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## Cybersecurity Planning & The Importance of Attorney-Client Privilege

How Attorney-Client Privilege Can Help Protect Your Business In The Event of a Cyber-Breach



# Cybersecurity & Data Privacy

## Cybersecurity & The Importance of Attorney-Client Privilege

Businesses have a major need to assess their own cybersecurity risks, and to openly exchange internal information within the company to effectively address and mitigate an actual breach situation. Yet a company's internal assessments of its own weaknesses and the holes in its cybersecurity protections can, ironically, actually expose the company to even greater danger in future security breach litigation.

### Why?

- A company's good faith internal report of its cybersecurity weaknesses can potentially serve as almost an admission that it has found its cybersecurity protections for personal and confidential data to be inadequate.
- In a cyber breach event, it's of extreme importance that that the company's personnel freely exchange information related to the breach crisis situation quickly and without undue worries about how the disclosure of that information might look in a future litigation discovery proceeding.
- The involvement of the company's legal counsel in all important aspects of a cybersecurity risk assessment and breach response is crucial because of the protections that involvement can potentially provide the company in:
  - attorney-client privilege
  - work product protection

### Attorney-Client Privilege

The "attorney-client privilege" protects the future disclosure of confidential communications between attorneys and their clients that relate to a request for legal advice. The attorney-client privilege can protect communications relating to a cybersecurity risk investigation which is primarily designed to gather facts a lawyer needs to provide the company with the legal advice it has sought. In an actual breach situation it is absolutely crucial that the company's attorney be involved in all communications dealing with the breach and evaluating the legal compliance issues it creates. There are various nuances to the attorney-client privilege protections, and the privilege can be lost if the individuals involved do not act carefully.

Companies should work closely with their attorneys to ensure that the privilege is not inadvertently lost through failure to take such nuances into account.

- For the attorney-privilege to apply, the attorney must be involved and be central to the communications.
- As part of a company's retention of an attorney to address compliance with cybersecurity laws, the engagement of third party cybersecurity consultants should be done with attorney involvement. The attorneys should be included on all e-mails and other correspondence between the company and its cybersecurity consultants.
- In an actual breach situation, it may be able to provide protections from disclosure of the communications occurring in investigating the breach and discussions of how best to mitigate and address the potential damage. This in turn can help make all the participants at the company feel more comfortable speaking freely about what has happened, resulting in a more effective response to the situation.

### Work Product Protection

The "work product doctrine" can protect documents relating to an investigation if the company was in (or anticipated) litigation at the time, and the documents' creation was primarily motivated by such litigation matters (rather than by some other purpose). If documentation falls within the work product doctrine, then disclosure of that documentation in a litigation context may potentially be avoided.

The work product doctrine has various limitations, however. A litigant against a company in a cybersecurity breach situation may be able to overcome the protections of the doctrine if the litigant can make the case that it needs the particular documents and cannot obtain the substantial equivalent of such documentation without undue hardship.

### In Conclusion

The bottom line is that the attorney-client privilege and work product doctrine are crucial means for a company to protect itself in cybersecurity compliance and breach situations. Close collaboration between the company and its attorneys is essential.

For Specific Questions Concerning Your Company's Cybersecurity, Please Visit [lindabury.com](http://lindabury.com) or Call 908.233.6800 to Speak to Any of Our Cybersecurity & Data Privacy Attorneys