

Management summary

Background, research goals and methodology

Legal privilege (and the resulting right not to disclose privileged client information) serves the public interest of citizens being able to turn freely to lawyers or civil law notaries without fearing disclosure of what has been entrusted to them in their professional capacity. Additional privileged professions where confidentiality applies, include doctors and clerics. A confidential relationship is essential for the practice of these professions and, in the case of legal privilege, for the functioning of the rule of law. Practitioners of privileged professions have the opportunity to invoke their right of non-disclosure in certain situations. If privileged documents are seized in the context of a criminal investigation, a lawyer or civil law notary can invoke their right of non-disclosure, thereby declaring that the material cannot be subject to analysis by investigative services.

In the Netherlands several investigative services and the judiciary have drawn attention to the fact that procedures regarding the seizure of (potentially) privileged material can take a very long time. This warrants research into the nature, scope and processing time of claims regarding legal privileged material, as well as the consequences of their substantial processing times for criminal investigations.

The Research and Documentation Centre, the *Wetenschappelijk Onderzoek en Documentatiecentrum (WODC)* of the Ministry of Justice and Security, has asked Significant APE to research the processing time of procedures regarding legal privilege and the seizure of (potentially) privileged material. The central research question is: *What is the nature and scope, and what are the consequences of appeals to the right of non-disclosure for the duration of criminal investigations?*

To answer the research questions we used a combination of desk research, interviews (general interviews and interviews about specific cases of procedures regarding legal privilege), and an analysis of registered data on cases brought before the Supreme Court, that was complemented with qualitative information from www.rechtspraak.nl and data from the public prosecutor's office.

Legal privilege: right to non-disclosure of privileged information

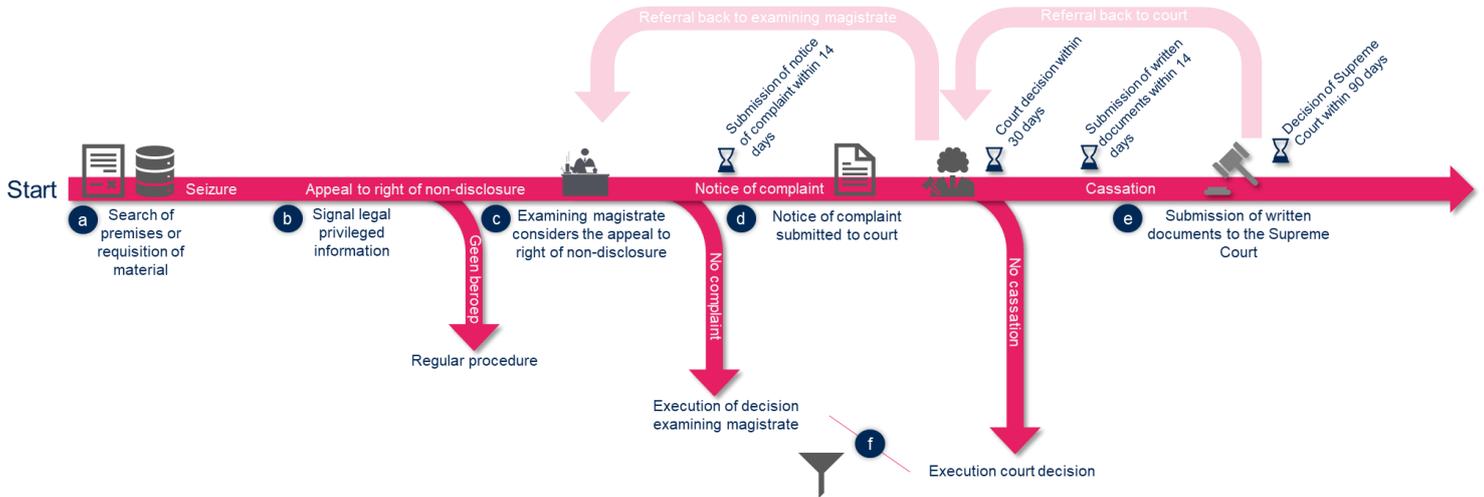
An appeal to the right of non-disclosure on the basis of legal privilege serves the public interest of being able to turn to certain counsellors for assistance and advice, without fear of disclosure. In that, legal privilege outweighs the public interest of the truth coming to light.¹ The legal framework for legal privilege is set out in article 218 Sv, and can be translated roughly as 'those who are in their position or profession bound to confidentiality, can be exempted from giving testimony or answering certain questions, but only when the information was confided to them as such' (in that capacity).

When a privileged party appeals to his or her right not to disclose information, and the public prosecutor nevertheless wants to use the relevant material in his or her investigation, it is first up to the examining magistrate to make a decision on whether the information can be disclosed to the benefit of the investigation. After that, the privileged party can file a

¹ *Kamerstukken II 2015-2016, 29279, 289.*



complaint against this decision to the council chamber of the court (art. 98 lid 1 and 4 Sv).² After that an appeal can be lodged in cassation with the Supreme Court (art. 552d Sv). In the following figure we show the process as followed in procedures regarding the right to non-disclosure of privileged information, following the legal precedent. The procedure depicted relates specifically to the confiscation of potentially privileged information.



