

EVERSHEDS  
SUTHERLAND



## **Passport to disclosure and privilege**

Your global  
guide



The law on disclosure and privilege differs between common law and civil law jurisdictions and from country to country.

Our litigation and arbitration practice has a truly international reach with offices across the UK, Europe, Middle East, Asia, Africa and the US. Our dedicated teams from across the globe have collaborated to provide you with a quick reference guide to the approach to disclosing documents and privilege across different jurisdictions. For advice on specific issues, please get in touch with the contact/s for each jurisdiction. This is a free resource provided to our clients and the wider business community. We hope that you find the guide helpful for you and your teams and welcome any feedback you may have on its future development.



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# Jurisdictions



## **UK Jurisdictions**

England and Wales  
Northern Ireland  
Scotland

## **Rest of Europe**

Austria  
Belgium  
Czech Republic  
Finland  
France  
Germany  
Hungary  
Italy  
Latvia  
Lithuania  
Netherlands  
Poland  
Portugal  
Slovakia  
Spain  
Sweden  
Switzerland  
Republic of Ireland  
Russian Federation

## **Middle East**

Jordan  
Qatar  
The Kingdom of  
Saudi Arabia  
UAE

## **Asia**

Hong Kong  
Japan  
People's  
Republic  
of China  
Singapore

## **Africa**

Angola  
Egypt  
Kenya  
Madagascar  
Mauritania  
Mauritius

## **Morocco**

Nigeria  
Senegal  
South Africa  
Tanzania  
Tunisia  
Zimbabwe

## **The Americas**

Brazil  
United States  
of America

# England and Wales



## Are parties to litigation required to disclose documents?

Generally yes. The process is called Disclosure and Inspection and is governed by the Civil Procedure Rules ('CPR'), in particular CPR Part 31 and Practice Directions 31A-31C. Other CPR Practice Directions cover cases falling within pilot schemes or specialist proceedings with bespoke disclosure regimes (for example: the Disclosure Pilot Scheme - CPR Practice Direction 51U; Shorter & Flexible Trials - CPR Practice Direction 57AB). Disclosure means stating whether or not a document exists. A party is under an obligation to disclose the existence of documents which fall within the scope of the Court's order for disclosure. The Court will limit disclosure to that which is necessary to deal with the case justly, taking into account issues of proportionality and relevance. A party to whom a document has been disclosed has the right to inspect that document. The duty to provide Disclosure continues up to the conclusion of the case.

## What is a 'document' for the purposes of that process?

A document is anything in which information of any description is recorded. 'Copy', in relation to a document, means anything onto which information recorded in the document has been copied by whatever means and whether directly or indirectly. A document is not limited to paper, so may be in electronic format including computer databases, memory sticks, mobile phones, email, text messages, webmail, social media, voicemail and audio or visual recordings extending to information that is stored or backed-up, including metadata and other embedded data.

## Is the requirement to provide documents automatic and when does it arise?

Disclosure is not automatic and is generally dependent on a court order that is made at the first substantive procedural hearing. Disclosure generally takes place after that hearing. Under the Disclosure Pilot Scheme, Initial Disclosure is generally provided with the statement of case and Extended Disclosure may be ordered at the first substantive hearing. A party can ask the Court, at any time (although usually it is after Inspection has taken place) for an order for another party to provide Disclosure of specific documents or classes of document. It is also possible for a party to apply to Court for an order for Disclosure against a party (who is likely to become a party to litigation) prior to the commencement of proceedings and/or for an order for

Disclosure against a third party. Some documents do however, have to be provided automatically, for example: documents referred to in a party's statement of case or documents required under any applicable pre-action protocol.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document may be withheld if it is privileged. There are many categories of privilege but the most common is legal professional privilege, which comprises legal advice privilege (which generally protects documents between lawyer and client) and litigation privilege (which generally protects communications made in connection with litigation). Other types of privilege include: without prejudice privilege (which protects communications made in a genuine attempt to settle a dispute), privilege against self-incrimination, public interest immunity, joint privilege and common interest privilege.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Potentially yes. As mentioned previously, documents between a lawyer and a client could fall within the legal advice privilege category even where no litigation is in existence or contemplated. The document must be made in confidence for the dominant purpose of giving or receiving legal advice. Only documents between the lawyer and individuals authorized to obtain legal advice, within the client organization will be protected.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, as long as they are acting in capacity as lawyer.\* Those who work under the direction and supervision of the lawyer are also included. It also includes foreign in-house lawyers.

*\*This does not apply to European Commission Competition Law investigations.*

## Do parties to litigation have any other specific additional rights to withhold documents?

The primary basis on which documents can be withheld is if the document is privileged, as to which see above. Parties can also seek orders limiting the scope of the disclosure of documents for reasons such as proportionality of costs, relevance and so on.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege can be lost if the document is no longer confidential or by express or implied waiver. In addition, documents made to further illegality are not protected.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. Privilege will be a defense to a regulator's demand for documents under its statutory powers, unless the statute expressly or by necessary implication overrides privilege. However, there is an increasing appetite for regulators to dispute claims to privilege.



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# Northern Ireland



## Are parties to litigation required to disclose documents?

Yes. The process is known as Discovery and documents are made available to opposing parties for Inspection. Parties are obliged to discover documents which are relevant to the litigation and which are in their possession, custody or power.\* Parties are required to disclose: (i) relevant documents which may be made available for Inspection, (ii) relevant correspondence or documents which are not available for Inspection as they are privileged, and (iii) relevant documents which are no longer in the possession, custody or control of that party.

*\*The 'Peruvian Guano' case continues to govern the definition of 'relevant' for the purposes of Discovery in Northern Irish proceedings.*

## What is a 'document' for the purposes of that process?

There is no definition of 'document' provided in The Rules of the Court of Judicature (NI) 1980. Accordingly, it is generally taken to include any item of correspondence or fact, whether in hard copy or electronic form, including emails, letters, text messages, notes, statements, accounts and any other record of information.

## Is the requirement to provide documents automatic and when does it arise?

In High Court litigation, under Order 24 Rule 2, Discovery should be automatically provided within 14 days of the close of pleadings. Pleadings are deemed to be closed either: (i) upon the expiry of 21 days after service of the reply or, if there is no reply but only a defense to counterclaim, after service of the defense to counterclaim, or (ii) if neither a reply or a defense to counterclaim is served, upon the expiry of 21 days after service of the defense.\* In the County Court, under Order 15 Rule 1, Discovery should be provided within 14 days of particulars having been furnished.

*\*High Court commercial actions are also governed by the Commercial Court Pre-Action Protocol and subject to more stringent requirements.*

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Much like in other Common Law jurisdictions, documents may be withheld if they are privileged. The most common forms of privilege are legal professional privilege (which is split into legal advice privilege and litigation privilege) and without prejudice privilege which protects communications made in a genuine attempt to settle a dispute.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Most likely yes. Documents between a lawyer and a client would likely fall within the legal advice privilege category even where no litigation is in existence or contemplated. The document must be made in confidence for the purpose of giving or receiving legal advice. Drafts of documents are captured within this heading of privilege. Only documents between the lawyer and individuals authorized to obtain legal advice, within the client organization will be protected.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, provided they are acting in their capacity as lawyer. Those who work under the direction and supervision of the lawyer are also included.

## Do parties to litigation have any other specific additional rights to withhold documents?

Potentially under the litigation privilege category. This covers confidential documents between a lawyer and a third party, or between a client and third party, which came into existence after litigation was contemplated for the dominant purpose of obtaining information or advice in connection with that litigation. Parties may also wish to redact information which is commercially sensitive. Redactions may be challenged by other

parties in the proceedings and, in our experience, the Court may order that certain persons or parties be entitled to view the unredacted content, often with solicitor undertakings provided in order to protect the confidentiality. This is sometimes described as a 'confidentiality ring'.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege can be lost by express or implied waiver or if the document is no longer confidential. In addition, documents made to further illegality are not protected.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. Privilege will be a defense to a regulator's demand for documents under its statutory powers, unless the statute expressly or by necessary implication overrides privilege. However, there is an increasing appetite for regulators to dispute claims to privilege.



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# Scotland



## Are parties to litigation required to disclose documents?

There is no requirement to disclose documents without an order from the Court. If the action is in Court, either party can enrol a motion for Commission and Diligence. A list of documents or types of document known as a Specification of Documents accompanies the motion. This sets out the documents that the party is seeking to recover. The Court must be persuaded that the documents are relevant to the case as set out in the written pleadings. If the motion is granted, the successful party can then serve the order and Specification on anyone ("the Haver") in Scotland. The Haver does not need to be a party to the action. They will be required to lodge any documents that fall within the Specification with the Court.

## What is a 'document' for the purposes of that process?

Document is defined by the Civil Evidence (Scotland) Act 1988. It includes, in addition to a document in writing:

- (i) any map, plan, graph or drawing;
- (ii) any photograph;
- (iii) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (iv) any film, negative, tape or other device in which one or more visual images are recorded so as to be capable (as aforesaid) of being reproduced therefrom.

## Is the requirement to provide documents automatic and when does it arise?

There is no requirement to disclose documents without a court order as described above. In circumstances however, where a party incorporates a document into their pleadings then it ought to be produced at the same time as the written pleadings are intimated to the other parties to the action.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. There are a number of situations where a document can be withheld despite the court order. The main categories of exceptions are documents that are irrelevant to the case, privileged, or not in the public interest. In these circumstances, the Haver is still required to lodge the documents with the Court. However they are placed in a confidential envelope and it is for the Court to decide if they ought to be disclosed following submissions by both parties.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Potentially yes. Documents between a lawyer and a client could fall within the privileged category even where no litigation is in existence or contemplated. The document must be made in confidence for the purpose of giving or receiving legal advice. Only documents between the lawyer and individuals authorized to obtain legal advice, within the client organization will be protected.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, as long as they are acting in a capacity as lawyer. Those who work under the direction and supervision of the lawyer are also included.

## Do parties to litigation have any other specific additional rights to withhold documents?

Potentially yes under the litigation privilege category. This covers confidential documents between a lawyer and a third party or a client and a third party which came into existence after litigation was contemplated for the dominant purpose of obtaining information or advice in connection with that litigation.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege can be lost if the document is no longer deemed confidential or by express or implied waiver. In addition, documents made to further illegality are not protected.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. It remains an important part of litigation in Scotland.



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# Austria



## Are parties to litigation required to disclose documents?

In general, no. Burden of Proof is the principal concept in Austrian civil law and the Civil Procedure Act (ZPO). Each party has to provide their own account and their statements of fact to support their legal position. Each party will have to provide evidence for their statements, unless the opposite party agrees on these facts. Such evidence may be provided by submitting documents to the Court and the opposite party. However, there is no general obligation to disclose information on documents that may be relevant to the case other than the documents submitted as evidence. There are only a few and very narrow exceptions resulting in a party being able to designate documents in the possession of the opposite party or a third party as their own evidence, in which instances, the Court may order the possessor to disclose them. However, the party relying on such documents not in their own possession has to specify the individual documents and provide proof for an exception to apply.

## What is a 'document' for the purposes of that process?

A document is a record containing purposefully compiled information. It may be paper or another tangible medium but may also be an electronically stored file (including emails). The purposefully compiled information may be written (by hand or machine), a map or technical drawing. However, whilst photographs (being reproductions of reality with no purposefully added information) or paintings do not fall under the definition of a document, they follow most of the same rules as documents.

## Is the requirement to provide documents automatic and when does it arise?

As mentioned above, the requirement to provide documents is the exception in Austrian civil procedure and only applies under very narrow circumstances. The principal exception is where a party to proceedings is in possession of a document that another is legally entitled to inspect or receive. This usually applies where a document is in only one party's possession (or their agent's possession) but is jointly owned. A third party may only be obliged by the Court to provide a specified document, either if it is a document jointly owned with a party to the proceedings, or if the third party, in whose possession the document lies, is subject to a legal or contractual obligation to provide the document.

## Are there any exceptions when a document can be withheld from disclosure?

In the rare case that a party is obliged to provide a document to the Court and the opposite party, they are exempt from such obligation, if the information contained within the document: (i) covers their family affairs, (ii) would infringe a person's reputation or otherwise be considered libellous, (iii) result in a person's risk of criminal investigation, or (iv) is subject to similar considerations. In addition, a document may be withheld if, providing the document would infringe a form of Professional Secrecy (for example, attorneys, physicians, priests etc) or a violation of a trade secret. If the person or entity who has possession of the document is subject to Professional Secrecy, they are obliged to withhold it.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Documents between an attorney or law firm and a client are subject to Professional Secrecy and therefore exempt. The legal test is broadly that a document in the possession of a party has to be drafted or sent as part of their instruction to or advice from their attorney to be exempt from the rare obligation to provide it to the Court and the opposite party.

## Does this include lawyers who work within an organization as opposed to in private practice?

No. Under the strict professional rules in Austria, lawyers within an organization may not be considered attorneys. A lawyer has to be admitted to the bar as an attorney either in their private practice or as member of a law firm for Professional Secrecy to apply. In addition, an attorney's Professional Secrecy also applies to their non-lawyer employees.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. There is no concept of 'litigation' privilege. As mentioned above, the obligation to provide a document to the Court is the exception in Austria. The usual reason for a party to provide a document is to use it as evidence for the purpose of supporting their own statements of fact and legal position.

## Can the right to withhold a document be lost and if so how?

Yes. The exceptions to the rare obligation of providing a document in one's own possession may be lost. In general, this is the case when the relevant circumstances that give rise to the exception change. For example: (i) a trade secret may cover information that has legitimately been made publicly available or otherwise loses its status as a trade secret; and/or (ii) potentially libellous information or documents bearing the risk of a person's criminal investigation, if this risk has already otherwise materialized or is no longer applicable due to lapse of time.

## Do regulators and investigative bodies respect the concept of privilege?

Regulators and investigative bodies respect the concept of Professional Secrecy including the secrecy of correspondence between a party and their lawyer with regard to copies in the direct possession of the party. They may seize documents or copies, but the application of Professional Secrecy may be invoked. This results in the documents being sealed and reviewed by an independent judge who has to decide which documents are not covered by Professional Secrecy and are to be disclosed and provided to the regulator or investigative body.



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# Belgium



## Are parties to litigation required to disclose documents?

No, the Belgian Judicial Code\* does not provide for discovery or pre-trial disclosure. The general rule is that the claimant carries the Burden of Proof.

*\*article 870 Belgian Judicial Code.*

## What is a 'document' for the purposes of that process?

N/a - see above.

## Is the requirement to provide documents automatic and when does it arise?

No. The Court can, at the request of a party involved in the proceedings or ex officio, order a (third) party to provide specific data or documents, but only if there are serious, concrete and concurring presumptions that that (third) party is holding data or documents containing proof of a relevant fact.\* This entails rendering a judgment to this effect, which cannot be opposed or appealed by the targeted (third) party. So-called 'fishing expeditions' are prohibited.

*\*article 871 and 877 Belgian Judicial Code*

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Data or documents may be withheld if they are privileged. As a general rule, this is the case where data or documents have been entrusted by a person or legal entity to a private practitioner who is bound to Professional Secrecy (such as doctors, lawyers, police officers). In principle, a Court will not allow data or documents that are provided by a party in violation of the Professional Secrecy of a private practitioner, and can order these documents or data to be removed from the procedure (ex officio or at the request of a party involved in the proceedings). As a general rule, correspondence (including any documents in annex) between lawyers that are members of the Belgian Bar

Association is strictly confidential and can, in principle, not be used as proof. In very rare cases, this confidentiality can be lifted by the President of the Bar ('Stafhouder'/'Bâtonnier'). Thus, in principle, only official correspondence between lawyers can be brought forth as proof before a Court. Correspondence between lawyers that falls under the scope of the Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe, is only confidential if it is explicitly labelled as such and if this confidential nature is accepted by the lawyer recipient.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

A lawyer cannot provide the Court and/or any (third) party with the correspondence they have had with their client or with any other data or documents that were provided by the client, unless the client has given approval. Doing so without the client's approval would violate the Professional Secrecy of the lawyer, which is a violation of article 458 of the Belgian Criminal Code. On the other hand, the client is allowed to make public any correspondence, data or document that was sent by the lawyer, as the client is not bound by any Professional Secrecy. However the client has no obligation to disclose, unless as mentioned above.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. Belgian law recognizes legal professional privilege for in-house counsel.\* Any advice given by in-house counsel, for the benefit of the counsel's employer and in the framework of activity as legal counsel, is confidential.

*\*cfr. article 5 of the Act of 1st March 2000 creating the Belgian Institute for In-house counsel*

## Do parties to litigation have any other specific additional rights to withhold documents?

No. There is no concept of 'litigation' privilege.

## Can the right to withhold a document be lost and if so how?

Yes. This right can be lost if the data or document is no longer confidential or by implied or express waiver. In addition, documents made to further illegality are not protected.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. Although lawyers must remain very vigilant in this respect when being asked for information with regard to a client.



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# Czech Republic



## Are parties to litigation required to disclose documents?

Generally, no. However, parties to litigation may be required to disclose documents in some types of disputes, i.e. disputes under special procedure rules where the subject matter relates to sectoral matters (for instance proceedings according to the Competition Compensation Act). All proceedings (regardless of their nature) are also led by two key principles, namely (i) obligation to state decisive facts - Burden of Allegation and (ii) obligation to prove, declare and present evidence - Burden of Proof. This means that the participant must prove the alleged facts and provide (disclose) decisive evidence in order to succeed.

## What is a 'document' for the purposes of that process?

There is no legal definition of a document for the purposes of disclosure. The only definition of document is contained in Act No. 499/2004 Coll., on Archiving and Records Services according to which, a document is any written, visual, audio or other recorded information, whether in analog or digital form. However, document for the purposes of disclosure may in general be anything in which information of any description is recorded. Copy means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly including for instance, documents, text messages, emails etc. and may be even held on computers, memory sticks, mobile phones or databases.

## Is the requirement to provide documents automatic and when does it arise?

Some documents must be provided automatically in order to fulfil the Burden of Proof because parties to litigation are obliged to disclose documents to prove their claims. Any party to litigation can ask the Court, at any time for an order for another party to provide disclosure of specific documents. Such a situation happens rarely, but if so, the requiring party must accurately specify the documents to be disclosed.

## Are there any exceptions when a document can be withheld from disclosure?

Taking of evidence must be carried out in such a way as to protect the confidentiality obligation of classified information protected by a special law and any other statutory or recognized duty of confidentiality. In such cases, evidence may be carried out only if it has been exempted from confidentiality by the competent authority or by an entitled person.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. A lawyer is obliged to maintain confidentiality of all facts they have learned in connection with the provision of legal services. Only a client can relieve a lawyer of confidentiality. Documents between a lawyer and a client fall within the confidentiality even where no litigation is being carried out. The test is whether the document was made in confidence for the purpose of giving or receiving legal advice.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. Provided they are acting in capacity of qualified lawyer (attorney/barrister registered at the Bar Association). Those who work under the direction and supervision of the lawyer are also included. Lawyers working within organizations and not registered at the Bar Association are excluded.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. There is no concept of 'litigation' privilege.

## Can the right to withhold a document be lost and if so how?

Yes. It can be lost if the document is no longer confidential or by express or implied waiver.

## Do regulators and investigative bodies respect the concept of privilege?

Generally, no. However, when a file is inspected by a third party, authorities anonymize all documents which are confidential or they exclude them from the file. However, in case of the lawyer-client relationship, the concept of privilege is respected.



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# Finland



## Are parties to litigation required to disclose documents?

Generally speaking, not on their own initiative. However, counterparties may request that a party who may have in their possession documents or other items that may be used as evidence is ordered by the Court to disclose and deliver the document or other evidence to the Court.

## What is a 'document' for the purposes of that process?

For the purposes of disclosure orders, the concept of evidence is extensive. It incorporates conventional documents, documents in electronic form and the like, but may well include other kinds of evidence, such as, prototypes or other items that may have evidentiary value.

