reference to the relevant paragraph of section 136 of the Search and Surveillance Act and any corresponding Evidence Act 2006 provision) and the potentially privileged information/communications that may be discovered in the course of the search etc. For example:</p> <ul style="list-style-type: none"> - “J Bloggs is a minister of religion. As well as the evidence of fraud, I suspect we will find at her home, communications between her and individuals made in confidence and for the purpose of the person obtaining from J Bloggs religious or spiritual advice, benefit or comfort. I am aware that this material may be the subject of a claim of privilege under sections 136(1)(e) of the Search and Surveillance Act and section 58 of the Evidence Act 2006.”
2	<p>Special requirements - Lawyers</p> <p>For warrants where you are wanting to seize communications held by a lawyer that are of a kind to which legal professional privilege normally applies, you also need to satisfy the issuing officer that there is a prima facie case that the thing you want to seize was made, or received, or compiled, or prepared-</p> <ul style="list-style-type: none"> - for a dishonest purpose; or - for the purpose of planning to commit or committing an offence. (s 102 - Restrictions on issue of search warrant)
3	<p>Special requirements - Journalists</p> <p>For warrants/orders involving journalists, the five general guidelines recorded in Television New Zealand Ltd v Attorney General [1995] 2 NZLR 641, at 647-648 that affirmed the importance of media freedom and the correlative caution as regards media warrants should also be referred to, namely:</p> <ul style="list-style-type: none"> - “...in a case where there is no suggestion that the media organisation has committed any offence and it has done no more than record events which include the commission of offences by others, ... the intrusive procedure of a search warrant should not be used for trivial or truly minor cases ... - ...as far as practicable, a warrant should not be granted or executed so as to impair the public dissemination of news. ... - ...only in exceptional circumstances where it is truly essential in the interests of justice should a warrant be granted or executed if there is a substantial risk that it will result in the “drying-up” of confidential sources of information for the media. ... - ... a warrant should be executed considerately and so as to cause the least practicable disruption to the business of the media organisation. ... - ...the relative importance of the [material sought] for the purposes of a prosecution ...”
4	<p>Explain procedures to prevent search of privileged material and facilitate privilege claim</p> <p>Explain:</p> <ul style="list-style-type: none"> - what procedure you will follow on execution to prevent the search of privileged material [see Procedures when carrying out searches involving privileged material below]. For example: <ul style="list-style-type: none"> - “I anticipate that there may be privileged material on the computer that we expect to find. The computer will be seized and cloned by a forensic expert assisting Police. The computer will be returned to J Bloggs and the forensic clone delivered to the court. Neither the computer nor the clone will be searched until J Bloggs has an opportunity to claim privilege.” - what procedures will be taken to facilitate a claim of privilege and to ensure protection of materials seized. For example: <ul style="list-style-type: none"> - “As required by s144, after securing the scene, I will contact J Bloggs. I will arrange to search the property when J Bloggs or her representative is present. Before commencing the search I will ask her whether she wants to claim privilege or interim privilege in respect of any material that is covered by the warrant. If she claims privilege or interim privilege in respect of any material, it will not be searched. Instead, it will be seized. She will be given an opportunity to make a copy of the material for which she has claimed privilege and the privileged material will be secured in an envelope or suitable container, and sealed with tape. The material will then be delivered to the District Court Registrar at X Court to enable a claim of privilege to be determined by a Judge.”

Before a warrant is obtained in respect of material that may reasonably be the subject of a privilege claim, it is recommended that you obtain legal advice.

Conditions

Consider whether it would be appropriate to propose conditions that the issuing officer could impose on the warrant.

Note: The Search and Surveillance Act has specific requirements in relation to the procedures when executing search warrants that Police must be aware of and ought to reflect in the application, particularly where it relates to searching the offices, mobile devices or documents of lawyers and the professional material of ministers of religion, medical practitioners and clinical psychologists. See [‘Procedures when executing search warrants and other search powers where privilege claim anticipated’](#).

Covert warrants

If a covert warrant may involve privilege material, legal advice should be sought on the application and the procedure to be followed.

Procedures when executing search warrants and other search powers where privilege claim anticipated

Overview

When executing a search warrant or other search power involving privileged material, comply with any conditions specified in the warrant or order, any processes you have set out in your application (see '[What to include in an application for a search warrant or production/examination order](#)') as well as the Search and Surveillance Act requirements to:

- give the person an opportunity to claim privilege (usually this will involve the person or their representative being present and showing you what material is privileged)
- seize and secure (but not search) the material for which privilege is being claimed
- supply a copy for the person claiming privilege or give them access to the material
- deliver the material to the court to enable determination of the privilege claim.

Searchers should be familiar with the requirements of sections [142](#) to [147](#) of the Search and Surveillance Act.

Planning before the search

When planning execution of the warrant, consider how (after you have secured the scene and before you commence the search) you will:

- make reasonable efforts to contact the person; and
- give them a reasonable opportunity to claim privilege.

These requirements will probably mean there is a time delay between securing the scene and commencing the search.

Reasonable efforts to contact the person

If the person is not already at the search location, make reasonable efforts to contact them and invite them to come to the search location to point out where there is any privileged material, or to send a representative to do that on their behalf.

Contacting lawyers, ministers of religion, medical practitioners and clinical psychologists

For search warrants authorising search and seizure of materials held by lawyers, ministers of religion, medical practitioners or clinical psychologists the search warrant must not be executed unless the lawyer, minister of religion, medical practitioner, or clinical psychologist, or a representative of them is present (s [143](#)(2) and s [144](#)(2)).

If unable to contact the lawyer, minister of religion, medical practitioner, or clinical psychologist or their representative prior to starting the search, you must instead contact:

- the New Zealand Law Society, in the case of lawyers, or
- the church or professional body to which the person belongs

and ask them to appoint a person to represent the interests of their clients, parishioners or patients in relation to the search (s [143](#)(3) and s [144](#)(3)). Given this ability of the church or professional body to appoint someone, it is unlikely there will be an occasion when you cannot contact someone who can claim privilege within a reasonable time if for some reason the lawyer, minister of religion, medical practitioner or clinical psychologist cannot personally be there.

Contacting other privilege holders (including journalists) in searches involving privileged material.

For warranted or warrantless searches where you have reasonable grounds to believe that any thing discovered in the search may be the subject of another type of privilege, you still need to provide any person (or their lawyer) who you believe may be able to claim a privilege a reasonable opportunity to claim it (s [145](#)). While the Act does not specifically require the person to be present, giving them an opportunity to claim privilege will mean you will need to make reasonable attempts to get in contact with the person and ask them to identify material they claim privilege for. The easiest way for them to do that will usually be for them to be present.

If you are unable to identify or contact a person who may be able to claim a privilege, or that person's lawyer, within a reasonable period then you can:

- secure the thing (but not search it) and deliver it to the court - see ‘[Secure and copy the material for which privilege material is claimed](#)’ for an outline of section 146; and
- apply to a Judge for determination of the status of the thing.

Treatment of legally privileged documents viewed during a search

In conducting a search, material which attracts privilege must be treated with care so that the integrity of the privilege is upheld as far as possible. The person entitled to claim privilege must be afforded the opportunity to do so. In [Bayliss v R](#) [209] NZCA 141 upon seeing documents were privileged, the investigator should have stopped reading immediately and quarantined them in order to preserve the privilege.

Reasonable opportunity to claim privilege

Continue to preserve the scene while waiting for the person to arrive. Do not start to conduct the search or begin to look at material to assess relevance.

When the person or their representative arrives, or if they want to deal with you over the telephone, give the person (or their representative) a reasonable opportunity to claim privilege on behalf of the privilege holder or make an interim claim if unable to contact their client, patient or parishioner.

What is a reasonable opportunity to claim privilege will depend on the circumstances. For example, if the person is away in another New Zealand city at the time you secure the scene but when you contact them by telephone they indicate they intend to get the next flight back so they can point the privileged material out to you later that day it would likely be reasonable to wait until they return.