## Is the requirement to provide documents automatic and when does it arise?

Disclosure is not automatic and is generally dependent on a court order made following an application by a party or the Court's own initiative in some exceptional circumstances.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Evidence, whether documents or other kinds of evidence, may be withheld if the party in possession of the evidence is required by the applicable law to withhold the evidence. For example, medical information in possession of health care professionals. The reason for this is that medical professionals and the like are required to keep material confidential. However, this does not relate to trade secrets as the law does not require trade secrets to be kept confidential and as such, an interested party must request that trade secrets are kept confidential. It is worth noting that the exception concerning trade secrets, is often highly criticized, as it has been traditionally interpreted extensively, which has made disclosure orders occasionally ineffective.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

With respect to documents between a lawyer and a client and their confidentiality, the applicable law classifies lawyers in distinct categories when confidentiality is considered: those involved in advising the client in preparation, avoidance or conduct of trial and those involved in other advice. As for lawyers involved in trials, they are prohibited by applicable law to disclose any information that the client may have provided to them, unless, that is, the client explicitly permits the disclosure. Where other kind of legal advice is concerned, whether the evidence can be withheld depends on the kind of evidence. The mere fact that the holder of evidence is a lawyer who has obtained evidence from his client does not exempt the evidence from disclosure as such. However if, for example, the documents between a lawyer and a client are considered to include trade secrets, such as forthcoming business arrangements or the like, the evidence could be withheld based upon its nature as a trade secret.

## Does this include lawyers who work within an organization as opposed to in private practice?

No. Qualified lawyers employed by various companies are just considered as employees and do not enjoy special status.

## Do parties to litigation have any other specific additional rights to withhold documents?

Only as mentioned above. There is no separate 'litigation' privilege category.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege can be lost if the document is no longer confidential or by express permission by the party for whom the right or obligation to withhold the evidence is given.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, within the limitations discussed previously. Furthermore, in various delicate situations such as searches conducted within medical practices or law firms, a dedicated "search ombudsman" (a trained lawyer issued by the Court), will be present and decide if certain material can be seized or if due to the content of the evidence it should be initially sealed and exempted from seizure for the purposes of providing the competent Court the power to decide whether sealed material can or cannot be seized.



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# France



## Are parties to litigation required to disclose documents?

Generally, no. The general principle under article 9 of the French Civil Procedure Code, is that it is for a party to prove the facts on which its claim relies. However, in specific circumstances, a party can be ordered to produce a particular piece of evidence.\*

*\* articles 11 and 142 of the French Civil Procedure Code*

## What is a 'document' for the purposes of that process?

A document in the context of the production of exhibits is any support of information that a party can produce in Court to establish the truthfulness of its allegations.

## Is the requirement to provide documents automatic and when does it arise?

No, the requirement is not automatic. It must be ordered by the Court. To be justified, the document production request must aim to safeguard a right recognized by law or sanctioned by a Court. Furthermore, the document must be indispensable to the uncovering of the truth and it must be the only means of the party obtaining that document. The document whose production is requested must be specifically identified – general requests for a category of documents are not possible and the existence of the document whose production is requested must be plausible.

## Are there any exceptions when a document can be withheld from disclosure?

Provided that the requested document does exist, there are exceptions which can be invoked to oppose the production of that document. These are essentially banking secrecy (*secret bancaire*), medical secrecy (*secret médical*) and legal privilege covering the correspondences between lawyers, and between a lawyer and client.\*

*\* see for instance Cass. com. 10 February 2015, n° 13 14.779 on banking secrecy*

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. The confidentiality that applies to any exchange between a lawyer and their client is very wide and absolute. In any matter, whether transactional or contentious, any advice from the lawyer to their client, any correspondence exchanged between the lawyer and their client, any minutes of meetings and more generally any piece of the case file are covered by Professional Secrecy.\*

*\*article 66-5 of Law No. 71-1130 of 31 December 1971*

## Does this include lawyers who work within an organization as opposed to in private practice?

No. "In-house lawyers" in France are not legally recognized as lawyers and the work they undertake for their organization is not covered by privilege.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. There is no specific "litigation privilege" equivalent to that which exists in common law. Notably the legal privilege granted to lawyers under French law is already very wide.

## Can the right to withhold a document be lost and if so how?

As far as legal privilege is concerned (be it correspondence between a lawyer and their client, or between lawyers), it is strictly enforced and such documents cannot be produced in legal proceedings, and this privilege cannot be lost or waived – even by the head of the Bar of the involved lawyers (called "Bâtonnier").\* An exception exists when the lawyer is suspected of having taken part in an illegal activity, in which case the relevant documents can be seized by the investigators, provided specific procedural guarantees are complied with.

*\*see Cass. civ. 1, 15 December 2011, n° 10-25.437*

## Do regulators and investigative bodies respect the concept of privilege?

In general, yes. In the case of dawn raids at the office of a lawyer (which are possible under certain circumstances), the head of their bar (the "Bâtonnier") must be present to make sure that legal privilege and the rights of the defense are complied with by the officers.



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# Germany



## Are parties to litigation required to disclose documents?

Generally no. In civil proceedings, a party does not have to provide to the other parties the evidence necessary to win a case. However, under Section 142 German Code of Civil Procedure ("ZPO")\*, a Court can request a party to submit certain documents. In criminal proceedings, there is also no obligation for private parties to actively hand over documents/objects to the authorities. However, the investigative bodies may seize documents/objects for evidence.

*\*Other regulations regarding disclosure of documents can be found in Section 421 ZPO, Section 140c German Patent Act ("PatG") and Section 33g Restriction of Competition Act ("GWB").*

## What is a 'document' for the purposes of that process?

A document for the purposes of disclosure (section 142 ZPO) is every written expression of thought. The term is to be understood broadly and also includes plans, drawings or photographs, insofar as their content is concerned.\*

*\*For electronic documents, see section 371 ZPO.*

## Is the requirement to provide documents automatic and when does it arise?

Disclosure is not automatic and is generally dependent on a court order. The decision is left to the discretion of the Court. The Court may order disclosure at any stage of the proceedings. If a party refuses to hand over the documents, there is no way of enforcing the order. The refusal will be taken into account in the assessment of evidence, which generally leads to the loss of the proceedings if there is no objective reason for the refusal, such as more important confidentiality issues.

## Are there any exceptions when a document can be withheld from disclosure?

Third parties can withhold documents if disclosure is: (i) unreasonable (for example, in case of high confidentiality interests) or (ii) a right to refuse to testify exists (for example, in case of family relationship with one of the parties). For parties to the proceedings, there is no right to withhold documents, but the Court has to take legitimate confidentiality interests into account in its discretion. In criminal proceedings, a very limited scope of documents are privileged from seizure.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes, in principle the Court exceeds its discretionary powers when it orders the disclosure of documents between a lawyer and a client. Correspondence between the party and the lawyer representing them is particularly protected. In criminal proceedings not all correspondence between a lawyer and a client is protected, but only the correspondence between the defendants and their counsel and – except for "defense material" – only when in possession of the lawyer.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, as long as they are acting in capacity as lawyer. Those who work under the direction and supervision of the lawyer are also included. However, in criminal proceedings, correspondence with the in-house-lawyer is not protected against confiscation.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. There is no concept of 'litigation' privilege.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege can be lost if the document is no longer confidential or by express or implied waiver.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. In civil proceedings, German Courts rarely ask for documents (under Section 142 ZPO), so disclosure hardly features. In criminal cases, the investigative bodies respect the concept of privilege which is, however, of a rather narrow scope, as mentioned previously.



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# Hungary



## Are parties to litigation required to disclose documents?

Yes. The process itself is called 'Making the Document Available and Inspection' and is governed by Chapters 22 & 23 of Act CXXX of 2016 on the Code of Civil Procedure ("CCP"). Making available in this context means releasing or presenting the document.

## What is a 'document' for the purposes of that process?

In Hungarian law, there is no definition of a document. There are several definitions in legal literature regarding the essence of a document. The modern notion of a legal document could be defined as "a recording of human thought by means of signs expressing thoughts, via, in particular, characters or signs that can be converted into characters, where the device or the method of recording is irrelevant, but overall is capable of ensuring its lasting preservation and credible presentation". This definition includes not only traditional paper-based but also electronic documents.

## Is the requirement to provide documents automatic and when does it arise?

At the request of the party presenting evidence, the Court may oblige the opposite party to make available the document that is in their possession, which they would be obliged to release or present anyway, under the general provisions of the civil law. In particular, the party with opposing interests shall be subject to such an obligation, if the document was issued in the interest of producing evidence or attests a legal relationship concerning the party, or it is related to a hearing pertaining to such a legal relationship.\* If the document is in the possession of a person who is not participating in the action, the Court will make the document available by applying the rules on Inspection.

*\*clause 320 of CCP*

## Are there any exceptions when a document can be withheld from disclosure?

According to CCP, any document, or part of a document that contains so-called classified information is not admissible as evidence in the action, if the original classifier refuses to allow

the party to have access thereto.\* The above does not apply if the action was brought due to the refusal of the request for access, or if the purpose of the action is to decide whether or not the document in question is to be treated as classified information. In such action, the plaintiff, the intervener entering the action in league with the plaintiff and their counsel shall not be allowed to access such classified information during the proceedings. Other persons involved in the action, and their counsel are only allowed to access the said classified information if they have been vetted for security clearance for national security purposes.

*\*clause 322 of CCP*

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

According to the provisions of Act on the Attorneys, the person bound by the attorney's confidentiality obligation may not disclose the documents and data containing the attorney-client privileged information and is not obliged to testify and provide data concerning the attorney-client privileged information during the authority's revision, inspection, on-site search but may not hinder the authority's procedure.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. As long as they are acting in the capacity of a lawyer.

## Do parties to litigation have any other rights to withhold documents? If so, what is the legal test to fall within such a 'litigation' exception?

There is no separate category of 'litigation' privilege. If a document made available contains - according to the statement of the sender - any classified information, business secret, privileged information or other secret provided for by an act, the use of which had not been authorized by the original classifier or the person entitled to grant an exemption from the obligation of confidentiality ("classifier"), the Court shall contact the original classifier or the classifier requesting access to the classified

information or secret, except where the contents of the document does not qualify as business secrets under statutory provisions, or if the goal of the action is to decide whether the content of the document in question is to be treated as public information.\*

*\*pursuant to S320 of CCP.*

## Can the right to withhold a document be lost and if so how?

Yes, where the contents of the document do not qualify as business secrets under statutory provisions, or if the goal of the action is to decide whether the content of the document in question is to be treated as public information.

## Do regulators and investigative bodies respect the concept of privilege?

Yes.



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# Italy



## Are parties to litigation required to disclose documents?

During proceedings, no automatic document disclosure procedure takes place. Each party has a duty to prove the facts on which their case/defense relies by way of their own documents and a party cannot compel another party to disclose documents the former does not hold, except in specific cases.\* The Court, on the petition of a party, can order a party or a third party to disclose a specific document subject to certain tight conditions set out below.\*\*

*\*Pursuant to article 2697 of the Italian Civil Code  
\*\*Pursuant to article 210 of the Italian Code of Civil Procedure*

## What is a 'document' for the purposes of that process?

A document is defined as any material element that is suitable to represent or depict a fact in order to convey knowledge to the observer. Therefore, it is not limited to paper or electronic form, rather it includes emails, text messages, voicemails, audio or visual recordings, and so on.

## Is the requirement to provide documents automatic and when does it arise?

As mentioned previously, disclosure procedure is not automatic and depends on a court order upon petition of a party. Indeed, a party can request the Court (within the same deadlines as those established for requesting new evidences i.e. within the deadline for the filling of the second brief\*) to make an order for another party to disclose a specific document, provided that this does not cause any serious prejudice to the parties concerned. The request\*\* for the disclosure order should include: (i) proof that the recipient of the order is in possession of the relevant document (evidence of possession can also be presumptive and be provided by recalling previously acquired investigative findings or notions of common experience. However, it is by no means necessary when it is clear that the document is owned by the recipient of the order because he has a legal obligation to preserve it, or because such preservation is normal, even if it is not legally prescribed); (ii) proof that the relevant document is essential for the pending proceedings, that is, it is not possible to obtain evidence of the fact that the party is referring to. A party may challenge the request for a disclosure order submitted to the Court and practically, the granting of an order to disclose is not a straightforward matter.

*\*Under article 183 of the Italian Code of Civil Procedure  
\*\* Under article 210 of the Italian Code of Civil Procedure*

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document may be withheld if the disclosure entails a breach of professional, office or state secrecy. For instance, a lawyer cannot be obliged to give evidence of any information acquired by reason of their mandate, including conversations and communications with their client\*, nor can a lawyer be obliged to disclose any document which is in their possession as a result of their professional activities if they declare in writing that the document is covered by professional confidentiality.\*\* In addition, according to article 48 of the Lawyers' Code of Conduct, any correspondence between lawyers marked as confidential, as well as communications concerning discussions on out-of-court settlement are protected from disclosure.

*\*Pursuant to article 200 of the Italian Code of Criminal Procedure  
\*\*Pursuant to article 256 of the Italian Code of Criminal Procedure*

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. It is forbidden to disclose in Court both documents and correspondence between lawyer and their client, as well as any other information acquired while assisting the client.\* Nevertheless, documents filed in breach of such a ban can be still examined by the judge.

*\* Pursuant to article 28 of the Lawyers' Code of Conduct*

## Does this include lawyers who work within an organization as opposed to in private practice?

No. In-house counsel are not enrolled with the Lawyers' Bar so they are not considered to be subject to the relevant Code of Conduct.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. Only as mentioned previously.

## Can the right to withhold a document be lost and if so how?

A lawyer is allowed to derogate to their confidential and professional secrecy if the disclosure is necessary: (i) to the execution of their mandate; (ii) to avoid committing a crime of a particular seriousness; (iii) to allege circumstances in a dispute between a lawyer and their client or assisted party; (iv) within disciplinary proceedings.

## Do regulators and investigative bodies respect the concept of privilege?

Regulators and investigative bodies have no duty to respect 'foreign' privilege. Furthermore, if the Court has reason to doubt that the statement made by the lawyer who invokes the abovementioned article 200 of the Italian Code of Criminal Procedure to exempt itself from the testimony, it will carry out the necessary investigations. Thus, where the Court concludes that the invoked exemption is ungrounded, it orders the lawyer to testify. In any case, the professional secrecy set out therein does not apply in cases where the lawyer is obliged to report to the competent judicial authority (for example, public prosecutors) an alleged crime.\*

*\*pursuant to article 200 of the Italian Code of Criminal Procedure*



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# Latvia



## Are parties to litigation required to disclose documents?

Litigating parties are not obliged to a specific concept of disclosure of documents under Latvian Civil procedure Law. However all submissions, claims, objections and requests must be based on evidence submitted by the party advancing the argument. All the documents or their derivatives evidencing the factual basis of a procedural action must be annexed with the procedural document. The other litigants, regardless of whether proceedings are based on private or public law, have rights to receive a copy of the procedural document along with its annexes.

## What is a 'document' for the purposes of that process?

The general concept of a document is any recorded information either in physical or electronic form and its derivatives (copies, excerpts and duplicates).

## Is the requirement to provide documents automatic and when does it arise?

The general principle in relation to providing documents is that the information submitted to the Court or other authorities must be annexed with evidence, that is respective documents, proving the information provided. However, the obligation to provide documents is not automatic. A party may choose to provide documents or not. The exception is when the Court or other authority (especially in investigations) requests documents.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Certain types of documents are privileged or protected by immunity. The privileges and immunities are provided in law. Immunity means that a document cannot be considered "evidence" unless the immunity is expressly waived. Privileged documents are documents which are disclosed only to the Court or subject to partial disclosure to other litigants. Other litigants may not "inspect" documents that are protected by privilege. Only the Court has the exclusive right to request and inspect privileged documents in full. The most common types of privilege are privacy of individuals, commercial secrets and state secrets.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Immunity applies to all documents and communication between client and advocate defined in accordance with the meaning of Advocacy Law of the Republic of Latvia ("Law on the Bar") which includes sworn advocates, assistants to sworn advocates, advocates of European Union Member States and foreign advocates, who are allowed to practice in Latvia in accordance with the international agreements. However, the immunity does not apply to lawyers who have no advocate status in the meaning of Law on the Bar and who do not practice in the law offices incorporated by advocates under the Law on the Bar.

## Does this include lawyers who work within an organization as opposed to in private practice?

Lawyers practicing outside of the Law of the Bar do not enjoy immunity. However, other privileges (privacy, commercial secret etc.) may apply to documents and communication between lawyers and their clients.

## Do parties to litigation have any other specific additional rights to withhold documents?

There are a multitude of defenses against a request to provide documents but none specific to litigation. The most common defenses apart from immunity and privilege are right to private life, data protection and protection of the interests of a child. The right to withhold documents depends on the defense relied upon.

## Can the right to withhold a document be lost and if so how?

Yes. Protection of either immunity or privilege can be waived or lost if disclosed to the public. Presumption of commercial secret can be rebutted if the party making the request proves that the information claimed to be a commercial secret either: (i) is generally known to the relevant public (ii) derives no commercial benefit from being secret; or (iii) the defendant has not taken effective and reasonable care to protect its secrecy. In addition, documents under the immunity of advocate could lose protected status, if an investigation is initiated regarding illegal activity in the interests of the client or activity supporting illegal offense.

## Do regulators and investigative bodies respect the concept of privilege?

Generally yes. Investigative bodies need prior consent from the Court (or in case of urgency - consent of the prosecutor) to inspect privileged documents during an investigation. However, if the person has been officially recognized as a suspect, then no such consent is needed.



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# Lithuania



## Are parties to litigation required to disclose documents?

In terms of mandatory disclosure, no. The Code of Civil Procedure (CCP) establishes the general rule that parties have to prove the circumstances which they use to ground their claim or use as an argument to reject the claim. On this basis it is a party's right and obligation to provide documents by which their legal position is motivated. Pursuant to the CCP, evidence must be provided at the earliest stage of the process. The claim must be grounded by the supporting evidence and by providing the response, the respondent should also provide all documents confirming the respondent's position, as the Court may refuse to accept the evidence or motives at a later stage, if this could prolong the adoption of the decision in the civil case.\* In practice, evidence is accepted by the Court even at a later stage of the process if this does not unreasonably prolong the process. So there is no limitation to provide new evidence in the first instance Court as long as the party does not abuse the procedural rights and this does not prolong the case examination. However, limitation on new evidence is applicable in the appeal instance Court where the Court could accept new evidence only if the party proves that these documents could not have been provided in the first instance Court. Only when documents are submitted to the case do both parties have access to them, unless the Court considers that the other party cannot be "acquainted" (that is, see them), due to commercial or professional secret.

\*Art. 142, Para 3 of the CCP

## What is a 'document' for the purposes of that process?

There is no mandatory disclosure as mentioned previously.

## Is the requirement to provide documents automatic and when does it arise?

As mentioned previously, there is no concept of mandatory disclosure in Lithuania and parties submit documents as evidence to their case by their free will in order to motivate their claim/response. If it is considered that relevant documents are withheld, a party may request the Court to obligate another party or third party to provide documents to the Court. In such a case, the duty to provide the document arises within the terms established in the Court's ruling.

## Are there any exceptions when a document can be withheld from disclosure?

Where the Court obligates a party/third party to provide certain evidence, that party may ask the Court to restrict the other party getting acquainted with the documents (that is seeing them) and to copy on the grounds of professional or commercial secrecy. The request must be motivated and the Court issues a separate ruling to approve such a request or reject it.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

The Law on the Bar of the Republic of Lithuania establishes that it is forbidden publicly or secretly to get acquainted and use as evidence the information which is considered as advocate's professional secret. Factors taken into account include: application to the advocate, conditions of the agreement between the advocate and the client, information and data provided by the client, the matter of consultation and data collected by the advocate under the engagement, also other content of the communication (meetings, correspondence, phone calls or other forms) between the advocate and the client.

## Does this include lawyers who work within an organization as opposed to in private practice?

No. The above restriction applies only in relation to the secrecy of an advocate (or assistant to advocate) as member of the Bar and does not apply to other lawyers to whom the Law on the Bar is not applicable.

## Do parties to litigation have any other specific additional rights to withhold documents?

There is no specific category of 'litigation' privilege. As noted previously, parties may refrain from providing documents to another party, if this includes professional or commercial secret. In some cases the Court may restrict parties from getting acquainted to Court material where there is a need to ensure the confidentiality of a person whose confidentiality is guaranteed by the Law on the Protection of Whistleblowers of the Republic of Lithuania. Also, upon the request of a party or on its own discretion, the Court may also establish that all or part of the case material should not be made public, when it is necessary to

protect the secrecy of the person, his or her private life and property, the confidentiality of information relating to human health, and where there is reason to believe that a state, service, professional, commercial or other secret protected by laws could be divulged.

## Can the right to withhold a document be lost and if so how?

Potentially the right to withhold a document could be lost in relation to professional and commercial secrecy, if the Court adopts a later ruling by which it re-considers that the document does not include a professional or commercial secret.

## Do regulators and investigative bodies respect the concept of privilege?

This depends on a case by case basis. Generally, the Court will approve an application requesting a restriction on another party getting acquainted with a document, if it includes data that falls within the definition of professional or commercial secret.



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# Netherlands



## Are parties to litigation required to disclose documents?

Dutch (procedural) law does not provide for general discovery of documents, either before or after initiating litigation. However, there are disclosure obligations in certain situations under the Dutch Code of Civil Procedure (“DCCP”) which sets out the basis on which a party or the Court can request/order disclosure of documents. Over recent years there has been a tendency towards more possibilities for disclosure of documents in civil proceedings in the Netherlands.\* In 2013, this was underlined by a decision of the Dutch Supreme Court to allow pre-judgment attachments for the purpose of preserving evidence. \*\* It is worth noting that a legislative bill was introduced with the aim of modernizing and simplifying the Dutch law of evidence. This draft bill was revised recently. One of the aspects of the revised draft is the introduction of a pre-trial obligation to gather and disclose certain information, which is strongly reminiscent of discovery or disclosure in common law countries. The revised bill is still under review by the House of Representatives (Tweede Kamer) and it is uncertain whether these obligations will indeed be implemented.

\* R. Hermans & M. Poot in: *The Dispute Resolution Review*, p. 564, 577; L.A. Bosch in: *T&C Burgerlijke Rechtsvordering*, art. 843a Wetboek Burgerlijke Rechtsvordering, aant. 1(c).  
\*\* Dutch Supreme Court 13 September 2013, ECLI:NL:HR:2013:BZ9958.

## What is a ‘document’ for the purposes of that process?

A document for the purposes of disclosure is anything in which information of any description is recorded. It not only relates to signed documents (private documents), but also to other written documents such as payment orders, bank statements, salary statements, computer printouts or a (draft) manuscript. \* It can also be data on data carriers other than paper such as film, photo, CD-ROM, DVD, audio tapes, computer files, e-mail, USB stick, tachograph disc, Event Data Recorder (black box) or data in the cloud. \*\*

\* Dutch Court of Appeal The Hague 15 November 2011, ECLI:NL:GHSGR:2011:BU4306.

\*\* L.A. Bosch in: *T&C Burgerlijke Rechtsvordering*, art. 843a Wetboek Burgerlijke Rechtsvordering, aant. 4(a).

## Is the requirement to provide documents automatic and when does it arise?

Disclosure is not automatic. As mentioned previously, Dutch law does not provide for general discovery of documents. However, there are disclosure obligations in certain situations. Article 22 of the DCCP provides that in civil proceedings, the Court may order a party to submit certain documents it deems relevant and a party may only refuse to do so for compelling reasons. The Court will decide whether the reasons cited are justified and if not, it may draw conclusions from this refusal as it deems fit. On the basis of Article 162 of the DCCP, during the proceedings the Court may order, at the request of a party or ex officio, that a party submit the books and records that it is required to keep in accordance with the law (such as a company’s accounts). If the relevant party refuses to do so, the Court may draw conclusions from this refusal as it deems fit. In addition, pursuant to Article 843a of the DCCP, a party with a legitimate interest may request from another party access to or a copy of certain documents with respect to a legal relationship to which it or a predecessor is a party.\* The objective of this provision is to allow a party to request certain evidence from the party that has it in its possession. The request may be made both in and out of Court. The claim can be allowed if the four elements set out in Article 843a(1) of the DCCP are satisfied, provided that none of the three restriction grounds set out in Article 843a(3) and (4) apply. The elements set out in Article 843a(1) DCCP are (essentially) that the requesting party with a rightful interest may claim disclosure of certain documents or records that are at the disposal of or held by the requested party and that relate to a legal relationship to which the requesting person is a party. \*\*

\* Please note that under this Article, a party can only request access to or a copy of certain documents, not issue the original documents.

\*\* R. Hermans & M. Poot in: *The Dispute Resolution Review*, p. 579.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Under Article 22 DCCP parties have, if there are ‘compelling reasons’ for doing so, the possibility to disregard the Court’s order wholly or partially by either refusing to comply with the order to submit certain documents or by submitting that only the Court will be allowed to hear the requested explanation or documents. This is at the discretion of the Court, assessed on a case-by-case basis.\* Examples of ‘compelling reasons’ within the meaning of Article 22 DCCP are confidential, personal or business data, such as data regarding sexual orientation and medical or financial data. \*\* Article 162 DCCP on the other hand does not stipulate that the parties may refuse to comply with a court order on the ground of ‘compelling reasons’. However, it is conceivable that this ground of exception can also be invoked in connection with Article 162. \*\*\* Apart from meeting the requirements set out in Article 843a DCCP, this article also sets three restriction grounds under which a document can be withheld from disclosure. The grounds for restrictions are: (i) the person holding the documents is under a duty of confidentiality regarding such documents by virtue of their administrative position, profession or employment (in practice limited to documents held by a certain group of professionals such as lawyers, civil notaries, doctors and priests) or (ii) there are serious reasons why the holder of the documents should not comply with the claim for disclosure, or (iii) there is a reason to believe that the proper administration of justice can also be guaranteed without the requested documents being disclosed.

\* Dutch Supreme Court 11 July 2008, ECLI:NL:HR:2008:BC8421, (*De Telegraaf/ Staat*)

\*\* A.I.M. van Mierlo in: *T&C Burgerlijke Rechtsvordering*, art. 22 Wetboek Burgerlijke Rechtsvordering, aant. 3(a), voorbeelden

\*\*\* D.J. Beenders in: *T&C Burgerlijke Rechtsvordering*, art. 162 Wetboek Burgerlijke Rechtsvordering, aant. 4

# Netherlands



## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. It follows from Article 165(2)(b) DCCP, that professionals such as doctors, lawyers\* and civil-law notaries are not required to cooperate in providing a copy, extract or inspection of documents. Under Dutch law, legal privilege is a general principle of law. It is the right of certain professionals who have a duty of confidentiality by virtue of their office or profession to refuse to give testimony in front of a judge or to provide information that has been entrusted to them by the client in their professional capacity. Whether this legal test is met is at the discretion of the professional who holds the privilege. Note that it is the professional who holds the privilege, not the client. The client only has a derived legal privilege. This means that the professional can invoke the privilege, even if the client would want to waive it. The professional, having a duty of confidentiality, cannot waive the privilege without the client's consent. \*\*

\* Dutch Supreme Court 12 December 1958, NJ 1961/270 (*Viskil*), Dutch Supreme Court 22 June 1984, NJ 1985/188 (*Panholzer/Cancuk*)

\*\* R. Hermans & M. Poot in: *The Dispute Resolution Review*, p. 578 and L.A. Bosch in: *T&C Burgerlijke Rechtsvordering*, art. 843a Wetboek Burgerlijke Rechtsvordering, aant.13(a).

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. Under Dutch national rules, in-house legal counsel admitted to the bar have legal privilege to the same extent as external lawyers.\* The Dutch Supreme Court ruled that in view of Dutch practice and the safeguards applicable to the professional practice of Dutch in-house lawyers by virtue of the Dutch bar regulations, an in-house lawyer cannot be denied professional legal privilege solely because of the fact that they practice practices in employment by the company.\*\* Furthermore, those

who work under the direction and supervision of the lawyer are also included. \*\*\*

\*This does not apply to European Commission Competition Law investigations.  
\*\* R. Hermans & M. Poot in: *The Dispute Resolution Review*, p. 578.  
\*\*\* C.J.J.C. van Nispen in: *T&C Burgerlijke Rechtsvordering*, art. 165 Wetboek Burgerlijke Rechtsvordering, aant. 5(f).

## Do parties to litigation have any other specific additional rights to withhold documents?

The Netherlands does not have a separate concept of 'litigation privilege' or 'legal advice privilege' as is in the case in, for example, England and Wales, nor does it have a work product doctrine where protection from disclosure is concerned. Note that documents created in anticipation of litigation fall within the scope of legal privilege on the grounds that an attorney and his client have a right to prepare for proceedings in confidence. Legal privilege extends to all the information that is shared with the attorney in his or her professional capacity. \*

\* E. Perez & F. Dudok van Heel in: *Getting the Deal Through, Legal Privilege & Professional Secrecy*, question 3.

## Can the right to withhold a document be lost and if so how?

Yes. It can be lost by express or implied waiver. With regard to implied waiver, the District Court of The Hague ruled\* that legal privilege was not applicable to a specific (factual) report, considered that the report at hand had been given to the defendants in draft form at an earlier stage, and a reservation had been made that the report could be shared with the relevant authorities. The Court did not expressly state that this was an implied waiver, but this could be derived from the judgment. In addition, documents made to further illegality are not protected.

\* District Court of The Hague's interlocutory judgment of 14 January 2015, ECLI:NL:RBDHA:2015:248.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, although The Dutch Supreme Court established that exceptional circumstances can lead to 'the search for truth' prevailing over the professional legal privilege. These exceptional circumstances may, for example, appear in situations where an attorney is suspected of a serious criminal offense.



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# Poland



## Are parties to litigation required to disclose documents?

Yes. The process is governed by the Polish Civil Procedure Code ("CPC"). Parties are obliged to present, pursuant to a court order, at a specified time and place, a document in their possession constituting evidence of a fact relevant to the resolution of the case, unless the document contains classified information.\*

\* Article 248 of CPC

## What is a 'document' for the purposes of that process?

A document is defined very broadly as any carrier of information enabling the perusal of its contents.

## Is the requirement to provide documents automatic and when does it arise?

The requirement is not automatic. It arises on the basis of a motion filed by the party, accepted by the Court.

## Are there any exceptions when a document can be withheld from disclosure?

The obligation may be waived by anyone who, as regards the circumstances covered by the document, could refuse to testify as a witness or who holds a document on behalf of a third party who could oppose its production on the same grounds. However, presentation of a document cannot be refused where the holder or the third party is required to do so by at least one of

the parties or where the document is drawn up in the interest of the party seeking proof. Furthermore, a party may not refuse to produce a document if the harm to which they would have been exposed consists of losing the proceedings. Military personnel and civil servants who have not been released from the obligation to maintain the secrecy of classified information labelled as "restricted" or "confidential" and persons under the obligation to maintain the secrecy of Prokuratoria Generalna Rzeczypospolitej Polskiej [the Solicitors' Office of the Republic of Poland], may refuse to provide a document if the document could involve information which leads to a violation of this obligation. Moreover, all documents containing information about health, in particular mental health, may be withheld by the parties. No test is conducted.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Theoretically no. Both a client and a lawyer may claim that the document was produced in relation to a legal assistance. No test is conducted, however the reasons for refusal to provide a document are evaluated by the Court.

## Does this include lawyers who work within an organization as opposed to in private practice?

No, the above does not include in-house lawyers.

## Do parties to litigation have any other specific additional rights to withhold documents?

No.

## Can the right to withhold a document be lost and if so how?

Yes, if the obligation to maintain the secrecy has been waived by the proper authority.

## Do regulators and investigative bodies respect the concept of privilege?

Yes but with some limited exceptions, such as mistake or improper activity.



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# Portugal



## Are parties to litigation required to disclose documents?

No. However, as a general rule, under the Civil Procedure Code and within proceedings, the Court may order at a party's request or otherwise, that the other party or a third party presents any document(s) that may be in their possession.

## What is a 'document' for the purposes of that process?

According to the Civil Code, a document may be any object created by man in order to reproduce or represent a person, thing or fact.

## Is the requirement to provide documents automatic and when does it arise?

No. It only arises under a court order.

## Are there any exceptions when a document can be withheld from disclosure?

Within ongoing proceedings, there are some privileged documents that may be withheld under certain circumstances (for example, banking secrecy, tax secrecy or professional secrecy). Outside of proceedings, documents do not have to be disclosed at any time to the other party.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Yes. Legal privilege (privilege between lawyers and clients) may only be lifted in very exceptional cases by court order or upon request to the Bar Association.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, provided that lawyers within an organization are actively registered at the Bar Association and are practising law.

## Do parties to litigation have any other specific additional rights to withhold documents?

N/a – please see above.

## Can the right to withhold a document be lost and if so how?

Yes, as a result of a court order.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, even though they can apply to the Court to lift the privilege.



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# Slovakia



## Are parties to litigation required to disclose documents?

Basically yes. Everyone is obliged to disclose documents that are necessary for court proceedings. On the other hand, there is a legal opinion that in civil proceedings, the disclosure obligation does not apply to the parties to litigation, only to third parties.

## What is a 'document' for the purposes of that process?

There is no statutory definition. "Document" can be defined as any information which is originally recorded in writing or any electronic copy of such information. The disclosure obligation however applies in the wider sense, i.e. not only to documents but to all things that are necessary for court proceedings.

## Is the requirement to provide documents automatic and when does it arise?

No, disclosure is not automatic. It applies based on a court order. Any party may seek a court order. However, the Court will not grant the order if the motion is submitted later than necessary. Slovak law requires any party to specify and designate the documents to prove its arguments as soon as possible, generally before the first hearing. If the party seeks disclosure in the later stage of the civil proceedings and could have applied for it anytime earlier, the Court may deny the request for disclosure. Disclosure obligations apply specifically to third parties.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. The disclosure in civil proceedings applies primarily to third parties because there is case law which says it does not apply to parties to the litigation. In any event, anyone (either a party to litigation or a third party) may withhold a document if it is "privileged" or "confidential." Confidentiality of a document or its privileged status follows from various laws. The most common type of privileged documents are attorney-client privileged documents or those covered by business secrecy.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Basically, all documents between attorney and client are privileged since attorneys are bound by a confidentiality obligation. The attorney is released from this obligation, only with the consent of the client. Other exceptions include keeping statutory anti-money laundering obligations or where there is a dispute between the attorney and client.

## Does this include lawyers who work within an organization as opposed to in private practice?

Lawyers working for an organization (i.e. not attorneys) are considered as regular employees and have no special privileged status. All documents belong to the organization. Therefore, the Court will not call the lawyer to disclose the document, but the organization itself.

## Do parties to litigation have any other specific additional rights to withhold documents?

There is no separate category of 'litigation' privilege. All documents that are produced whether before or after the start of litigation and which are part of the judicial file are in a certain sense privileged. This privilege refers only to the judicial file. Right to inspect the judicial file is limited to the parties to the litigation (and their representatives). The judge may allow inspection to third parties only if there is a serious reason and the rights of the parties are not affected. However, if the document/communication is not in the judicial file, it is not protected. Also note that it does not mean that once a document is used in a piece of litigation, that a party cannot claim or challenge that it is privileged document or used in different litigation. There is however a right to withhold documents under a protection of party's interests category. This arises where disclosure could lead to a potential criminal investigation against a party or is close associates.

## Can the right to withhold a document be lost and if so how?

Yes. Privileged or confidential status can be lost if the document is no longer confidential or by express or implied waiver.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, although there are some attempts to challenge it.



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# Spain



## Are parties to litigation required to disclose documents?

No automatic disclosure takes place. In practice, if a party is interested in the other party disclosing certain documentation, they have the right to request such disclosure, following certain requirements contemplated in the Spanish Civil Procedural Law. Those prerequisites are mainly that: (i) the documents are not already available to the requesting party and, (ii) the documents are related to the subject matter of the proceedings. The request for disclosure must be accompanied by a copy of the requested document or, if the provision of that copy is not possible, by a description of its content with as much detail as possible. \*

*\*Articles 328.1 and 328.2 of the Spanish Civil Procedural Law.*

## What is a 'document' for the purposes of that process?

A document under the Spanish Civil Procedural Law can be public or private and, procedural or material. Public documents include: (i) resolutions and proceedings of all kinds of legal actions that have been carried out, as well as testimonies issued by the lawyers of the Administration of Justice, (ii) documents authorized by a notary, (iii) documents intervened by Associated Commercial Brokers and the certifications of the operations in which they have intervened, (iv) certifications issued by the Property and Commercial Registrars, (v) documents issued by public officials legally empowered, and (vi) documents that, with reference to archives and registers of state bodies, public administrations or other public law entities, are issued by officials authorized to attest to the provisions and actions of those bodies, administrations or entities. Private documents are those documents which are not considered public. Procedural documents include: (i) powers of attorney granted to court representatives, provided that the court representative intervenes in the proceedings and that the representation is not granted *apud acta*, (ii) documents that prove the representation of the party and, (iii) documents or opinions that prove the value of the litigious matter. Material documents include: (i) documents that the parties base themselves on when seeking judicial protection, (ii) interrogatories of the parties, public documents, private documents, judicial recognitions and interrogatories of the

witnesses, (iii) certifications and notes on any registry entries or on the contents of registry books, records or files, (iv) experts' opinions, and (v) reports prepared by professional legally authorized private investigators.\*

*\*Article 317 (public documents), Article 324 (private documents), Article 265 (material documents) and Article 264 (procedural documents) of the Spanish Civil Procedural Law.*

## Is the requirement to provide documents automatic and when does it arise?

Disclosure of documents is not automatic and can take place at different stages of the judicial procedure: (i) during the early stage, (ii) during the proceedings and/or (iii) during the pretrial hearing. The pretrial hearing is the last procedural moment when documents can be disclosed and submitted to the Court before trial, unless the information parties intend to disclose after the pretrial hearing is new or of new knowledge.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document may be withheld if it is privileged. A document can qualify as privileged for a number of reasons, for example, if it falls under the category of legal professional privilege. In Spain, legal professional privilege relates to the duty of the lawyers to keep confidential and respect the secrecy of, as a general rule, any spoken or written communications or documents that have been exchanged between the lawyer and the client. It also includes documentation or communications exchanged between lawyers. It is important to bear in mind that in Spain there is no express regulation on "privileged" documents or communications. The Court can also limit the exhibition of evidence to what it understands proportionate and, when determining that, it will take into consideration the legitimate interests of all parties to the proceedings and of interested third parties. In particular, it will consider: (i) the extent to which the claim or defense is supported by available facts and evidence which justify the request for disclosure, (ii) the extent and consequences of the disclosure of the evidence, (iii) the avoidance of indiscriminate searches for information that are

unlikely to be relevant to the parties to the proceedings and, (iv) the fact that the evidence sought includes confidential information, especially in relation to third parties. \* Other categories of privilege include privilege against self-incrimination and public interest immunity.

*\* The right of the Court to limit the exhibition of evidence is regulated in article 283 bis a) 3 of the Spanish Civil Procedural Law.*

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. As mentioned previously, Spanish lawyers must keep secret all facts or information they know as a consequence of their professional performance, which implies that, in general, they cannot be forced to make a statement in Court about them. This is applicable to any communication or document exchanged between the lawyer and the client, and lawyers cannot be released of secrecy obligations, not even by the client. However, there are two main exceptions in this regard: The first exception is imposed by the Spanish General Tax Law which, in its article 93, establishes that lawyers have the obligation to collaborate with the tax authorities and to communicate the information they require as long as it has tax implications, not being obliged to communicate any other information that does not contain data of a patrimonial nature or that belongs to the private sphere. The second exception is imposed by the SEPBLAC (Executive Service for the Prevention of Money Laundering). Lawyers are obliged by virtue of Law 10/2010, of April 28th, on the Prevention of Money Laundering and Financing of Terrorism, to communicate to SEPBLAC, any fact or operation when they are certain, or there is an indication, that money laundering is being committed and such communications with the executive services cannot be disclosed to the client.\*

*\*Professional confidentiality in Spain is regulated under article 24 of the Spanish Constitution, article 542 of the Organic Law of the Judiciary, in the Spanish Lawyers General Statute and in the Spanish Lawyers Code of Conduct.*

# Spain



## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. In general, in-house lawyers are subject to the same rights and obligations as lawyers in private practice as long as they are acting in their capacity of lawyer. This implies that they are also subject to legal professional privilege.\*

*\*This does not apply to European Commission Competition Law investigations.*

## Do parties to litigation have any other specific additional rights to withhold documents?

As previously explained, all communications between the client and the lawyer, including communications before the commencement of the proceedings as well as communications once litigation has started, are protected by legal professional privilege, which means that the lawyer has a duty to keep confidential and respect the secrecy of such communications. There is however no separate litigation exception which extends beyond lawyer and client communications, although in practice, in order to protect information exchanged between the client and/or the lawyer with third parties, it is normal to sign a confidentiality agreement or a statement is included establishing that the information is confidential.