Invite them to tell you what material they claim privilege over. For example, they might be able to describe where the material is (all documents in a particular room or cabinet; all documents contained in particular files) or it might be more straight forward for them to locate and assemble the material for you.

The person may claim privilege over **all** documents and computer files that the search warrant entitles you to seize. They are entitled to claim privilege in respect of any and all material if they believe there is a valid privilege claim and it is not Police’s role to assess whether that claim has any merit or validity. The claim will be independently determined later by a court.

Dealing with material not covered by privilege claim

For material not included in the claim of privilege, you can search, assess for relevance, and seize in the usual way.

When you cannot contact the person or their representative

If you are unable to identify or contact a person who may be able to claim a privilege, or that person’s lawyer, within a reasonable period then section 145 of the Act provides that, where you have reasonable grounds to believe any thing discovered in the search may be the subject of a privilege recognised by the Act, you can:

- secure the thing (but not search it) and deliver it to the court - see ‘[Secure and copy the material for which privilege material is claimed](#)’ for an outline of section 146; and
- apply to a Judge for determination of the status of the thing.

In the absence of the person or their lawyer, in order to form reasonable grounds to believe that something you discover in the search may be the subject of a privilege, you will need to start sifting through the material to make a preliminary assessment of whether any of it may reasonably be privileged. Once you form the belief that the material may reasonably be privileged (for example, there is a folder entitled “Legal advice”), then secure it but do not search that material further.

Note: Given the ability of the church or professional body to appoint someone to make the privilege claim, it is unlikely there will be an occasion when you cannot contact someone who can claim privilege within a reasonable time if a lawyer, minister of religion, medical practitioner or clinical psychologist cannot personally be there to claim privilege with respect to material held by them.

If the person or their representative refuses or neglects to identify privileged material

The person or their representative may refuse to say what material is or isn’t privileged or they may neglect to do so after being given a reasonable opportunity (e.g., they haven’t kept promises to come to the search address in order to identify privileged material and have stopped taking your calls).

Section [145](#) of the Act provides that, where you have reasonable grounds to believe any thing discovered in the search may be the subject of a privilege recognised by the Act, you can:

- secure the thing (but not search it) and deliver it to the court - see section [146](#) below under '[Secure the material](#)'; and
- apply to a Judge for determination of the status of the thing.

When the person has refused or neglected to make a privilege claim despite being given a reasonable opportunity to do so, in order to form reasonable grounds to believe something you discover in the search may be the subject of a privilege, then you will need to start sifting through the material to make a preliminary assessment of whether any of it may reasonably be privileged. Once you form the belief that the material may reasonably be privileged (for example, there is a folder entitled “Legal advice” or a letter headed up “Confidential settlement proposal”), then secure it but do not search that material further.

Secure and copy the material for which privilege is claimed

If you receive or expect to receive a claim of privilege and are unable to search a thing because of the privilege, you:

- may secure the thing (if the thing is intangible, e.g. computer data, do this by making a forensic copy) - [s146\(a\)\(i\)](#) and (ii) - but must not search the thing secured, unless no claim of privilege is made, or a claim is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege - [s146\(c\)](#)
- must supply the person who may or does claim privilege with a copy of, or access to, the secured thing - [s146\(b\)](#)
- may deliver the thing or a copy of it to the appropriate court to enable determination of the privilege claim- [s146\(a\)\(iii\)](#). You should preserve the privilege and evidential integrity of the material, for example, by sealing it before delivering it to the court.

Complete a POL 268 inventory as soon as practicable - preferably before leaving the premises but in any case not later than 7 days after the seizure and record which items privilege has been claimed over.

Note: Where you are not able to list details of some materials seized because the privilege claim prevents you from searching (reading) those documents, consider referring to the documents over which privilege is claimed as a group - for example, “One eastlight folder identified by XXX as containing privileged documents - sealed”. Where possible, show this to the person or their representative who is present and invite them to check the accuracy of the inventory. Leave the original POL 268 form with the lawyer, minister of religion, medical practitioner, or clinical psychologist or other person claiming privilege or their representative.