With regards to trade secrets, the Commercial Courts of Barcelona published, in November 2019, a Protocol for the Protection of Trade Secrets containing rules of conduct for the homogenization of procedural practice in relation to information processing considered to be secret or confidential. The Protocol recalls that the requirements to be met in order establish that we are dealing with a trade secret (Article 1 of Law 1/2019 of Trade Secrets) are the following: (i) The information must be secret, not generally known, nor easily accessible; (ii) The information must have a business value, either real or potential, due to being secret; (iii) The information must be subject to reasonable protection measures adopted by its holder to maintain secrecy. According to the Protocol, the application for qualification as a trade secret carried out by the parties, must necessarily include the following: (i) Sufficient legal justification; (ii) Specification of the information to be protected and on what support; (iii) Location of the information; (iv) Protective measures requested;

(v) Adequate basis for compliance with the principles that have to be respected; and/or (vii) Persons who will be part of the circle of confidentiality. The Protocol emphasizes that Judges and Courts may also qualify ex officio information provided by the parties or third parties as a trade secret and take concrete measures for their protection.

## Can the right to withhold a document be lost and if so how?

Yes. The right to withhold a document can be lost if the document is made available to the public and thus, is no longer confidential, or by express or implied waiver by the local bar association. In addition, documents made to further illegality are not protected.

## Do regulators and investigative bodies respect the concept of privilege?

Generally, yes, however this depends on a case by case basis.



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# Sweden



## Are parties to litigation required to disclose documents?

Yes, under certain circumstances. The procedure of disclosing documents is regulated by the Swedish Code of Judicial Procedure.\* The document in question needs to be, among other things, assumed to be of importance as evidence. It is not only parties to the litigation who may be required to disclose this category of documents. Even a third party holding a written document that can be assumed to be of importance as evidence may be obliged to produce it, if certain prerequisites are met.

*\*Rättegångsbalken (´RB´) [Chap. 38 Section 2-8]*

## What is a ‘document’ for the purposes of that process?

The procedure includes first and foremost written documents. The term ‘written document’ is not further defined in the relevant provisions of the Swedish Code of Judicial Procedure. However, according to the case law of the Swedish Supreme Court, the duty to provide documents also includes information that is stored digitally. In addition to being a written document, the document needs to be, among other things, identifiable, assumed to be of importance as evidence and in possession of the party that the application is filed against. In addition to these prerequisites, the Court will do a proportionality test where the party’s interest of obtaining the document will be balanced against the other party’s interest of withholding the document.

## Is the requirement to provide documents automatic and when does it arise?

Disclosure is not automatic. In general, the party that wants a document to be disclosed needs to obtain a court order. Usually, a party can apply for a court order after a litigation process has been initiated.\* However, some documents must be disclosed without a court order. In the preliminary procedure, a party is obliged to produce all evidence that the party intends to invoke in the procedure. At the request of the counterpart, the party also needs to state what other evidence is in their possession.

*\*In general, an application for disclosure needs to be done in the District Court, as the chances of being successful with such an application if done for the first time in the Appeal Courts is limited. There is also a possibility to apply for disclosure even though a litigation process has not yet been initiated under Chap. 38 Section 3 RB. However, it’s only applicable under specific circumstances.*

## Are there any exceptions when a document can be withheld from disclosure?

Yes. There are several categories of documents that can be withheld from disclosure. Two categories of documents that can be withheld are documents subject to attorney-client privilege and, under certain circumstances, documents containing trade secrets.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Potentially yes. Such documents may be subject to attorney-client privilege. The Court cannot order disclosure of documents regarding circumstances that the client confided in the attorney (advokat)\* in conjunction with an assignment. Associate lawyers who work under the direction and supervision of the attorney (biträdande jurist) are also included.

*\*Attorneys (advokater) are a special category of lawyers in Sweden. The title may only be used by lawyers who have been admitted to the Swedish Bar Association (Sveriges advokatsamfund). The Swedish Procedural Code of Judicial Procedure charges the Swedish Bar Association with the responsibility to ensure that attorneys meet professional standards and thus establishes certain requirements for membership in the association.*

## Does this include lawyers who work within an organization as opposed to in private practice?

Lawyers employed as in-house counsel cannot be attorneys. Therefore, attorney-client privilege does not include lawyers who work within a company. However, documents from a lawyer working within an organization might, under certain circumstances, be withheld on other grounds.\*

*\*An example of this might be documents subject to ‘litigation privilege’ under Chap. 36 section 5 RB. The litigation privilege is considered to be significantly less extensive in comparison to attorney-client privilege according to Swedish legal scholars.*

## Do parties to litigation have any other specific additional rights to withhold documents?

Potentially yes as stated previously. Also, in general, documents containing trade secrets can be withheld from disclosure. When it comes to an application regarding disclosure of documents containing trade secrets, disclosure can only be granted under exceptional circumstances.

## Can the right to withhold a document be lost and if so how?

Potentially yes. Privilege can be expressly waived under certain circumstances.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, as far as we are aware.



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# Switzerland



## Are parties to litigation required to disclose documents?

Yes. A party must, upon request filed by the requesting party, disclose documents that are under its control, provided that there is an interest in evidence of the requesting party. A request for disclosure may not be used to search for information from the other party or, in particular, in order to bring the requesting party into the position of filing a claim against the requested party (a fishing expedition).

## What is a 'document' for the purposes of that process?

The Swiss Civil Procedure Code ("CPC") does not provide a definition for the term "document". The general understanding is that it covers all documents, electronic files and the like, that are suitable to prove legally significant facts. The CPC lists in a non-exhaustive manner, papers, drawings, plans, photos, films, audio recordings, electronic files and the like as "documents".

## Is the requirement to provide documents automatic and when does it arise?

The disclosure of documents is in principle subject to a request by a party. The document to be disclosed must be sufficiently specified in such request. The party under obligation must be able to determine, without doubt, which documents it must submit. In cases where the Court must ex-officio establish the facts and take the evidence required, no such request of a party is required. In addition to the above-mentioned procedural duty of a party to disclose documents in active litigation, the CPC provides for the possibility to file a request for "precautionary taking of evidence". The Court may, upon request, take evidence, in particular the production of documents, at any time before the main claim is filed, if the law grants the right to do so, or the applying party shows credibly that the evidence is at risk or that it has a legitimate interest.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A party in litigation proceedings (or a third party) has pursuant to CPC, the right to refuse the production of documents forming correspondence between such party and an attorney-at-law, provided that the correspondence relates to the

attorney's typical professional activity (legal advice and legal representation). However, it is not legally possible to shield existing facts (which are otherwise discoverable) from discovery by transmitting them to an attorney. A party may also refuse to cooperate, and therefore refuse to disclose documents, if the taking of evidence would expose a close associate of this party, as defined in the CPC, to criminal prosecution or civil liability. In addition, there are further situations based on which a party may, pursuant to the CPC, refuse to disclose documents. For the sake of completeness, the Court may take appropriate measures to ensure that taking evidence does not infringe the legitimate interests of any parties or third party, such as for example business secrets. Furthermore, a party (or third party) does not have to disclose documents whenever the Court denies a party's request for disclosure.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

The short answer is yes. In order to be privileged and therefore to allow a party not to disclose such documents, communication between a client and an attorney must relate to the typical professional activity of an attorney, namely legal representation and legal advice. On the other hand, communication with an attorney that relates to business activities such as asset management or other activities (for example, when the attorney is acting as a member of the board of directors or a trustee) is not protected. If the communication relates to the attorney's usual professional activities, the attorney-client privilege applies regardless of whether the communication originates from the client or the attorney.

## Does this include lawyers who work within an organization as opposed to in private practice?

Pursuant to Swiss case law, this exception only applies to communication exchanged with independent attorneys (ie not with in-house counsel), who are admitted to the bar, i.e. registered with a cantonal register and are permitted to professionally represent parties. Communication by the client with agents of the attorney and communication by agents of the client with an attorney also fall within the scope of attorney-client privilege under Swiss law, provided these

communications/documents relate to the typical professional activity of the attorney.

## Do parties to litigation have any other specific additional rights to withhold documents?

None other than listed previously.

## Can the right to withhold a document be lost and if so how?

Yes, whenever the Court grants a request for disclosure. Attorney-client privilege cannot be invoked in criminal proceedings if the attorney is also charged in the same context as the client. Furthermore, attorney-client privilege is lost when a third party, who is not obliged to maintain privilege, is involved in privileged communication between an attorney and a client and discloses the communication, since the secret character of such communication is usually lost. The provisions of the CPC relating to illegally obtained evidence are reserved.

## Do regulators and investigative bodies respect the concept of privilege?

In general yes.



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# Republic of Ireland



## Are parties to litigation required to disclose documents?

Yes. The process is referred to as Discovery. Where one party to litigation seeks sight of documents in the other party's possession or procurement, they will generally seek an order for Discovery. In addition, a party can seek an order for Inspection and Production of relevant documents that are referred to in the other party's pleadings or affidavits (other than discovery affidavits). Both applications are covered under Order 31 of the Rules of the Superior Courts ("RSC"), Order 32 of the Circuit Court Rules (for Circuit Court proceedings) and Order 45B of the District Court Rules (for District Court proceedings). Discovery or Inspection of documents will only be ordered where they are relevant and necessary for the fair disposal of the matter and for the saving of costs.

## What is a 'document' for the purposes of that process?

There is no definition of document in the Court rules or under statute, save that it includes all electronically stored information.\* However the Courts adopt a wide interpretation of document such that it encompasses written documents, printed documents, photographs, electronic information and any item from which information may be derived.

\*Order 31, Rule 12(13) RSC

## Is the requirement to provide documents automatic and when does it arise?

There is no automatic requirement to provide documents. Rather, one party applies to the other party for voluntary Discovery. In the absence of agreement to provide voluntary Discovery or in the event of a dispute over the extent of Discovery sought, the parties will apply to the Court for an Order for Discovery. In general, Discovery can only be sought after the pleadings are closed. There may be exceptions to this general rule, such that Discovery can be granted at an earlier stage i.e. pre-pleadings, however that will only arise in the most exceptional circumstances. Once Discovery is agreed or ordered, the party providing Discovery will list the documents on affidavit. Under the Court rules, the other party can then seek production of the documents listed, so that they can inspect them. In practice however, the party providing Discovery will supply copies of the documents with the affidavit of discovery.

## Are there any exceptions when a document can be withheld from disclosure?

Documents can be withheld from Discovery where they are privileged. Privilege is not an objection to Discovery in itself, but to the production of documents that have been discovered. Therefore, the party providing Discovery must inform the other side of the existence of the privileged documents, but that it will claim privilege from production. The main types of privilege are legal professional privilege, without prejudice privilege and public interest privilege. The burden rests on the party asserting privilege to establish that the documents are privileged.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Documents between a lawyer and a client, if they satisfy certain criteria, will fall within the legal professional privilege exception. Legal professional privilege includes two categories (litigation privilege and legal advice privilege.) Legal advice privilege will attach to a document where it constitutes or refers to a communication between lawyer and a client; it arises in the course of the professional lawyer-client relationship; it is confidential in nature; and it is for the purpose of giving or receiving legal advice. The Irish Courts draw a distinction between legal advice and legal assistance. The Court will seek to determine whether the dominant purpose of the communication is such that it relates to legal advice or legal assistance. If the dominant purpose is legal advice, the entire communication will prima facie be privileged. If the dominant purpose of the communication is legal assistance, then the document may have to be discovered.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, as long as they are acting in their capacity as legal advisors.

## Do parties to litigation have any other specific additional rights to withhold documents?

Yes. Litigation privilege will attract to communications between a client and lawyer where the dominant purpose of that communication is to prepare for actual or reasonably apprehended litigation. Litigation privilege differs to legal advice privilege where

'once privileged always privileged' applies as it only lasts as long as the litigation to which it relates lasts.\*

\* Per *Finlay Geoghegan J in University College Cork v The Electricity Supply Board [2014] 2 IR 525*

## Can the right to withhold a document be lost and if so how?

Yes. It can be lost where it is waived expressly or impliedly by the client. Waiver can arise where the client discloses privileged documents to the opposite side, or in certain circumstances to a third party. Once the document loses its confidentiality through disclosure, the client waives the right to assert privilege. Waiver also arises where the client sues their lawyer.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. Irish regulators and investigative bodies respect the concept of privilege. This may be in part due to the approach adopted by the Irish Courts to date, where litigation privilege has been held to apply to documents created in the context of tribunals of inquiry and regulatory investigations (i.e. non-adversarial proceedings).\*

\* see *Ahern v Mahon [2008] 4 IR 704; Quinn & Ors v IBRC & Ors [2015] IEHC 315; The Director of Corporate Enforcement v Leslie Buckley [2018] IEHC 51.*



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# Russian Federation



## Are parties to litigation required to disclose documents?

Yes. The process is called Disclosure and is governed by Russian procedural law.\* In cases where documents are not timely disclosed (generally before the hearing or as instructed by the Court), Russian Courts may draw adverse inferences and hold the breaching party liable for costs or impose a fine of up to RUB 100,000 (circa GBP 1,140). However, Russian law does not provide for any special pre-trial disclosure procedures.

*\*e.g. Article 65(3) of the Russian Commercial Procedure Code*

## What is a 'document' for the purposes of that process?

Russian law does not define the term "document" for these purposes. However, Russian case law suggests that it is anything in which information of any description is recorded.

## Is the requirement to provide documents automatic and when does it arise?

Yes. It is triggered automatically whenever the claimant initiates litigation. However, this is applicable to the documents that are relevant to the case. Additionally, any person participating in the case who is unable to obtain specific documents may ask the Court for an order for disclosure against the person that is likely to have them.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document may be withheld if it is privileged. Russian law recognizes various types of privilege (for example, privilege against self-incrimination, attorney-client privilege, audit secrets, etc).

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Potentially yes. Any documents and information relating to the provision of legal assistance by attorneys to clients constitute an attorney-client privilege.

## Does this include lawyers who work within an organization as opposed to in private practice?

No. The attorney-client privilege does not generally apply to relations between in-house lawyers (who are not attorneys) and clients. In-house lawyers may withhold documents if they constitute trade secrets, secrecy of correspondence, audit secrets, physician-patient privilege, etc.

## Do parties to litigation have any other specific additional rights to withhold documents?

There is no specific concept of 'litigation privilege'. Parties to litigation can however withhold documents on the basis of state secret privilege\* or trade secrecy, privacy of correspondence, audit secrets, physician-patient privilege or any other privilege recognized by Russian law.

*\*information may be classified as state secret in accordance with Russian Law No. 5485-1 (as amended on July 29, 2018) On State Secret dated July 21, 1993*

## Can the right to withhold a document be lost and if so how?

Yes. It can be lost if the document is no longer confidential (it applies, for instance, to information constituting state secrets). Declassification procedure must be specified by the company in an internal document usually titled "Trade Secrets Regulations". As for state secrets, the declassification procedure is described in Russian Law No. 5485-1 (as amended on July 29, 2018) On State Secret dated July 21, 1993. Decisions on declassifying information, which constitutes state secrets, are made by heads of relevant state bodies.

## Do regulators and investigative bodies respect the concept of privilege?

Generally yes but it has been known for investigative bodies to seize attorneys' documents in violation of the attorney-client privilege for the purposes of criminal investigation. This may lead to further litigation and resulting inadmissibility of evidence.



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# Jordan



## Are parties to litigation required to disclose documents?

At the outset, it is important to note that the notion and concept of 'disclosure' is not recognized under Jordanian legislation in the same manner as it is in common law countries, and parties to litigation are under no legal duty to disclose documents under Jordanian law. However, the Court has the power to order one of the parties to litigation to disclose specific documents, either through the exercise of the Court's power under Jordanian law or upon the request of the other party to the litigation. Specifically, the Court has the power under Article 100 of the Civil Procedures Law to compel any of the parties to litigation to submit any document that deems necessary to adjudicate a case. In addition, either party may, under the Jordanian Evidence Law, request the Court to compel the other party\*, or a third Party\*\* to submit any document that is listed in that party's evidence list. The request must specify, with details, the description of the document required to be submitted, its relevance and the circumstances showing that the other party is in possession of that document.

\* Article 21 of the Jordanian Evidence Law.

\*\* Article 25 of the Jordanian Evidence Law.

## What is a 'document' for the purposes of that process?

Whilst highlighting that there is no 'disclosure' duty per se under Jordanian law, Jordanian Evidence Law divides written evidence into: (i) official documents (whether prepared or only certified by a public official), (ii) regular unofficial documents (which are prepared and/or signed by the signatories to the document) and (iii) unsigned documents (such as diaries and notebooks). It should be noted that types of documents include original and copied documents, paper and electronic documents. The Jordanian Evidence Law provides varying evidential power depending on the type of the written evidence.

## Is the requirement to provide documents automatic and when does it arise?

There is no automatic requirement to provide documents. However, as stated previously, the Court has the power to order one of the parties to litigation to disclose specific documents, either through the exercise of the Court's power under Jordanian law or upon the request of the other party to the litigation. The Court's power to request, at its discretion, any party to submit any document may occur at any stage during the litigation process. However, the request by either of the litigating parties to compel the other party, or a third party, to submit a certain document must be submitted as part of that party's list of evidence. Such list, depending on the party's standing in the case, may only be submitted upon filing the case, along with the statement of response, or upon the submittal of the evidence rebutting the defendant's evidence.

## Are there any exceptions when a document can be withheld from disclosure?

As already mentioned, the concept of disclosure is not adopted under Jordanian law, and therefore, the related concept of withholding documents from disclosure is not also recognised. On the other hand, there are exceptions that a party may rely on in order to resist a request for an order to produce or submit documents. Under Article 106 of the Civil Procedures Law, a party to a dispute may claim that a document can be withheld from submission if it is deemed 'Immune'. It must be noted that the provisions of the said law does not define what falls under the concept of immunity. This is subject to the sole discretion of the Court, but generally refers to documents that contain official secrets under applicable laws. In addition, certain Jordanian laws provide that certain information is privileged, for example: (i) State secrets are protected under the Law on Protection of State Secrets and Documents No. 50 of 1971; (ii) Statements shared before a mediator pursuant to the Civil Mediation Settlement Law No. 12 of 2006; and (iii) Documents disclosed under the Investor Grievance Regulation No. 163 of 2019.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Jordanian legal system does not consider documents between a lawyer and a client 'privileged' per se. However, those documents are still protected in a manner similar to attorney-client privilege, through an expansion of the lawyer's duty of confidentiality and legal professional privilege, which is recognized by law. Therefore, lawyers may, in principle, refuse to testify on any information received from a client during the course of their professional duty. Similarly, submission or disclosure of any document that contains such confidential information may be refused. The Jordanian Evidence Law\* prohibits lawyers from disclosing any information, obtained in the course of their profession and related to their clients' affairs, even after the termination/expiry of their appointment as legal counsel, unless such disclosure is intended for the prevention of crime. Furthermore, the Jordanian Bar Association Law\*\* prohibits lawyers from testifying against their clients - in matters relating to cases in which they are appointed as legal counsel. Moreover, such law prohibits the disclosure of confided or entrusted secrets or such information obtained in the course of performing their professional duty before the Courts. In addition, the Jordanian Lawyers' Code of Conduct states that: "A lawyer must preserve his/her client's secrets, and shall owe him/her a duty of absolute secrecy; a duty which also applies to those that work in his office and, shall continue until after the end of his representation and; the lawyer may not accept representation that entails or may entail, disclosing such secrets or using the same, whether for the benefit of the lawyer or against the interests of the client, absent the client's knowledge and written consent, even if there were other resources that may be resorted to in order to reach those [sic] perform his duties in full towards his new or old client." The Jordanian Penal Code\*\*\* criminalizes the "disclosure of secrets obtained throughout the course of one's profession, absent any legal justification for such disclosure" and penalizes it by imprisonment of up to 3 years.

\* Article 37 of the Evidence Law

\*\* Article 60 of the Bar Association Law

\*\*\* Article 355 Penal Code

# Jordan



## Does this include lawyers who work within an organization as opposed to in private practice?

The Jordanian law does not distinguish on the basis of the lawyer's place of work, and does not distinguish, for purposes of the protection of client's information and secrets, between lawyers that work within an organisation as opposed to those in private practice.