If the person has claimed privilege for some items being seized:

- Supply the person with a copy of the material or make arrangements for them to receive a copy or have access to the material. For example, the person could make a copy at the search site (if that is possible and the amount of material is reasonable). For larger amounts of material, the copy may need to be made off site and copied in a manner that ensures the privilege is preserved and the material is not being searched by Police. For example, an external provider might be engaged. Having a copy of or access to the material enables the person to particularise their privilege claim (see '[Determination of privilege claim](#)').
- Place the documents for which privilege is claimed in an envelope (in the person's presence if possible); seal it; and deliver it as soon as practicable to the appropriate court (High Court where privilege claim relates to protection of journalist sources; or the District Court in other cases).

Carrying out searches where privileged material is discovered during a search

Even if you don't reasonably anticipate a privilege claim when planning for a search and before carrying out the search, you may still unexpectedly come across material that could be privileged during a search.

If you are executing a search warrant or another search power and form reasonable grounds to believe that any thing you discover during the search may be privileged material, then under section [145](#), you still need to provide any person who you believe may be able to claim a privilege a reasonable opportunity to claim it. See '[Treatment of legally privileged documents viewed during a search](#)' and [Bayliss v R](#) [209] NZCA 141.

If you are unable to identify or contact a person who may be able to claim a privilege, or that person's lawyer, within a reasonable period then you can:

- secure the thing (but not search it) and deliver it to the court - see [Secure and copy the material for which privilege is claimed](#); and
- apply to a Judge for determination of the status of the thing.

Refer to these sections for more guidance:

- '[Reasonable efforts to contact the person](#)'
- '[Reasonable opportunity to claim privilege](#)'
- '[Secure and copy the material for which privilege is claimed](#)'
- '[Determination of privilege claim](#)'.

Determination of privilege claim

Initiating a privilege claim

Court determination of the privilege claim may be initiated by:

- the person claiming privilege; or
- Police.

Application by the person claiming the privilege

The person claiming the privilege may:

- provide Police with a particularised list of the things for which privilege is claimed, as soon as practicable after being:
 - given the opportunity to claim privilege, or
 - advised that a search is to be, is being, or has been conducted (s147(a))

or

- if the thing/s cannot be adequately particularised, apply to a Judge of the appropriate court (with a copy of the material) for directions (s 147(b))

They can then apply to the appropriate court for determination of their privilege claim. (s142(b))

Police application

If a detailed list of things for which privilege is claimed is not forthcoming and the person has not made an application to the court for determination of the privilege, then you may instigate an application to a Judge of the appropriate court for determination of the privilege under section 146(a)(iii) by using:

- in the case of privilege arising from rights conferred on journalists to protect sources, Police Form PR4 - Application for determination of claim of privilege (Journalists - High Court)' form located in Police Forms > Search and Surveillance > Privilege. Note this application is to be made to the High Court (s 136(3)(a))
- for other types of privilege claims, Police Form PR3 - Application for determination of claim of privilege (District Court)' form located in Police Forms > Search and Surveillance > Privilege. Note this application is to be made to the District Court (s 136(3)(b))

If you secured potentially privileged material but were unable to identify a contact person who may be able to claim a privilege or their lawyer (refer '[Contacting other privilege holders \(including journalists\) in searches involving privileged material](#)' and section 145), apply to the court for determination of the status of the thing using:

- Police Form PR2 (where the privilege may arise from rights conferred on journalists to protect sources (application is to the High Court)
- for other types of privilege, Police Form PR1 (application is to the District Court).

Dishonest purpose or enabling an offence relevant to privilege determination

The court may determine that no privilege applies in respect of any communication or information if there is a prima facie case that the communication of information is made or received, or compiled or prepared:

- for a dishonest purpose, or
- to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

Evidence of this nature will be relevant to the Judge's determination of whether the claimed privilege applies.