## Do parties to litigation have any separate rights to withhold documents? If so, what is the legal test to fall within such a 'litigation' exception?

No such rights exist other than the above-mentioned exceptions where a party can withhold submitting certain documents. If the Court orders or approves the opponent party's request to disclose any document, the other party is obligated to submit the requested document immediately or within specified date assigned by the Court. If the opponent party denies that the document is under their possession, they should perform an oath before the Court that the document is not under their possession or that they do not know about the document. If the failing party does not submit the document or refuses to perform the oath the Court will consider the copy submitted by the other party as a true copy and if the party requesting the document does not submit a copy of the requested document, the Court will accept the description of this document as stated by the party requesting this document.

## Can the right to withhold a document be lost and if so how?

As stated previously, the notion of privilege and the right to withhold documents per se is not recognized under Jordanian. Nonetheless, a party who is not subject to a confidentiality or secrecy obligation may produce or submit such document by way of evidence.

## Do regulators and investigative bodies respect the concept of privilege?

The concept of privilege, stemming from the concept of disclosure, as stated previously, does not exist per se under Jordanian. However, the Courts tend to approve requests of inadmissibility of evidence should the party requested to submit the same be bound by a certain professional confidentiality undertakings or a secrecy obligation. Jordanian Courts generally consider the production of such documents as contrary to the law. Regarding regulatory and investigative authorities, in general, they do not appear to respect any professional secrecy.



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# Qatar



## Are parties to litigation required to disclose documents?

One party may request the other party to submit any exhibits or processed papers in that party's possession.\*

*\*Article 228 of the Civil and Commercial Procedure Law – Law No. 13 of 1990 ("Law No. 13 of 1990").*

## What is a 'document' for the purposes of that process?

A document is referred to as an "exhibit", a "paper" or "processed papers" that each party possesses.\*

*\*Law No. 13 of 1990 does not mention 'document'.*

## Is the requirement to provide documents automatic and when does it arise?

The requirement to disclose is not automatic as it is generally dependent on a court order. The disclosure requirement takes place after the claimant and the respondent have outlined their position in their statement of case. The application for a party requesting the other party to disclose or submit exhibits or papers, will need to clarify the following in relation to the exhibits or papers the other party is requested to disclose: (i) the description of the exhibit or paper; (ii) contents of the exhibit or paper; (iii) the occurrence relating to (ii); (iv) the evidence and circumstances for which the party believes that the other party possesses the exhibit or paper and; (v) the reason for requesting the other party to disclose the exhibit or paper.\*

*\* Article 228 of Law No. 13 of 1990.*

## Are there any exceptions when a document can be withheld from disclosure?

The Court may not order an exhibit or paper to be disclosed if the party who disclosed it has a legitimate interest to abstain from doing so. Article 233 of Law No. 13 of 1990 makes no further mention of what legitimate interest is, which suggests that the Court has absolute discretion as to what 'legitimate interest' means for the party.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

The concepts of legal professional privilege (or in other words, documents between a lawyer and a client) and without prejudice correspondence do not exist. The parties have the right to use any exhibits or papers which may support their position in civil litigation. Fundamentally, there is no express provision in Qatari Law which imposes a duty on lawyers not to disclose documents between a lawyer and a client. However, lawyers in Qatar are bound by duties of confidentiality, which incorporate concepts similar to legal professional privilege. Under Article 265 of Law No. 13 of 1990, the concept of legal professional privilege is limited to the professional relationship between a lawyer and a client in which the lawyer has a duty to keep the client's information confidential.

## Does this include lawyers who work within an organization as opposed to in private practice?

Although Qatari law is silent on whether the advice of in-house lawyers is privileged from disclosure, lawyers who work within an organization and in private practice have a duty to keep all documents and information received from a client confidential.\*

*\*Law 23 of 2006 regarding Enacting the Code of Law Practice Articles 51 and 57*

## Do parties to litigation have any other specific additional rights to withhold documents?

There is no separate 'litigation' exception but note previous comments on 'legitimate interest'. Such an interest is defined or decided by the Court, conveying the legal test for withholding documents.

## Can the right to withhold a document be lost and if so how?

The Court can order that an exhibit or paper be shown to both the party concerned and the Court, if it considers it necessary or appropriate. This can still happen even if such an order is in favor of a party who does not intend to use it as proof to an entitlement related to an exhibit or paper.\*

*\*It is assumed under Article 233 of Law No. 13 of 1990. There is no express provision relating to withholding a document and losing that right.*

## Do regulators and investigative bodies respect the concept of privilege?

It is unclear whether such bodies respect the concept of privilege, given that there is no express provision under Qatari Law to impose a duty on lawyers not to disclose documents relating to correspondence between a lawyer and a client. Nonetheless, regulators and investigative bodies appear to respect the concept of confidentiality for which the concept of privilege is limited to a lawyer's duties of confidentiality – the professional relationship between a lawyer and a client.



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# The Kingdom of Saudi Arabia



## Are parties to litigation required to disclose documents?

Parties to litigation are required only to submit the documents they are relying on in their submissions. However, parties to commercial disputes have the right to file an application for disclosure and inspection to the Commercial Courts.\*

*\*The process of disclosure and inspection is governed by article 46 of the Commercial Courts Law and by articles 46 and 47 of the Implementing Regulations of the Commercial Courts Law.*

## What is a 'document' for the purposes of that process?

'The Commercial Courts Law\* does not define a "document" for the purpose of disclosure. Therefore reliance will be on the linguistic definition of a "document".

*\*It is noted that the Commercial Courts Law accepts the submission of electronic evidence.*

## Is the requirement to provide documents automatic and when does it arise?

Disclosure is not automatic and is contingent upon the application of either party to the proceedings. Ordering disclosure is then subject to the Commercial Courts' discretion. An application for disclosure shall be relevant to the commercial deal (subject matter of the commercial dispute) and the application shall identify specific documents or classes of document to be disclosed. Also a party to Commercial Courts' litigation can apply to the Commercial Courts' with an application requesting a third party to a litigation or a governmental entity to submit documents under their possession.

## Are there any exceptions when a document can be withheld from disclosure?

Generally yes, but still subject to the Commercial Courts' discretion. Confidential documents can be withheld from disclosure. A document is confidential for the purpose of disclosure if, (i) it is identified to be a confidential document by any other applicable law, (ii) the parties to the litigation agreed that such document is a confidential document, or (iii) disclosing such a document will reveal a trade secret.\*

*\*The concept of legal professional privilege is not recognized in Saudi Arabia law.*

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Potentially yes, if disclosing such a document would reveal a trade secret. Although qualified lawyers in Saudi Arabia are under a confidentiality obligation toward their clients, they are relieved from this obligation if they are receive an official inquiry from official authorities.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes.

## Do parties to litigation have any other specific additional rights to withhold documents?

No.

## Can the right to withhold a document be lost and if so how?

Yes. If the law identifying such document as confidential has changed, the trade secret is no longer a secret or the party requested to disclose the document waives the right to withhold the document.

## Do regulators and investigative bodies respect the concept of privilege?

N/a.



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# UAE



## Are parties to litigation required to disclose documents?

**Laws of United Arab Emirates (“UAE”):** there are no obligations on parties to disclose documents in litigation conducted before the UAE civil Courts. There is no process of discovery and inspection. Parties are entitled to file documents which they wish to rely upon for their case. There is no obligation on a party to disclose a document which is damaging to its case. The Court will often appoint an expert to try to determine the factual matters in a case. The Court appointed expert can request copies of documents from either party, to help with report preparation. Whilst the expert cannot compel a party to produce a document, it is generally considered good practice to cooperate with the expert. There is a process, pursuant to Articles 18 and 19 of the UAE Evidence Law, to request the Court to compel the other party to disclose a particular document, but the process requires the document to be specified in the request and to be either a document in common between the parties or a document the other party is relying on. If the party against whom the request is made does not deny having the requested document and refuses to submit it to the Court, the Court may draw an adverse inference and assume that the requesting party’s allegations are true with respect to this document.

**Laws of the Dubai International Financial Centre (“DIFC”):** the DIFC Courts are based in one of Dubai’s free zones and adopt a common law approach to litigation. Litigation is to be conducted in accordance with the DIFC Procedure Rules (“the RDC”), which in many parts are similar to the England and Wales Civil Procedure Rules (“the CPR”). However, the provisions regarding disclosure under the RDC are different to the CPR and are more akin to the disclosure provisions for arbitration. Both parties disclose the documents upon which they intend to rely, using a “Redfern” schedule and then make “Requests to Produce” of the other party. A party can object to any request, providing its reasons in writing. A party seeking to object can rely on any of those reasons provided for by RDC 28.28. Applications can be made to the Court for an Order to Produce if the counterparty refuses to accept that the objections are reasonable. In determining the applications, the Court will usually be guided by whether the document in question is relevant to the issues in dispute and other factors such as the

reasonableness and proportionality of the request. The Court may compel a party to disclose documents requested. Consequently, parties may be required to disclose documents which are “adverse” to their case.

**Laws of Abu Dhabi Global Markets (“ADGM”):** the ADGM Courts are based in one of Abu Dhabi’s free zones and adopt a common law approach to litigation. Disclosure of documents, within the ADGM, is determined by the rules of the ADGM Court Procedures Rules 2016 (as amended) and Practice Direction No. 6. The default position under the rules of the ADGM is that “Standard Disclosure” of documents are to take place within 28 days after the defendants have filed their defense. Under “Standard Disclosure” all documents, that the parties will rely upon during the trial will also have to be disclosed using a “Redfern Schedule”. However, this default position may vary depending on the type of proceedings that the parties have entered into, the agreement between the parties and/or any directions ordered by the ADGM Courts. Standard disclosure will not apply in the following circumstances: (i) proceedings that use Rule 30 – Simplified Procedure to ask the Court a question which does not involve a dispute of fact; (ii) proceedings within the Small Claims Division; (iii) judicial Review Proceedings.

Additionally, parties also have the ability to apply to the ADGM Courts for “Specific Disclosure”. When applying for specific disclosure, the applicant must ensure that the request is focused and proportionate in nature. Furthermore, the applicant would also need to prove to the ADGM Courts that the documents requested are needed for the fair and effective trial of the proceedings. Consequently, Specific Disclosure may lead to disclosure/production of documents that may adversely affect a party’s case.

In circumstances where production of documents is disputed, applications can be made to the Court to rule on whether such production should take place. As with the DIFC, in determining the applications, the ADGM Court will usually be guided by whether the document in question is relevant to the issues in dispute and other factors such as the reasonableness and proportionality of the request.

## What is a ‘document’ for the purposes of that process?

The DIFC rules define a ‘document’ as “anything in which information of any description is recorded”. This includes electronic documents.\*

The ADGM’s Practice Direction No. 6, defines a ‘document’ as “anything in which information of any description is recorded and includes an electronic document”.

*\*see RDC 28.1. and 28.2*

## Is the requirement to provide documents automatic and when does it arise?

**UAE:** under Articles 18 and 19 of the UAE Evidence Law, parties can seek to compel the disclosure of a useful written document in limited circumstances. These are: (i) if the law allows them to ask for the submission or delivery of the documents; (ii) if the document is joint between the parties; or (iii) if the opponent based its claim on the document (but has not produced it) in the proceedings. Lawyers cannot disclose documents provided by their client without their client’s permission. If a Court-appointed expert demands the production of documents, it is generally considered good practice to cooperate with the expert.

**DIFC:** each party shall disclose: (i) all documents available to it on which it relies; and (ii) all documents it is required to produce by any Law, Rule or Practice Direction. This will include documents which the Court has ordered a party to disclose in response to the counterparty’s “Request to Produce”. A party may also inspect a document referred to in a statement of case, a witness statement, a witness summary or an affidavit. This includes expert reports. Procedurally, disclosure and inspection usually takes place at the same time. In other words, the list of documents and copies of the documents are provided to the counterparty at the same time, rather than waiting for the counterparty to identify those documents it would like copies of.

**ADGM:** disclosure of documents is regulated through Practice Direction 6 and Part 13 of the ADGM Court Procedure. The party must disclose documents that they will rely upon during the trial, except for documents that have already been submitted by the

# UAE



other party. Additionally, unless a specific disclosure order has been ordered by the Court and/or there has been a Court directed general discovery (rare), automatic disclosure will not take place. As in the DIFC, a party before the ADGM Courts will have the right to inspect documents referred to in an opposing party's statement of case, expert reports, the witness statements and/or summaries used or any affidavits submitted.

## Are there any exceptions when a document can be withheld from disclosure?

**UAE:** there are no obligations to disclose documents. Documents can be withheld at the party's discretion, unless it relies on the document, or the document is joint. If a party withholds a document, which is known to be in existence, when asked to produce it by a Court appointed expert, the expert will most likely bring this to the Court's attention.

**DIFC:** RDC 28.28 sets out the grounds upon which a party may rely when objecting to a party's Request to Produce documents. These are as follows: (i) lack of sufficient relevance or materiality; (ii) legal impediment or privilege under the legal or ethical rules determined by the Court to be applicable; (iii) unreasonable burden to produce the documents requested; (iv) loss or destruction of the document has been reasonably shown to the Court; (v) grounds of commercial or technical confidentiality that the Court determines to be compelling; (vi) grounds of special political or institutional sensitivity that the Court finds compelling; and (vii) considerations of procedural economy, proportionality, fairness or equality of the parties that the Court determines to be compelling. The party wishing to withhold production of documents must set out their reasons in writing and then it will be for the Court to decide. A party may also seek to withhold documents in reliance on the 'Public Interest Objection'. This requires an application to be made, which can be made without notice. The DIFC Court may invite representations from other parties/third parties before determining the application. It may ask the party withholding the document to produce it to the Court for its consideration.

**ADGM:** whilst the standard disclosure obligations only require parties to disclose the documents upon which they intend to rely, the counterparty may make requests to produce further

documents. If the recipient of these requests objects to the disclosure, they will need to substantiate their reasons as to why. The Court is likely to order disclosure if the documents are significant, and the request is considered focused, reasonable and proportionate (see Part C of Practice Direction 6).

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

**UAE:** All communications between an advocate and their client are confidential and there are very few exceptions to this rule. These include circumstances in which the disclosure is made pursuant to the client's written consent, pursuant to a court order or to prevent a crime. Importantly, litigation privilege on settlement correspondence is not recognised. As a result, "without prejudice" correspondence can be filed at Court, and relied upon by parties in litigation heard before a UAE Court.

**DIFC:** there is no DIFC legislation that deals specifically with privilege. However, as the DIFC Courts are based on a common law system, common law principles of privilege to correspondence and information sharing between lawyers and clients are generally adopted. This is evidenced by the case of *Georgia Corporation v Gavino Supplies (UAE) FZE* [2016] DIFC ARB 005. This is one of the very few cases determined published by the DIFC on the issue of privilege, where the English law test for "without prejudice" privilege was applied. Additionally, the DIFC Code of Conduct addresses the duty on lawyers, partners and employees to keep correspondence and information shared with the client confidential. Part C-8(6) of the Code fails to make a distinction between legal and non-legal communication. Consequently, it may be inferred that the obligation placed on attorneys, partners and employees is a general obligation. The only circumstances under which any correspondence and/or information shared between lawyers / partners/employees and their clients may be disclosed are as follows: (i) when the disclosure is authorized by the client; (ii) when the disclosure is ordered by the DIFC Court; and (iii) when the disclosure is required by law. This duty of confidentiality exists following the cessation of the attorney acting for the client. The concept of 'privilege' is also referenced at RDC 28.28 and in the glossary section of the DIFC Court Rules. It states that it is the right of a party to refuse the disclosure or production of a document, or

the rejection to answer questions on grounds of 'special interest' recognized by law. If the client has participated in settlement negotiations, such written communications can be kept confidential in DIFC litigation (Part E(7) of the DIFC Code of Conduct). The principle of "substance over form" will apply in determining whether the communication genuinely is without prejudice. (See Part E, SPD E-23(i) of the Supplementary Code of Conduct Practice Direction for further guidance).

**ADGM:** similar to the DIFC, the ADGM operates as a 'free zone' within the Emirate of Abu Dhabi, a free zone where English Law (common law) carries legislative authority. The ADGM Rules of Conduct address the confidentiality obligations of a lawyer. Specifically, lawyers have an obligation to keep information communicated to them, by their client, confidential. However, the language used in the Rules of Conduct, similar to the DIFC, do not differentiate between legal and non-legal advice. Consequently a broad overarching duty is placed on lawyers and their duty to keep information and/or correspondence between them and their clients confidential. The only circumstances under which confidential information may be released, are as follows: (i) authorization by the client; (ii) order of the ADGM Courts; (iii) required by law. Due to the nature of the ADGM Courts, and the use of English Law when considering privilege, litigation privilege will apply to communications or documents which are: (i) confidential in nature; (ii) produced at a time when litigation is either in process or there is a reasonable prospect of litigation commencing; (iii) the dominant purpose for the creation of the information/document was for its use in or to obtain legal advice in order to assist with litigation.

# UAE



## Does this include lawyers who work within an organization as opposed to in private practice?

Lawyers in the region are governed by, amongst others, Article 41, 42 and 44 of Law No. 23 of 1991, which contain provisions similar to attorney-client privilege. However, these rules do not necessarily include in-house counsel as in-house counsel are considered to be providing their services on an employment basis. All employment relationships are governed by Law No. 8 of 1980 which does not contain any provisions in relation to privilege. However, Article 120 of Law No.8 of 1980 does prescribe a duty on the employee not to reveal secrets of his/her employer.

Under the Rules of the DIFC, there is no specific obligation and/or rules/obligations of privilege that apply to in-house lawyers. Given the common law nature of the Courts, reference is routinely made to English case law principles. However, if the governing law of the dispute belongs to another jurisdiction, the Courts may also consider the approach to privilege in that relevant jurisdiction.

English law is directly applicable in the ADGM. Consequently, English law principles will apply when determining the extent to which the rules/principles of privilege extend to the actions of in-house counsel. The key authorities include - *Alfred Crompton v Customs & Exercise (No.2) [1972] 2 QB 102*, *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* and *The RBS Rights Issue Litigation 2016*. These cases are authority for the well-established principle that not all recipients of legal advice within a company are deemed to be the "client" of the in-house advice. Consequently, only when in-house advice is sent to a limited and specified group of employees of the company, shall the benefits of privilege apply.

## Do parties to litigation have any other specific additional rights to withhold documents?

This is not applicable in the UAE – there is no default obligation to disclose documents. For the position in the DIFC and ADGM see above.

## Can the right to withhold a document be lost and if so how?

**UAE:** there are only limited circumstances in which a party may be required to disclose documents.

**DIFC:** generally the right to withhold a document may be lost by waiver. However, there is little guidance or precedent available as to precisely when this may happen and most of the authorities are fact specific. The Courts are likely to take into account the facts of the case, the relevant practitioner's home jurisdiction and the law governing the dispute.

**ADGM:** there is little authority available regarding the issue of when the right to withhold might be lost. However, as English common law and various English statutes are directly applicable in the ADGM, we anticipate Judges relying on English case law and principles to determine any disputes on the issue.

## Do regulators and investigative bodies respect the concept of privilege?

**UAE:** there is little guidance on the rights of onshore regulators and investigative bodies to obtain privileged or confidential lawyer/client communications. However, it is generally accepted that such documents are at risk of being seized by the authorities should they require them.

**DIFC:** the concept of privilege being recognized by regulators will depend on the regulator making the request and the source of its powers. The Dubai Financial Services Authority for example has the power to request any documents required under the Regulatory Law DIFC Law No.1 of 2004, s.73, if it considers such documents "necessary or desirable to meet its objectives". This could include privileged communication.

**ADGM:** similarly, the concept of privilege being recognised by regulators in the ADGM will depend on the regulator making the request and the source of its powers. For example, Section 210 and 211 of the ADGM's Financial Services and Money Regulations 2015, along with Clauses 5.6.9 and 5.6.10 of the ADGM's Financial Services & Regulatory Authority ("FSRA") Guidance and Policy Manual (GPM), state that the FSRA will recognize valid claims for legal professional

privilege made by the privilege holder or a third party seeking to assert the legal professional privilege claim on behalf of the privilege holder. There are however exceptions to the right not to disclose privileged documents, which are as follows: (i) where the person to whom, or by, or on behalf of whom, the communication was made is a corporate body that is subject to winding-up, the liquidator of the body consents to the lawyer complying with the requirement; or (ii) where the person to whom, or by, or on behalf of whom, the communication was made consents to the lawyer complying with the requirement. Consequently, a demand made by the FSRA for a document that is subject to legal professional privilege would not have to be complied with, unless one of the above exceptions applies. There are also specific confidentiality provisions which apply to the FSRA within the ADGM and that are contained within their own Confidentiality Policy. In the case of legally enforceable demands relating to civil and/or commercial matters, the FSRA, where appropriate, can assert any of its legal rights and/or privileges to resist disclosure and protect its confidential information (for example through Public Interest Immunity). However, in criminal matters, the FSRA are required to disclose all information, including information that is determined to be confidential.



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# Hong Kong



## Are parties to litigation required to disclose documents?

Generally yes. The process is called Discovery and Inspection and is governed by the Hong Kong Civil Procedure, specifically by Order 24 of the Rules of the High Court (Cap 4A) ("RHC"). There is also a pilot scheme for Discovery and Provision of Electronically Stored Documents for cases in the Commercial List, which concerns rules on electronic discovery (see Practice Direction SL1.2). Discovery is a stage at which the parties disclose documents relating to matters in question in the action that are in their possession, custody or power. A party to whom a document has been disclosed has the right to inspect that document. The duty to provide Discovery continues until the action is finally determined.

## What is a 'document' for the purposes of that process?

A document for the purposes of Discovery means anything upon which evidence or information is recorded in a manner intelligible to the senses or capable of being made intelligible by the use of equipment.\* The document will have to relate to a matter in question in the action in order to be subject to Discovery.

*\*Practice Direction SL1.2 defines "Document" as including "Electronic Documents".*

## Is the requirement to provide documents automatic and when does it arise?

Yes. Generally, in most commercial civil proceedings, parties are required to give Discovery within 14 days of close of pleadings (ie after the parties have set out their respective positions in formal documents filed at Court) (RHC Order 24, Rule 2). However, a party may apply within that period to the Court to limit its discovery obligations, such as limiting the scope of documents to be disclosed, or to object to giving discovery on the ground that it is not necessary. A party can also apply under RHC Order 24, Rule 7 for an order to compel the other side to produce a specific document. The Court may order such discovery if it considers it necessary.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. For example, a document may be withheld if it is privileged. However, a description of the document has to be disclosed in a "list of documents" to be provided to the other side. There are several

categories of privilege but the most common are legal professional privilege (which generally covers legal advice privilege - communications between lawyer and client and litigation privilege - generally communications made when litigation is contemplated/underway) and without prejudice privilege (which protects communications made in a genuine attempt to settle a dispute). Other types of privilege include privilege against self-incrimination, public interest immunity, joint privilege and common interest privilege.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Usually yes. Documents evidencing communications between a lawyer and a client will generally fall within the legal advice privilege category even where no litigation is in existence or contemplated. The test is that the information communicated must be confidential and must be for the sole or dominant purpose of giving or receiving legal advice or assistance in a relevant legal context. Internal documents prepared by the client's employees, even if they are not communicated to the client's lawyer, may also be privileged, if the sole or dominant purpose of their production was to obtain legal advice.\*

*\*See Citic Pacific Ltd v Secretary for Justice & Anor (No.2) [2015] 4 HKLRD 20.*

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, as long as they are acting in the capacity of a lawyer. Those who work under the direction and supervision of the lawyer may also be included.

## Do parties to litigation have any other specific additional rights to withhold documents?

Potentially yes under the litigation category. This category is broader than that for legal advice privilege. It covers confidential documents passing between a lawyer and a third party or between a client and a third party, which were created after litigation was either in existence or in reasonable prospect, provided that they are for obtaining evidence or legal advice for the dominant purpose of that litigation. It generally covers civil or criminal proceedings (domestic and foreign) and can include arbitration, tribunal proceedings or investigations but they must be adversarial not inquisitorial.

## Can the right to withhold a document be lost and if so how?

Yes. The right of privilege belongs to the client. Privilege can be lost if the document is no longer confidential. It can also be lost if expressly, impliedly or accidentally waived. In addition, documents made to further illegality or fraud are not protected. Whether or not there has been a waiver is to be determined objectively. It does not matter whether a party intends to waive privilege in a particular document. Hong Kong Courts recognize the concept of partial waiver of privilege.\* A party may limit the scope of the waiver to a specific purpose and to designated parties (for example, when disclosing a privileged document to a regulator to explain the client's position).

*\* See Citic Pacific Ltd v Secretary for Justice & Anor [2012] 2 HKLRD 701.*

## Do regulators and investigative bodies respect the concept of privilege?

Yes. Regulators and investigative bodies generally respect the concept of privilege. The right to confidential legal advice is protected under Article 35 of the Basic Law. Furthermore, the privilege against self-incrimination is protected under section 65 of the Evidence Ordinance.



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# Japan



## Are parties to litigation required to disclose documents?

Generally no. A party to litigation is required to disclose documents when, upon request from the opposing party, the Court issues an order to submit those documents pursuant to the Code of Civil Procedure ('the Code') [Article 223]. However, the scope of the disclosure required under the Code is much narrower than that in other common law jurisdictions.

## What is a 'document' for the purposes of that process?

The relevant disclosure provisions in the Code apply not only to hard copy documents, but also to any other materials containing recorded information, including drawings, photographs, audiotapes, and videotapes [Article 231]. A commentary to the Code regarding electronic documents explains that both a printed copy and a recording device are subject to the relevant disclosure provisions in the Code.

## Is the requirement to provide documents automatic and when does it arise?

No. Disclosure is not automatic and is generally dependent on the Court issuing a disclosure order following a request from the opposing party in accordance with the Code, as mentioned previously.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. The Code provides several circumstances under which the Court will not issue an order to submit documents [Article 220]. Specifically, a disclosing party may withhold a document from disclosure if it: (i) contains information, for which the disclosing party or any other person who has a certain relationship with the disclosing party is likely to be the subject of criminal prosecution or conviction; (ii) contains confidential information relating to a public official's duties, the disclosure of which may harm the public interests or substantially hinder the performance of a public duty; (iii) contains information obtained by persons who are or were lawyers ("bengoshi" in Japanese), registered foreign lawyers ("gaikoku-ho-jimu bengoshi" in Japanese), patent attorneys, notaries or various other professionals (collectively "Qualified Professionals") through the performance of their duties, and if the Qualified Professionals are not released from

the duty of confidentiality for that information; (iv) contains confidential professional or technical information, and if the disclosing party is not released from the duty of confidentiality for that information; (v) was prepared solely for the use of the disclosing party; or (vi) is related to a criminal case or a juvenile protective case.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Generally yes. The Code does not contain any concept of attorney-client privilege. However, as mentioned previously, the Code provides an exemption from disclosure if a document contains information obtained by Qualified Professionals in the course of their duties and if the Qualified Professionals have not been released from the duty of confidentiality [Article 220 (iv) (c)].

## Does this include lawyers who work within an organization as opposed to in private practice?

Case law does not contain any precedent on this issue. However, the Code does not explicitly exclude in-house lawyers from the scope of Qualified Professionals. Thus, the question under the Code is likely to be whether in-house lawyers are classified as lawyers, registered foreign lawyers, or any other type of Qualified Professional.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. The Code does not contain any concept of work product privilege or litigation privilege.

## Can the right to withhold a document be lost and if so how?

Generally no. The Code does not contain a general concept of waiver regarding the entitlement to withhold documents from disclosure. However, a document that satisfies conditions (ii) or (iv) (as mentioned previously) is likely to be subject to disclosure if the document becomes public because those conditions only protect confidential information. Additionally, a document that satisfies condition (iii) (as mentioned previously) will be subject to disclosure if the Qualified Professionals are released from the duty of confidentiality.

## Do regulators and investigative bodies respect the concept of privilege?

Basically no. As mentioned, the Code does not contain the concept of attorney-client privilege. However, amended legislation (in force from 25 December 2020) creates an exception and confers a privilege regarding attorney-client communications in cases under the Antitrust Leniency Program. The privilege is similar to the attorney-client privilege, but is limited to communications with lawyers ("bengoshi" in Japanese). The privilege does not apply to communications with in-house lawyers (unless they are instructed by their employers to conduct their jobs independently and outside of the reporting line) and/or foreign lawyers.



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# People's Republic of China



## Are parties to litigation required to disclose documents?

In general, a party has the burden to provide evidence for its claim (Article 64, the Civil Procedure Law of the PRC) but there are exceptions to this principle. The Court at its discretion may order the production of documents. When a party is unable to collect evidence due to objective reasons, or if the Court thinks the evidence is necessary for the trial of the case, the Court can investigate and collect the evidence (Article 64, the Civil Procedure Law of the PRC). What constitutes an objective reason is in the Court's discretion. Examples include where (i) the evidence is archived by state authorities and the party has no right of access to it; or (ii) the evidence contains national secrets, trade secrets or personal information. In practice, the Court rarely exercises this right. The party with the burden of proof may apply to the Court for an order that another party produces as evidence, at the application of a party, certain documents in that second party's possession. The applicant has to bear any expenses arising from the production. If the opposing party fails to comply with the order without proper reasons, the Court will accept the content of the documentary evidence as asserted by the applicant (Article 112, the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC). On 14 October 2019, the Supreme People's Court passed a decision on revising the Certain Rules on Evidence in Civil Proceedings ("2019 Rules on Evidence"). The 2019 Rules on Evidence further stipulate that a party must produce certain classes\* of documentary evidence under its control at the Court's discretion or upon another party's successful application. The 2019 Rules on Evidence came into effect on 1 May 2020.

## What is a 'document' for the purposes of that process?

The classes include: (i) documentary evidence cited by the party in possession of it in litigation; (ii) documentary evidence produced for the benefit of the applying party; (iii) documentary evidence which the applying party has the right to access and obtain in accordance with the law; (iv) account books and original vouchers for bookkeeping; and (v) other documentary evidence which the Court considers necessary.

## Is the requirement to provide documents automatic and when does it arise?

No, as mentioned previously. If a party intends to make an application for the Court to order the production of evidence, it must do so before the expiration of the time period for adducing evidence (Article 112, the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC). The time period may be designated by the Court, or be agreed upon the parties subject to the Court's approval (Article 51, 2019 Rules on Evidence). If the Court designates a time period for adducing evidence, it shall be: (i) no less than 15 days for cases subject to the ordinary procedure at first instance; or (ii) no less than ten days for cases at second instance where the parties provide new evidence; or (iii) no more than 15 days for cases subject to the summary procedure; or (iv) no more than seven days for small claims cases.

## Are there any exceptions when a document can be withheld from disclosure?

The concept of legal professional privilege is not recognized under PRC law. A people's Court has the authority to investigate and collect evidence as necessary. Such investigation and collection of evidence shall not be refused (Article 67, the Civil Procedure Law of the PRC). Anyone who falsifies, conceals or destroys evidence, regardless of which side of a case they are on, may be subject to criminal investigation and sanction (Article 111, the Civil Procedure Law of the PRC). There are situations when a document cannot be disclosed. For example, a lawyer must keep confidential the national secrets and trade secrets that they learn as a result of their professional practice. In addition, a lawyer has an ethical duty in civil proceedings to "keep confidential facts and information learned during the representation which clients are unwilling to disclose". An exception to this rule is when the information involves crime or its disclosure may severely impair national or public security, or cause serious personal injury (Article 38, Lawyers Law of the PRC). The Court also has the right to order the production of a document which contains state secrets, business secrets, or may compromise the privacy of the parties or any third party, but any examination of evidence by the Court based on such a document will not be held publicly (Article 47, 2019 Rules on Evidence). Therefore, a lawyer's duty of confidentiality is not absolute.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

As mentioned previously, there is no concept of legal professional privilege under PRC law.

## Does this include lawyers who work within an organization as opposed to in private practice?

As there is no concept of legal professional privilege under PRC law, this is not applicable.

## Do parties to litigation have any other specific additional rights to withhold documents?

There are situations when a document cannot be disclosed as set out previously but there is no separate 'litigation' exception.

## Can the right to withhold a document be lost and if so how?

There is no general right to withhold a document.

## Do regulators and investigative bodies respect the concept of privilege?

Not applicable as the concept of privilege is not recognized.



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# Singapore



## Are parties to litigation required to disclose documents?

Generally, yes. The process is called Discovery and Inspection.\* The Court may order any party in litigation proceedings to make and serve on any other party a list of the relevant documents which are or have been in its possession, custody or power. A party who has served a list of documents on any other party must allow the other party to inspect the documents referred to in the list and take copies. The duty to provide Discovery continues up to the conclusion of the case.

*\*Supreme Court of Judicature Act (Chapter 322, Section 80), Rules of Court, Order 24*

## What is a 'document' for the purposes of that process?

A document is defined in s 3(1) of the Evidence Act (Cap 97, 1997 Rev Ed) to include, "in addition to a document in writing: (i) any map, plan graph or drawing; (ii) any photograph; (iii) any label, marking or other writing which identifies or describes anything of which it forms a part, or to which it is attached by any means whatsoever; (iv) any disc, tape, sound-track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; (v) any film, negative, tape, disc or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and (iv) any paper or other material on which there are marks, impressions, figures, letters, symbols or perforations having a meaning for persons qualified to interpret them (any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter). Documents that are subject to Discovery also include electronically stored documents. A wide range of electronic documents have been held to constitute a "document" for the purposes of Discovery and Inspection, including word processor documents, spreadsheets and presentation slides, emails and attachments, recording devices such as hard disks, computer databases and metadata information. Supreme Court Practice Directions, Part V, para. 46(1) provides that internally stored metadata information is discoverable as part of the electronically stored document in which it is embedded, whereas externally stored metadata information is discoverable as separate documents.

## Is the requirement to provide documents automatic and when does it arise?

Discovery is not automatic and is generally dependent on a court order that is made at the first substantive procedural hearing. Discovery generally happens after that hearing. In addition, a party can ask the Court, at any time (although usually it is after inspection has taken place) for an order for another party to provide disclosure of specific documents or classes of document (ie Specific Discovery). It is also possible for a party to apply to Court for an order for disclosure against a party, who is likely to become a party to litigation, prior to the commencement of proceedings and/or for an order for disclosure against a third party. If a party refers to a document in its pleadings, the other party may file a Notice of Inspection to inspect the document.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document may be withheld from Discovery on grounds of legal professional privilege, which includes legal advice privilege and litigation privilege. A document may also be withheld on grounds of without prejudice privilege, which protects communications made in a genuine attempt to settle a dispute.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Potentially yes. Communications/documents between a lawyer and a client could fall within the legal advice privilege category, if the document is made in confidence for the purpose of giving or receiving legal advice. Separately, communications/documents that are made where there is a reasonable contemplation of litigation may be subject to litigation privilege. The communications/documents must be made for the dominant purpose of litigation.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, legal advice privilege extends to communications/documents created between in-house lawyers (ie lawyers who work within an organization as opposed to in private practice) and their clients, where the communication/document created is for the purpose of giving or receiving legal advice.

## Do parties to litigation have any other specific additional rights to withhold documents?

Potentially yes, as mentioned above, under the litigation privilege category. This covers confidential documents between a lawyer and a third party or client and third party which came into existence after litigation was reasonably contemplated, and the documents were created for the dominant purpose of obtaining information or advice in connection with that litigation.

## Can the right to withhold a document be lost and if so how?

Yes, Privilege can be lost if the document is no longer confidential or by express or implied waiver. Documents made further to illegality are not protected.

## Do regulators and investigative bodies respect the concept of privilege?

They generally do respect the concept of privilege, but disputes may arise as to whether documents sought by the regulators/investigative bodies are in fact privileged. The Singapore High Court decision of *Ravi s/o Madasamy v Attorney-General [2020] SGHC 221* clarifies the test to be applied in such disputes and the process by which the police or the Attorney-General's Chambers should deal with documents which are subject to claims of privilege.



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# Angola



## Are parties to litigation required to disclose documents?

No. However, as a general rule, under the Civil Procedure Code and within proceedings, the court may order upon a party request that the other party or a third party presents any document(s) that may be in their possession.

## What is a 'document' for the purposes of that process?

According to the Civil Code, a document may be any object created by man in order to reproduce or represent a person, thing or fact.

## Is the requirement to provide documents automatic and when does it arise?

The requirement to provide documents is not automatic. It is ordered by the Court at the request of the other party to litigation.

## Are there any exceptions when a document can be withheld from disclosure?

Within ongoing proceedings, there are some privileged documents that may be withheld under certain circumstances, for example: banking, tax, and professional secrecy.

Outside of proceedings, documents do not have to be disclosed at any time to the other party.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Yes. Legal privilege (privilege between lawyers and clients) may only be lifted in very exceptional cases by Court order or upon request to the Bar Association.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, provided that lawyers within an organisation are actively registered at the Bar Association and practise law.

## Do parties to litigation have any other specific additional rights to withhold documents?

N/a.

## Can the right to withhold a document be lost and if so how?

Yes, as a result of a court order.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, it can be lost even though they can apply to a court to lift the privilege.



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# Egypt



## Are parties to litigation required to disclose documents?

There is no pre-trial discovery system in Egypt. Having said that, parties to litigation may be obliged to produce documents that are under their control, if the requirements set out in the Evidence Law (Law No. 25 of year 1968) are met.

## What is a 'document' for the purposes of that process?

A 'document' (for the purposes of documentary evidence that may be eligible to be produced in the event that it is relevant to the case at hand and not privileged and also meets any of the grounds that are discussed later) is any type of written proof being letters, contracts, licenses, certificates, or other writings, whether physically or electronically produced.

## Is the requirement to provide documents automatic and when does it arise?

As previously mentioned, under Egyptian Law, there is no automatic disclosure of documents. Nevertheless, Article 20 of the Evidence Law provides three grounds under which the request for document production by a party (or third parties, pursuant to article 26 thereof) could be approved by the Court: (i) if the law permits the request for providing or delivery of a document (e.g. article 28 of the Egyptian Trade Law entitles the Court, upon a party's request, to order the other party, in this case a trader, to produce its commercial books); (ii) if the requested document is common between the parties. In other words, if the document is in the interest of the parties or serves as a proof of their obligations and their mutual rights, (iii) if the document subject to request was relied on by the opposing party at any stage of the proceedings. In addition, Article 21 of the Evidence Law sets out the following requirements to be satisfied in order for any application for document production be considered before the Court: (i) the description of the requested document, (ii) the subject of the requested documents in detail, (iii) the fact that is alleged to be proved by the requested document, (iv) the circumstances which prove that the requested document is under the possession of the opposing party, (v) the reason for which the opposing party shall produce the requested document. It is worth mentioning that the request for document production can take place at any moment during trial (or even during an appeal as per article 26 thereof).

## Are there any exceptions when a document can be withheld from disclosure?

Documents that are privileged (as will be explained later) and not relevant to the case at issue cannot be disclosed. In addition, if an applicant for document production fails to provide sufficient evidence and information to satisfy Articles 20 and 21 of Law of Evidence, or the respondent to the application proves otherwise, such document production would not be requested by the Court. It is also worth noting that if a party denies the possession of a requested document/s, they would be ordered to take an oath in front of the Court stating that the requested document/s do not exist nor they are aware of their existence. The Court may, upon failure/ refusal of a party to produce the ordered document/s or taking of the oath, consider a photocopy (if available) of the requested document as evidence that it exists (giving it a higher evidentiary value), or establish their decision (if no photocopy submitted by the applicant) based on the information and content description provided by the document production applicant.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Lawyers in Egypt are strictly bound by the attorney-client privilege. Hence, all information communicated to a lawyer by the client, whether within a legal advice context or a litigation process, cannot be disclosed by the said lawyer, unless the client otherwise so instructs (i.e. a waiver) or the information is communicated with the purpose of committing a criminal offence. (article 66 of evidence law; article 79 of advocates law). For the avoidance of doubt, this privilege cannot be invoked unless the client has previously hired the said lawyer and communicated to them the would-be privileged information in this capacity.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. Information communicated to in-house lawyers is covered by the attorney client- privilege, so long as the relationship between the parties is a client to attorney relationship (i.e. the documents and information is provided to the lawyer in their capacity as an attorney not as a mere employee).