(s136 (2))

Admission of evidence when privilege claims are upheld

If a Judge upholds a claim to privilege, the communication or information to which the privilege applies is not admissible in any proceedings arising from, or related to the:

- execution of the search warrant, or

- exercise of another search or surveillance power, or
- carrying out of an examination or production order.

(s148)

Privilege in the context of production and examination orders

Privilege against self-incrimination

Privilege against self-incrimination applies in production and examination context

A production or an examination order does not affect the privilege against self-incrimination that a person may have under section [60](#) of the Evidence Act 2006.

A person may assert the privilege against self-incrimination as a ground for refusing to produce any document under a production order or to answer any question under an examination order. Any assertion of a privilege against self-incrimination must be based on section 60.

Privilege claim and application to court

If a person refuses to produce any information or document under a production order or to answer any question under an examination order on the ground that it is a privileged communication under section [60](#) of the Evidence Act 2006, the Commissioner or other enforcement officer (which includes a constable) may apply to a District Court Judge for an order determining whether or not the claim is valid.

Use Police Form POL PR5 'Application for determination of claim of privilege' form located in Police Forms > Search and Surveillance > Privilege, when making an application.

Determination by court

When the court is determining the privilege claim, the person claiming privilege against self-incrimination must offer sufficient evidence to enable the judge to assess whether self-incrimination is reasonably likely if the person produced the information or document or answered the question.

Note: Section [63](#) of the Evidence Act 2006 does not apply to production or examination orders under the Act.

(s [138](#))

Other privileges in production and examination context

Privilege claim and application to court

Any privilege [recognised](#) under section 136 that could be asserted in criminal proceedings may also be asserted in respect of the material covered by a production order or an examination order. If a person refuses to disclose information sought under a production order or examination order on the grounds that it is privileged, the Commissioner or other enforcement officer (which includes a constable) concerned may apply to a Judge of the appropriate court for an order determining whether or not the privilege claim is valid.

Note: If the privilege claimed involves the rights of journalists to protect certain sources, then use the application form addressed to a Judge of the High Court of New Zealand - Police Form PR6. In all other privilege cases use Police Form PR5, the application form addressed to the District Court Judge.

Determination by court

For the purpose of determining any application for privilege, the judge may require the information or document to be produced.

A judge must, on an application, disallow a privilege claim if they are satisfied that the claim to privilege would, under section [67\(1\)](#) of the Evidence Act 2006, be disallowed in a proceeding. Section [67\(1\)](#) of the Evidence Act provides that a Judge must disallow a claim of privilege if satisfied there is a prima facie case that the communication concerned was made or received or the information compiled or prepared for a dishonest purposes or to enable or aid anyone to commit (or plan to commit) what the person claiming the privilege knew (or reasonably should have known) to be an offence. Evidence of such matters is therefore relevant to the privilege determination.

(s [139](#))

Immunities under the Act

Immunities when obtaining or executing orders and warrants

You are immune from civil or criminal liability for any act done in good faith:

- to obtain:
 - an examination order
 - a production order
 - a search warrant
 - a surveillance device warrant
 - a declaratory order, or
 - other order referred to in the Act
- that is covered by a declaratory order
- in relation to the execution of all orders and warrants referred to in the Act, if the execution is carried out in a reasonable manner.

(s [165](#))

Immunities when exercising entry, search and surveillance powers

You are immune from civil and criminal liability for any act done in good faith in order to exercise an entry, search, or a surveillance power if you:

- exercise the power in a reasonable manner, and
- believe on reasonable grounds that the pre-conditions for the exercise of that power have been satisfied.

Every person is immune from civil and criminal liability for any act done in good faith and in a reasonable manner in order to assist you to exercise an entry, search, or a surveillance power, or in order to examine or analyse any thing that is seized.

Note: The onus is on the person asserting immunity in any civil proceeding to prove the facts necessary to establish the claim.

(s [166](#))

Crown immunity

Section [167](#) clarifies that if any person is immune from civil liability with obtaining or executing orders and warrants, exercising entry, search and surveillance powers in respect of anything done or omitted to be done, then the Crown is also immune from civil liability in tort in respect of that person's conduct.