## Do parties to litigation have any other specific additional rights to withhold documents?

As stated previously there is a general principle under the law that any professional (such as doctors, lawyers, and accountants), who receives confidential information by virtue of their profession may not disclose such information unless the law mandates to do so. As to the legal test (for lawyers), it is the same as stated previously. However there is no separate category of 'litigation' privilege.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege may be lost by express or implied waiver, where information is communicated with the purpose of committing a criminal offence, or if "confidential" information falls within the public domain.

## Do regulators and investigative bodies respect the concept of privilege?

Regulators and investigative bodies are legally bound by the concept of privilege as described. Any evidence extracted in breach of these legal privileges shall be declared inadmissible by the Court.



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# Kenya



## Are parties to litigation required to disclose documents?

Yes. In civil proceedings, pre-trial discovery is governed by section 22 of the Civil Procedure Act (Cap. 21 of the Laws of Kenya) and Order 11 of the Civil Procedure (Amendment) Rules, 2020 ("the Rules"). There are sanctions for non-compliance. The Rules require parties to file and serve documentary evidence with their pleadings. All documents relevant to the matter but not subject to privilege should be disclosed. Order 14 of the Rules empowers the court to order for production, impounding and return of documents. In criminal proceedings, the Guidelines Relating to Active Case Management of Criminal Cases makes oblige the prosecution to supply or give reasonable access to all parties, and the court all materials to be relied upon during the trial. This obligation does not extend to the accused person or the defence.

## What is a 'document' for the purposes of that process?

The Interpretation and General Provisions Act (Cap. 2 of the Laws of Kenya) defines a 'document' to include any type of written proof being an publication, or electronic document and any matter written, expressed or described on any substance by means of letters, figures or marks. It includes its derivatives such as copies, counterparts, excerpts, and duplicates.

## Is the requirement to provide documents automatic and when does it arise?

The Interpretation and General Provisions Act (Cap. 2 of the Laws of Kenya) defines a 'document' to include any type of written proof being an publication, or electronic document and any matter written, expressed or described on any substance by means of letters, figures or marks. It includes its derivatives such as copies, counterparts, excerpts, and duplicates.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Documents that are subject to privilege must be discovered but are not disclosed to the opposing party. Privileged documents include the following: (i) documents implicating a party in a criminal offence, which is protected by the privilege against self-incrimination (ii) documents written by one spouse to another, protected by marital privilege (iii) a written offer made without

prejudice with the intention of settling a matter (iv) documents written between an attorney or advocate to their client, which is generally protected by legal professional privilege, provided that the requirements are met (v) documents which fall under privilege in public interest (privilege of official communication) (vi) section 6 of the Access to Information Act, Act No. 31 of 2016 prohibits disclosure of certain information or documents that, if disclosed, could cause material harm to, amongst other things: - the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Yes. The Evidence Act (Cap. 80 of the Laws of Kenya) prohibits advocates from disclosing privileged advocate-client communication. The privilege covers contents and conditions of documents within the advocate's knowledge as well as advice rendered by the advocate to the client. The obligation for non-disclosure applies even after the employment of the advocate has ceased. An advocate is only permitted to disclose privileged communication with the express consent of the Client. The duty for non-disclosure of privileged information extends to the interpreters, clerks and employees of the advocate. The legal test applied is whether the contents or condition of any document or confidential communication was made to the advocate in the course and for the purpose of his employment as such advocate, by or on behalf of his client.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. This generally includes all lawyers working in their professional capacities as advocates whose names are entered onto the Roll of Advocates. It also applies to interpreters, clerks or employees of such advocates.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. There are no separate rights to withhold documents for parties to litigation. Any documents shared to the Court should be disclosed to the other parties to litigation.

## Can the right to withhold a document be lost and if so how?

Yes. If a party waives privilege either expressly or impliedly, for example, by furnishing privileged documents to the other side. In such circumstances, the right to privilege is lost. In addition, documents or communication made in furtherance of an illegal purpose as well as observation by the advocate on commission of crime or fraud from the time of his employment as the client's advocate, is not protected under such privilege.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. Privilege is applied as a defence to a regulator's demand for documents under constitutional or statutory privilege unless the Constitution or statute expressly or by necessary implication overrides privilege. However, there is likelihood of abuse of power and non-adherence of this concept in criminal proceedings or proceedings involving the state in general. Nevertheless, the courts are steadfast in upholding privilege, if an application to enforce it is merited in law.



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# Madagascar



## Are parties to litigation required to disclose documents?

Yes. The Court may order a party to litigation to produce any document which constitutes evidence. (Article 11 of Civil Procedure Rules\*).

*\*Art. 11. - (Law n° 2001-022 of April 9, 2003) - If a party is in possession of an item of evidence, the judge may, at the request of the other party, order that party to produce it, if necessary, under penalty of fine. The judge may, at the request of one of the parties, require or order, if necessary, under the same penalty, the production of all documents held by third parties where no lawful impediment to this exists.*

## What is a 'document' for the purposes of that process?

In accordance with Art.11 of Law No. 2001-022, it covers any piece of evidence.

## Is the requirement to provide documents automatic and when does it arise?

The requirement to provide documents is not automatic. It is ordered by the Court at the request of the other party to litigation.

## Are there any exceptions when a document can be withheld from disclosure?

There are no exceptions when a document can be withheld from disclosure unless there is a lawful impediment.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Yes. Documents between a lawyer and a client fall within such an exception.\*

*\*Art. 50 of the Internal Rules of The Order of Lawyers: The lawyer is bound to absolute professional secrecy by virtue of the constant tradition of the Bar as well as of the legislative provisions. (...)The lawyer can neither deliver to a third person the documents entrusted to him nor give any testimony for or against his clients or opponents.*

## Does this include lawyers who work within an organization as opposed to in private practice?

These rule apply to all the lawyers, members of the Bar Association of Madagascar.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. Parties to litigation don't have any other rights to withhold documents.

## Can the right to withhold a document be lost and if so how?

N/a.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, regulators and investigative bodies must respect the concept of privilege given that it is provided for by law, and no authority can go against the law.



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# Mauritania



## Are parties to litigation required to disclose documents?

The parties are not obliged to provide documents. However, the judge will decide the dispute based on the evidence provided by the parties and this evidence often consists of documents to be produced. In addition, it should be noted that the documents expressly requested by the judge must be produced and no confidentiality can be invoked in court.

## What is a 'document' for the purposes of that process?

Any type of document that can be used as proof (contract, invoice, correspondence, etc.)

## Is the requirement to provide documents automatic and when does it arise?

No, there is no automatic obligation to provide documents.

## Are there any exceptions when a document can be withheld from disclosure?

As the production of a document is not obligatory, the question of the exception is irrelevant.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

N/a.

## Does this include lawyers who work within an organization as opposed to in private practice?

N/a.

## Do parties to litigation have any other specific additional rights to withhold documents?

Under Mauritanian law, the judge cannot deviate from the demands of the parties. He can only rule on documents produced by the parties. It is therefore difficult to conceive an hypothesis where a party exercises a retention on a document. In addition, as soon as a document is known and its presentation is required by the judge, the party in possession of this document is obliged to produce it.

## Can the right to withhold a document be lost and if so how?

N/a.

## Do regulators and investigative bodies respect the concept of privilege?

Hardly. They most often think that the concept of confidentiality is not opposable to them. There are often cases of discussion when the laws creating these entities are not sufficiently explicit on access to documents.



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# Mauritius



## Are parties to litigation required to disclose documents?

Generally yes. Pursuant to Rule 10 of the Supreme Court Rules 2000, the Defendant in a Supreme Court case, which has been entered by Plaintiff with Summons, or any other party to the matter, may apply for such particulars of the plaint as they may require and for inspection of any document which the Plaintiff intends to adduce in evidence. Likewise, once the Defendant has put in his defense or plea, the Plaintiff or any other party to the case may request particulars as may be relevant. For lower Courts, the District, Industrial and Intermediate Courts Rules 1992 also provide for the exchange of pleadings between parties including furnishing particulars and documents in support of the averments in the plaint.

## What is a 'document' for the purposes of that process?

According to Section 2 of the Interpretation and General Clauses Act 1974, "document" includes any publication, or electronic document and any matter written, expressed or described on any substance by means of letters, figures or marks.

## Is the requirement to provide documents automatic and when does it arise?

Prior disclosure of documents sought to be adduced in evidence is automatic in cases before the Supreme Court. Rules 3 and 11 of the Supreme Court Rules 2000 provide that a Plaintiff with Summons, the Plea and/or the Counterclaim need to be accompanied by a notice describing the documentary evidence which the parties intend to adduce at the hearing and indicating where the documents may be examined within a reasonable time before the hearing. Before Lower Courts, disclosure is not automatic but forms part of the normal course of exchange of pleadings, where a party is entitled to request and obtain particulars and supporting documents from the other party to understand the case that it has to meet. Should a party refuse to provide the particulars or supporting documents sought by the other party, the Court hears arguments and can order the provision of particulars or disclosure of documents. It is important to highlight that requests for particulars and disclosure of documents are confined to averments in the pleadings.\*

\*Reference: case of *Gujadhur and ors. v Gujadhur & Sons Ltd* [1962 MR 49]

## Are there any exceptions when a document can be withheld from disclosure?

Yes. There are certain exceptions, including; (i) documents which are privileged. The different categories of privilege include legal professional privilege, without prejudice privilege (where parties communicate and exchange documents and/or information with the view to reaching an amicable settlement and/or settling a dispute) and privilege against self-incrimination (ii) books, accounts, records, financial statements or other documents or records of financial institutions, disclosure of which would be in breach of the strict duty of confidentiality imposed upon bankers under section 64 of the Banking Act; and (iii) disclosures which may be in breach data protection laws, against public policy or public interest.

*\*The procedure as to how the relevant authorities can ask for disclosure before the Judge in Chambers is provided under that section.*

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. The sacrosanct principle is that documents/communications between a lawyer and client, are privileged and the lawyer, as recipient of such documents/communications, would therefore be bound by a duty of confidentiality regarding the same. The test for the documents/communications to attract professional legal privilege is that they must be directly related to the performance by the lawyer of their professional duty as legal adviser of the client. The circumstances leading to the disclosure of client legally privileged documents/communication and derogating to this sacrosanct principle are almost inexistent, once the legal privilege has been established. One of the very few exceptions would be under Section 14(1) of the Financial Intelligence and Anti-Money Laundering Act 2002 which provides that: "Every [...] member of a relevant profession or occupation shall, as soon as practicable but not later than 15 working days from the day on which it becomes aware of a transaction which it has reason to believe may be a suspicious transaction, make a report to the FIU (Financial Intelligence Unit) of such transaction." This section must however not be construed as meaning that a lawyer must report any transaction of which they have acquired knowledge in privileged circumstances. The lawyer may only report the same if the information has been communicated to them in the furtherance of a criminal or fraudulent purpose.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. This generally includes all lawyers working in their professional capacities as Barristers or Attorneys.

## Do parties to litigation have any other specific additional rights to withhold documents?

Not specifically. Whilst the principle of litigation privilege is one capable of being accepted and enforced by local courts, it is typically considered under the wider classification of legal professional privilege, which is generally enforced by the Court.

## Can the right to withhold a document be lost and if so how?

Yes. The right can be lost if the document is not deemed to be confidential anymore, if the holder of the applicable privilege waives the privilege or if there is a court order which pertains to the disclosure of the said document.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, regulators and investigative bodies do, as a general rule, respect the concept of privilege.



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# Morocco



## Are parties to litigation required to disclose documents?

Yes. In regards to commercial and civil litigations, the parties are required to disclose all the documents they are referring to in their findings. A judge may ask a party to reveal a document even if this document is against its interest.

## What is a 'document' for the purposes of that process?

A document is a written evidence likely to be decisive in the settlement of a dispute. This is the principle of the relevance of evidence.

## Is the requirement to provide documents automatic and when does it arise?

Yes. The claimant/the defendant will provide the evidence of what they are invoking. The documents are attached to the findings or provided at the next hearing. This is called the principle of spontaneous production of evidence.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document can be withheld from disclosure, if it is protected by the principle of professional secrecy as it is set in article 466 of the Moroccan Criminal Code. Article 466 of the Moroccan Criminal Code states that "all persons who are entrusted with secrets by virtue of their status or profession or function are prohibited from disclosing them". Failure to comply with this rule is punishable by imprisonment for up to six months and can include a fine between MAD 1,200 to MAD 20,000.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Article 36 of Dahir 1.08.101 dated on 20 October 2008 enacting law n°28-08 forbids one from disclosing any information in breach of legal professional privilege. In this respect, it should be noted that the inspection of a lawyer's office by the judicial police officers cannot happen without the presence of a judge or a public prosecutor. Also, the President of the Bar Association will be notified and be present, for the sake of protection of the confidentiality of the documents subject to the legal professional privilege which are in their office (article 59 of the Moroccan Criminal Procedure Code).

## Does this include lawyers who work within an organization as opposed to in private practice?

In Morocco, the term 'lawyer' covers only legal professionals that are admitted to the Bar association. They are only allowed to work in a private practice, and may work under the title of 'lawyer'. Therefore, the In-house counsel does not benefit from a special legal status, and consequently this function does not benefit the privileges granted to the lawyers.

## Do parties to litigation have any other specific additional rights to withhold documents?

No. The only exception is relating to the professional privilege. For instance, a journalist can have the right to withhold documents during a legal procedure.

## Can the right to withhold a document be lost and if so how?

Yes. When it is relating to the anti-money laundering regulation (law n°43-05), the professional privilege will not be applicable. All legal professionals even if they are covered by such exception, should reveal the confidential documents and information. Indeed, law n°43-05 brought an important exception to the legal professional privilege as it imposes a declaration of suspicion to lawyers, when they receive information from their clients which may lead them to think that their client may be found guilty of anti-money laundering. Also, the lawyers cannot appeal or refuse to communicate information to the administrative or judicial authorities investigating cases of anti-money laundering.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. Regulators and investigative bodies respect the concept of privilege when it is related to the professionals that require to benefit from the right to maintain some information confidential in respect of the nature of their jobs. However, in order to maintain the public order, some laws can exclude such professional privilege, for example the money laundering and counter terrorist regulations.



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# Nigeria



## Are parties to litigation required to disclose documents?

Generally, parties to litigation are required to disclose documents requested for by the other party to the suit. A party to an action may request any party to that action to disclose documents in that other party's possession, custody, control or power. A party wanting to apply for discovery of documents must do so within 7 days of the close of pleadings, and the party from whom discovery is sought must produce the requested documents in the prescribed form, within 7 days of the request or such other time that the judge may permit.

## What is a 'document' for the purposes of that process?

A document for the purposes of disclosure may be anything on which information of any description is recorded. This is not restricted to writing or physical paper documents. It may include audio visual recordings, photographs, images, emails, text messages, and information stored on computers. It may also include documents which may have been deleted from electronical storage.

## Is the requirement to provide documents automatic and when does it arise?

The requirement to provide documents is not automatic. It follows from when a party to proceedings makes a request in writing for the documents to be disclosed, usually after pleadings have closed. The party in whose custody, control, or possession of the document, has a period usually within 7 days to respond truthfully on oath with copies of the requested document(s). The documents requested must be limited to matters in question in the suit. Documents which may advance the cause of the party requesting for them, or resulting in damage to the other party or leading to a train of enquiry, must be disclosed.

## Are there any exceptions when a document can be withheld from disclosure?

Yes, a document may be withheld from disclosure in the following instances:

(i) documents marked "*without prejudice*" made in the course of settlement of a dispute out of court; (ii) confidential communication that has taken place between a person and a legal practitioner; (iii) a legal practitioner is not permitted to disclose any communication made to him on behalf of his client or to state the conditions or content of any document that he has come across during his professional employment. This is the principle of legal privilege; (iv) oral or documentary communication received by a public officer in official confidence cannot be disclosed, especially where public interest may be jeopardised by such disclosure; (v) a public officer cannot be compelled to disclose communications (oral or written) made to him in official confidence if he believes the public interest would suffer from such disclosure, and (vii) a witness who is not a party to an action is not obliged to produce any document which he holds by virtue of a pledge or mortgage where such production may implicate him.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes, documents between a lawyer and a client will fall within such an exception. The Rules of Professional Conduct for Legal Practitioners (2007), particularly Rule 19, imposes a fiduciary duty of confidentiality on Nigerian lawyers, to the effect that '*all oral or written communication made by a client to his lawyer in the normal course of professional employment are privileged*,' consequently preventing disclosure of communication (written or oral) to third parties. In order to confer privilege, a communication must have been made by a client to a legal practitioner in the normal course of the legal practitioner's professional engagement, or advice has been given by a legal practitioner to a client, in the course of, and for the purpose of, the legal practitioner's professional engagement.

In addition to the above, legal practitioners are bound by section 192 of the Nigerian Evidence Act (2011), which prevents legal practitioners from disclosing any communications with their client made in the course of their professional employment, without having obtained the express consent of the client.

# Nigeria



## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. All lawyers are covered by the Lawyer- Client Confidentiality. In order to practise as a legal practitioner in Nigeria, that person's name must be on the "roll" of admitted legal practitioners. This roll is a list kept by the Registrar of the Supreme Court of Nigeria. The roll is consequently a list of those entitled to practise law in Nigeria. There is no distinction between in-house legal practitioners and private legal practitioners. As such, every legal practitioner having his / her name on the roll is subject to the rules of professional conduct, as well as the provisions of the Evidence Act, 2011, and are subject to the obligations relating to lawyer – client communications (documents).

## Do parties to litigation have any other specific additional rights to withhold documents?

See question 4.

## Can the right to withhold a document be lost and if so how?

There are several instances where a party may lose his right or privilege to withhold a document. Such instances may include i) Where a party decides to waive such privilege (i) where in the court's discretion the document will play a vital role in evidence; (ii) in compliance with a court order or permitted by law; (iii) where the acts of the client or party constitute a crime or fraud or such other illegal act; (iv) towards collecting or establishing a lawyer's professional fees; (v) to establish a lawyer's defence against allegations of professional misconduct; and (vi) where an application for disclosure under the Freedom of Information Act 2011 is made.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, regulators and investigative bodies respect the concept of privilege. The provisions of the Nigerian Evidence Act, Freedom of Information Act and rules of Courts have placed high emphasis on the principle of privilege. However, financial regulators and investigators of white-collar crimes have been able to bypass the concept of privilege in furtherance of their investigative activities and functions. The Economic and Financial Crimes Commission, a government agency set up for the investigation and prosecution of financial crimes and acts deemed detrimental to the economy of Nigeria, is one of such investigative bodies that would usually make a strong case for the departure from the concept of privilege.



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# Senegal



## Are parties to litigation required to disclose documents?

Yes. In the Senegalese legal system, it is up to the parties in a civil lawsuit to prove the merits of their claim. Accordingly, each party is required to file documents in support of its claim in order to win the case.

If a party does not support its claim with the necessary documents, the judge may reject its claim.

In the criminal trial, in principle, it is up to the Prosecutor to file all documents necessary to prove the guilt of a person. The prosecutor may be assisted by an investigation procedure entrusted to the police or the judicial police department. The accused person must, if he has any documents proving his innocence, produce them.

## What is a 'document' for the purposes of that process?

The law does not define what a document is. It can be any type of compliant document (documents that are considered false do not have to be produced).

## Is the requirement to provide documents automatic and when does it arise?

Yes. Communication between attorneys must be full, prior and spontaneous in order to uphold the rights of the defence and contribute to a fair and just trial.

Any document not communicated to the opposing party in the course of a trial is then set aside by the Judge.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Any exchange of information between a lawyer and his colleague, whether verbal or written, is in principle, confidential and the lawyer is not entitled, regardless of the medium, to communicate this information to his client or to a third party. Correspondence between lawyers cannot be produced in court. In addition, if the law provides for the confidentiality of a document, it cannot be produced in court, except with judicial authorization (for example, in the context of the conciliation procedure provided for by the OHADA Uniform Act on Collective Proceedings).

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. In general, the lawyer is bound by professional secrecy towards the client.

Indeed, he cannot disclose the correspondence exchanged with his client, consultations, interview notes and more specifically all the documents in the file, information and privileges received in the context of the litigation, without the client's prior authorization and consent.

## Does this include lawyers who work within an organization as opposed to in private practice?

N/a. Lawyers who work for a public or private entity that places them under a subordinate relationship are omitted from the bar.

## Do parties to litigation have any other specific additional rights to withhold documents?

Yes. Each party is free to decide which documents it must produce in court or not. However, when the production of a document is a legal or contractual obligation, any party may ask the Judge to compel the party withholding a document to produce it under a financial penalty per day of delay.

## Can the right to withhold a document be lost and if so how?

Yes. If there is a court order compelling the withholding party to produce the document under penalty.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. In criminal matters, the secrecy of the investigation must be respected. The secrecy of the criminal investigation prohibits the lawyer from disclosing any information extracted from the files or publication of evidence, documents or letters concerning an investigation or information in progress.



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# South Africa

## Are parties to litigation required to disclose documents?

Yes. The process is called Discovery and is done under oath. The purpose of Discovery is to list all documents or tape recordings that are relevant to the matter and that the party intends using at the trial. All documents relevant to the matter but not subject to privilege must be discovered. Documents that are subject to privilege must be set out in a separate schedule but are not furnished to the opposing party. The procedure governing Discovery is set out in the South African rules of Court.

## What is a 'document' for the purposes of that process?

A document is defined as a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record. Tape recording includes a sound track, film, magnetic tape, record or any other material on which visual images, sound or other information can be recorded.

## Is the requirement to provide documents automatic and when does it arise?

A party who receives notice of the trial date of an action is obliged to make Discovery if they have not already done so. Parties are also obliged to discover and provide documents provided a notice to do so is received, which notice is standard procedure and almost given. Once discovery has been made, the opposing party will request copies of certain (and sometimes all) of the documents discovered and tender the reasonable photocopying charges.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. Documents that are subject to privilege must be discovered but are not disclosed to the opposing party. Privileged documents include the following: (i) documents implicating a party in a criminal offence, which is protected by the privilege against self-incrimination (ii) documents written by one spouse

to another, protected by marital privilege (iii) a written offer made without prejudice with the intention of settling a matter (iv) documents prepared in contemplation of litigation (v) documents written between an attorney or advocate to their client, which is generally protected by legal professional privilege, provided that the requirements are met.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. Generally they would fall within the exception. Communications between lawyers and their clients are protected by legal privilege provided the communication meets the following criteria, the (i) legal practitioner must have acted in a professional capacity (ii) client must have made the communication to the lawyers in confidence (iii) communication must have been made for the purpose of obtaining legal advice (iv) advice must not facilitate the commission of a crime or fraud.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes. Professional privilege applies to communications between both in-house legal advisers/counsel and practicing attorneys.

## Do parties to litigation have any other specific additional rights to withhold documents?

Yes. As mentioned previously, documents prepared in contemplation of litigation are generally privileged and can be withheld.

## Can the right to withhold a document be lost and if so how?

Yes, it can be lost. If a party waives privilege, for example, by furnishing the documents to the other side, the right to privilege is lost.

## Do regulators and investigative bodies respect the concept of privilege?

Yes they do.



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# Tanzania

The Civil Procedure Code, Cap. 33 (as amended) is the main Act that provides for the procedure and related matters in civil proceedings in Tanzania. This Act will be commonly referred to in our responses as CPC. Some references will also be made to the Evidence Act, Cap. 6 (as amended). This Act will commonly be referred to as the Evidence Act.

## Are parties to litigation required to disclose documents?

Yes, every party to a civil litigation has the right to know the nature of its opponent's case so that he/she may prepare. The duty to disclose is limited to the documents that are in one's possession or power.

There are several ways through which the party can disclose or be required to disclose documents. Such ways include: (i) Pleadings; (ii) Interrogatories (iii) Discovery of Documents and (iv) Inspection of Documents.

**Pleadings:** The standard disclosure requires a party/plaintiff to disclose the documents on which he/she will rely in support of his/her case to be presented and filed with the Plaintiff. [Order VII Rule 14 of the CPC]

A court can make a specific order to compel a party to produce a document in order to discover or to obtain proper proof of relevant facts. [Section 176 (1) Evidence Act].

**Interrogatory:** Interrogatory is a discovery of fact where written questions are put by a party to the civil proceedings to his/her opponent. The Plaintiff or the Defendant, by order of the court may deliver interrogatories in writing to the opponent. The responses to interrogatory questions are answered by way of an Affidavit. [Order XI Rule 1 & Rule 7 of the CPC]

**Discovery:** This is a procedure which involves discovery of documents and is governed by Order XI Rule 10. Any party to the proceedings may apply to the court for an order to his/her opponent for discovery of all documents that are within his power or possession that he is going to rely on his/her case. While the application is made without an Affidavit, the response must be done by means of an Affidavit.

**Inspection of Documents:** Once the discovery has been made by a party who was ordered by the court to do so, the party who made an application may, at any time of the proceedings, give notice to the party who made discovery for the production of the documents for the purposes of making inspection either by him/herself or by his advocate.

## What is a 'document' for the purposes of that process?

Under section 3(1) of the Evidence Act, the term 'Document' for the purpose of disclosure or evidence is defined as any writing, handwriting, typewriting, printing, photocopy, photography, computer data, recording, or any form of communication or representation including electronic form, by letters, figures, marks or symbols which may be used for the purpose of recording any matter provided that the recording is reasonably permanent and readable.

## Is the requirement to provide documents automatic and when does it arise?

The general rule is it is automatic. This requirement arises from the premise that every party to the civil litigation has the right to know the nature of the opponent's case and that the plaintiff is required to disclose the type of evidence upon which he/she will rely on against his/her opponent.

However, in practice, it is not common for parties to disclose documents which are not advancing their cases or maybe incriminating. In order to deal with such a practical reality, the court, if moved properly, may order for the documents in questions to be produced, or, for the opponent to make an application for disclosure through interrogatories, discoveries and inspection.

## Are there any exceptions when a document can be withheld from disclosure?

Yes, there are such exceptions when a document or information can be withheld. These include:

**Privilege communications/privilege:** No advocate or professional legal adviser shall at any time be permitted without an expressed consent of his/her client to disclose any communication made to him in the course of his employment as an advocate. Neither is he not allowed to state the content or condition of any document which the advocate has become aware of in the course of his engagement as a professional legal adviser. [Section 134 of Evidence Act]. This privilege is extended to the interpreters, clerks or servants of the advocate.

Privilege relating to official records: Where it is stated on oath (whether by affidavit or otherwise) by a Minister, that he has examined the contents of a document forming part of any unpublished official records or communications received by a public officer in the course of his duty, the production of which document has been called for in any proceedings, and that he is of the opinion that the production would be prejudicial to the public interest either for the sake of Public Interest. [Section 132 of the Evidence Act].

# Tanzania

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes, documents between a lawyer and a client fall within an exception of professional communications and documents.

The following conditions need to be met:

- (a) It must be communicated to him/her in the course and for the purpose of their employment as an advocate by or on behalf of the client
- (b) It should be the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment
- (c) Any documented advice given by him to his client the course and for the purpose of such employment

The Advocates (Professional Conduct and Etiquette) Regulations GN No. 118 of 2018 requires advocates to act with highest integrity not to disclose the client's confidence.

In Tanzania it has to be a document between an Advocate (qualified and practicing lawyer) and a client and not just a lawyer because Advocates in Tanzania have monopoly privilege, they are the only professionals in Tanzania who are entitled to practice law, generally, in regular courts and in tribunals.

An Advocate in Tanzania is a lawyer who has been enrolled by the Chief Justice into a register of Advocates.

## Does this include lawyers who work within an organization as opposed to in private practice?

The rules of privilege apply to all advocates in Tanzania regardless of their fields of work. This includes inhouse lawyers' and compliance personnel who are advocates by profession.

The law covers the contents or condition of any document with which an advocate has become acquainted in the course and for the purpose of his professional employment.

## Do parties to litigation have any other specific additional rights to withhold documents?

Apart from the privilege as to professional communication between an advocate and his client and privilege for official records deemed by the Minister as confidential, there are no other rights to withhold documents for parties in litigation.

## Can the right to withhold a document be lost and if so how?

Yes, the common way is when the client himself/herself consents to disclose such a document and therefore loses the right to withhold a document.

Furthermore, the disclosure in the privilege to the professional communication/document cannot be protected in the following circumstances: (as section 134(1) of the Evidence Act) (i) any communication made in furtherance of an illegal purpose; (ii) any fact observed by an advocate in the course of his employment as such, showing that criminal offence, has been committed since the commencement of his employment, whether the attention of the advocate was or was not directed to that fact by or on behalf of his client; and (iv) proceedings in which the professional conduct of the advocate himself is or might be in issue.

## Do regulators and investigative bodies respect the concept of privilege?

Authorities might expect to waiver in some circumstances as expressly provided by the law but under no circumstances will it benefit the legal advisers for such cooperation which is already a legal obligation.

By way of an example, in the Anti-Money Laundering (Electronic Funds Transfer and Cash Transaction Reporting) Regulations GN No. 420 of 2019 which makes it a requirement for a legal practitioner to report to the Bank of Tanzania all Client's fund transfer or cash transaction involving United States Dollars Ten Thousand or above.

However, where disclosure is required by law or by order of a court of competent jurisdiction, the legal practitioner shall not give more information in respect of a client than is specifically required and has to assert the client's privilege.



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# Tunisia



## Are parties to litigation required to disclose documents?

Yes in relation to parties to a dispute. Third parties can only have access to documents after a well-justified request to the first president of the Court.

## What is a 'document' for the purposes of that process?

A document for the purposes of Disclosure is anything in which information of any description is recorded and submitted to the Court by parties of the claim.

## Is the requirement to provide documents automatic and when does it arise?

Parties to litigation are required to disclose documents between each other, at the beginning of the procedure, or at any time during the procedure.\* However, Disclosure is not automatic and is generally dependent on a court order that is made at the first substantive procedural hearing. Disclosure generally happens after that hearing. In addition, a party can ask the Court, at any time (although usually it is after inspection has taken place) for an order for another party to provide disclosure of specific documents or classes of document which aren't part of file document yet.

*\*Article 69 of civil and commercial procedural code.*

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document may be withheld if it is privileged. There are many categories of privilege but the most common are legal professional privilege (which covers advice between client and lawyer), self-incrimination for lawyers, health reports for doctors etc.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes with the exception of documents relating to crimes of a terrorist nature (the law on the fight against terrorism and the suppression of money laundering).\*

*\*The law on the fight against terrorism and the suppression of money laundering.*

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, if they are acting in capacity as lawyer.\* Those who work under the direction and supervision of the lawyer are also included.

*\*Decree-Law No. 2011-79 of 20 August 2011 on the organization of the legal profession. Of the legal profession and its objectives.*

## Do parties to litigation have any other specific additional rights to withhold documents?

No. There are no separate rights to withhold documents for parties to litigation. Any arguments or documents shared to the Court should be disclosed to the other party who have the right to consult and comment.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege can be lost if the document is longer confidential or by express or implied waiver. In addition, documents made to further illegality are not protected

## Do regulators and investigative bodies respect the concept of privilege?

Yes, although we are seeing increasing appetite to dispute claims to privilege.



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# Zimbabwe

## Are parties to litigation required to disclose documents?

Yes. The process is called Discovery and is governed by the High Court Rules, 1971\* when litigation is in the High Court and Magistrates Court (Civil) Rules, 2019\*\* in the Magistrates Court.

\*Order 24 of the High Court Rules, 1971

\*\*Order 18 of the Magistrates Court (Civil) Rules (Statutory Instrument 11 of 2019)

## What is a 'document' for the purposes of that process?

'Document' for the purposes of Discovery includes any record of information made in a permanent form. A document produced by a computer is admissible as evidence of any fact stated therein if direct oral evidence of that fact would be admissible. In terms of section 13 (5) (c) of the Civil Evidence Act [Chapter 8:01] a 'document' shall be regarded as having been produced by a computer whether it was produced by it directly or, with or without human intervention, by means of equipment the operation of which is compatible with the operation of the computer.

## Is the requirement to provide documents automatic and when does it arise?

Discovery is automatic as it is in terms of the Rules of Court. Discovery is initiated by a notice to make Discovery which is a written notice requiring a party to make Discovery of all documents relating to any matter in question or in issue which happen to be in their possession or is still in their possession or control. The notice can be served by either party and the time limits for responding is 24 days excluding public holidays and weekends. If a party believes that there are, in addition to documents as disclosed as aforesaid, documents, including copies thereof, which may be relevant to any matter in question in the possession of any other party thereto, the former may give notice to the latter requiring them to make the same available for inspection in accordance with rule 164 or to state on oath within six days that such documents are not in their possession, in which event they shall, if known to them, state their whereabouts.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. A document may be withheld if it is privileged. Privileged documents include communications between a legal practitioner and client, confidential\* communications, documents which fall

under privilege in public interest\*\* (state privilege), statements by witnesses – for the purpose of litigation existing or contemplated.

*\* Confidential communication is defined in section 9 of the Civil Evidence Act [Chapter 8:01] as a communication made by such a method or in such circumstances that, so far as the person making it is aware, its contents are disclosed to no one other than the person to whom it was made;*

*\*\*In terms of section 10 (3) of the Civil Evidence Act [Chapter 8:01] public interest includes matters that relate to– (a) the security or defence of the State; or (b) the proper functioning of the Government; or (c) international relations; or (d) confidential sources of information which are concerned with the enforcement or administration of the law; or (e) the prevention or detection of offences or contraventions of the law.*

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Yes. Documents between a lawyer and a client fall within the privilege relating to Legal Profession.\* Privilege applies to confidential communications between a client and their legal practitioner or the legal practitioner's employee or agent where the confidential communication was made for the purpose of enabling the client to obtain, or the legal practitioner to give the client, any legal advice and or where the confidential communication was made for the purpose of enabling the client to obtain, or the legal practitioner to give the client, any legal advice. The legal test applied is whether the confidential communication was made for the purpose of enabling the client to obtain, or the legal practitioner to give the client, any legal advice or submitted to the client's legal practitioner in connection with pending or contemplated legal proceedings in which the client is or may be a party.

*\*This is provided in section 8 of the Civil Evidence Act [Chapter 8:01]*

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, as long as they are acting in their professional capacity as lawyers. Those who work under the direction and supervision of the lawyer are also included.

## Do parties to litigation have any other specific additional rights to withhold documents?

Yes. Privilege extends to (i) any confidential communication between a client, or their employee or agent, and a third party (ii) confidential communication between a client's legal practitioner, or

their employee or agent, and a third party, where the confidential communication was made for the dominant purpose of obtaining information or providing information to be submitted to the client's legal practitioner in connection with pending or contemplated legal proceedings in which the client is or may be a party. The test is whether the communication was made for the dominant purpose of obtaining information or providing information to be submitted to the client's legal practitioner in connection with pending or contemplated legal proceedings in which the client is or may be a party. If it falls outside this scope then there is no privilege.

## Can the right to withhold a document be lost and if so how?

Yes. Privilege can be lost if: (i) the client consents to disclosure or waives the privilege (ii) if the confidential communication was made to perpetrate a fraud, an offence or an act or omission rendering a person liable to any civil penalty or forfeiture in favour of the State in terms of any enactment in force in Zimbabwe; or (iii) after the death of the client, if the disclosure is relevant to any question concerning the intention of the client or their legal competence.

## Do regulators and investigative bodies respect the concept of privilege?

Yes, although in some cases privilege may be disputed.



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# Brazil



## Are parties to litigation required to disclose documents?

Yes. According to the rules of 2015 Brazilian Code of Civil Procedure [CPC Section VI – “Disclosure of Document or Thing” – articles 396 to 404] the Court may order a party to disclose a document that is in the latter’s possession.

## What is a ‘document’ for the purposes of that process?

A document for the purposes of Disclosure is any result of a human work that conveys a physical record regarding some fact.

## Is the requirement to provide documents automatic and when does it arise?

Disclosure is not automatic and depends on a court order. In addition, a party can ask the Court, at any time (although usually it is after a pre-trial decision has taken place whereby the Court defines the points of fact which shall be subject to evidence) for an order for another party to provide disclosure of specific documents. It is also possible for a party to apply to the Court for an order for disclosure against a party, who is likely to become a party to litigation, prior to the commencement of proceedings and/or for an order for disclosure against a third party. Some documents do, however, have to be provided automatically, for example: according to art. 434 of the 2015 Brazilian Code of Civil Procedure, it is up to the party to produce evidence in the complaint or in the defense with documents aimed at proving his or her allegations.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. According to the art. 404 of 2015 Brazilian Code of Civil Procedure, the party and the third party are exempt from disclosing a document in court if: (i) said document concerns private family matters; (ii) its disclosure can violate a duty of honour; (iii) its publication brings dishonour and shame to the party or third party, and to their blood relatives or next of kin to the third degree, or puts them at risk of criminal proceedings; (iv) its exposure entails the disclosure of facts regarding which, by reason of status or profession, they must maintain confidentiality; (v) there are other grave motives that, at the judge’s discretion, justify the refusal to disclose; (vi) there is a

legal provision that justifies the refusal to disclose. It is also worth mentioning that whenever a judge receives a confidential document, they, whether acting ex officio or upon application of the parties, shall take the necessary measures to assure their confidentiality.

## Would documents between a lawyer and a client fall within such an exception? If so what is the legal test?

Yes. Documents between a lawyer and a client could fall within such an exception. The test is that the document must be provided for the purpose of giving or receiving legal advice, as provided in art. 7, item II of the Brazilian Federal Law nº 8.906/94 which rules the lawyer’s right to inviolability of his office or workplace, as well as of their working instruments, of their written, electronic, telephone and telematic correspondence, as long as related to the practice of law.

## Does this include lawyers who work within an organization as opposed to in private practice?

Yes, as long as they are acting in capacity as lawyer.

## Do parties to litigation have any other specific additional rights to withhold documents?

Potentially yes. According to art. 507 of 2015 Brazilian Code of Civil Procedure, the party is barred from raising issues that have already been decided and regarding which there is claim preclusion. In this regard, a party could refuse to disclose certain documents depending on the status / procedural stage of the litigation.

## Can the right to withhold a document be lost and if so how?

Yes. According to art. 309 of 2015 Brazilian Code of Civil Procedure, the right to withhold a document can be lost if the party has a legal obligation to disclose it; if the party had alluded to the document, during the proceedings, with the aim of providing evidence; or if the document, by virtue of its contents is common to the parties.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. From time to time we have seen a few initiatives aimed at rediscussing certain privileges, notably in the criminal area. Draft laws, court decisions, irregular searches and seizures, but as a rule the concepts of privileges are respected.



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# United States of America\*



## Are parties to litigation required to disclose documents?

Parties are required to disclose documents and relevant data through a process called Discovery. The process is governed by the Federal Rules of Civil Procedure which is detailed and well developed. Although State jurisdictions may differ somewhat, they are generally consistent with the Federal process.

## What is a 'document' for the purposes of that process?

Any memorial of information or data, including electronically stored information ('ESI').

## Is the requirement to provide documents automatic and when does it arise?

Some documents/data are required to be produced automatically under the Federal Rules of Civil Procedure, but most document/data are produced in response to a Request for Production propounded by the opposing party, usually within 30 days after receiving the request, and subject to objections.

## Are there any exceptions when a document can be withheld from disclosure?

Yes. There is a complex set of rules that govern when documents can be withheld. Most notably, all "privileged" documents are exempt from production. This includes attorney-client privilege and possibly other privileges.

## Would documents between a lawyer and a client fall within such an exception? If so, what is the legal test?

Yes. If the communication involves legal advice it is exempt.

## Does this include lawyers who work within an organization as opposed to in private practice?

Maybe. If the communication is uniquely legal advice, the in-house lawyer would qualify to invoke the privilege. There may be a question raised about whether the lawyer is involved in business management or other non-legal matters that would not be privileged, but the privilege is highly respected when the communication is directly between the lawyer and client.

## Do parties to litigation have any other specific additional rights to withhold documents?

Yes. This is a very complicated question because many factors must be weighed. There is no single legal test. Some examples may be: attorney work product; documents prepared in anticipation of litigation; documents prepared by a non-testifying consultant; possibly even documents that lack relevance in the right type of case where production would be unduly burdensome in comparison to the issues.

## Can the right to withhold a document be lost and if so how?

Yes, privileges can be waived. Because of the huge proliferation of data and ESI, parties commonly enter into non-waiver agreements and "clawback" agreements to protect against waiver.

## Do regulators and investigative bodies respect the concept of privilege?

Yes. US regulators and investigative bodies recognize the concept of privilege and usually do not seek privileged information. A corporation that declines to provide privileged materials may still receive credit for cooperating with an investigation if it discloses all known facts.

\*generally applicable to all US State jurisdictions.



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