The arrows bending down to the bottom of the figure represent the points in the process where the procedure can come to an end. The arrows at the top of the figure, that show a route from the court back to the examining magistrate and from the Supreme Court back to court, indicate that both courts can refer a case back for a new decision after declaring the initial decision void.

Findings

In the table below we present our findings for each of the (sub)research questions.

Research question	Conclusion	Place in the main report
Nature		
1. What professionals appeal to the right not to disclose privileged information?	The majority of cases studied as part of this research concerned lawyers appealing to their legal privilege. Other professionals that appealed to the right of non-disclosure were civil law notaries, and to a smaller extent doctors and tax advisors. Tax advisors are not entitled to legal privilege, but a form of derived legal privilege may apply. This ratio is derived from a sample of cases that were prosecuted all the way to the Supreme Court, which will naturally have an effect on the findings. The ratio might be different for cases in which the	2.3.2, pp. 22-26.

² At the request of the public prosecutor, the examining magistrate can confiscate all susceptible objects (art. 104 Sv) and search any place for this purpose (art. 110 Sv). The law continually declares that art. 98 (first paragraph) Sv applies. Should the examining magistrate decide that documents will not be seized by him or her on the basis of art. 98 paragraph 1 Sv, then arguably the public prosecutor can oppose this on the basis of art. 446 Sv, because the claim as referred to in art. 104 Sv was rejected. Generally speaking, a public prosecutor can demand an investigative act from the examining magistrate pursuant to art. 181 Sv and appeal against this in the event of refusal (also pursuant to art. 446 Sv). In the event that the public prosecutor could demand seizure of privileged information as an investigative act by the examining magistrate (which is not a foregone conclusion) and the examining magistrate dismisses that claim, the public prosecutor's office would then be able to appeal against that rejection.



Research question	Conclusion	Place in the main report
	procedure ends with the decision of the examining magistrate or the council chamber of the court.	
2. What role do the relevant professionals play in procedures regarding legal privilege?	The professional that appeals to his or her legal privilege can be involved in the procedure in different ways. The seizure or requisition of information can take place at the privileged party directly, or with a party that has a derived legal privilege resulting from their working relation with the privileged party. It is also possible that a client of the privileged party is the subject of a criminal investigation, or that a privileged party is a suspect themselves.	2.3.2, pp. 22-26.
3. In what type of cases are appeals to the right of non-disclosure made and what do they concern: written documents or giving testimony, or another form of providing information?	The analysis of registered data shows that appeals to the right of non-disclosure mostly result from investigations into financial and economic crime. More than half of the cases studied relate to property crime. Of the remaining cases many related to economic offences. This research has focused on the confiscation of written documents, as it soon became clear that these cases result in the largest bottlenecks in terms of the duration of procedures. In threequarters of the studied cases the confiscated materials consisted of physical <i>and</i> digital documents. Most of the searches were conducted at law firms, followed by companies, notaries and places of private residence. The interviews indicate that the longest procedures regarding legal privilege result from searches and seizures that took place at large companies.	2.3.2, pp. 22-26.
4. What are the considerations in claiming legal privilege and appeal to the right of non-disclosure?	Claiming legal privilege is primarily a matter of principle to those who are entitled to it. It is a way to fulfil the duty of confidentiality that is inherent to their profession. There are, however, considerations that might play a role in appealing to the right of non-disclosure and continuing the procedure. These include the scope of the information seized, the use of investigating officers (bound by confidentiality) in filtering out the privileged information, and the interpretation of the legal framework by the examining magistrate or council chamber of the court. Important to note is that all parties involved indicate that with good consultation regarding the confiscation of documents, long procedures regarding legal privilege can be avoided.	3.1, pp. 33-35.
Scale		
5. How often are appeals to the right of non-disclosure made in cases of confiscation of information?	This research question cannot be answered based on the registered data. There is no information available on the ratio between cases where appeals to the right of non-disclosure are made and cases where no appeals are made after a seizure of documents or data. The interviews do indicate that lawyers and notaries would always appeal to their legal privilege when privileged documents are seized, as a matter of principle.	3.1, pp 33-35.
6. Are there types of cases where appeals to the right of non-disclosure are more frequent than others?	The interviews present an image of most appeals and long procedures taking place in cases regarding fraud or money laundering involving large companies. The analysis of registered data shows that, of the cases that came before the Supreme Court, a large part concerned searches of law firms. It is probable that this type of case is over-represented in Supreme Court cases, as (nearly) all confiscated data from a law firm will be subject to legal privilege.	2.3.2, pp. 22-26.
7. How often is a notice of complaint filed in court	We are unable to answer these questions for all legal privilege procedures, as there is no information available on the total	2.3.3, pp. 27-31.



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<p>against the decision of the examining magistrate? And how often are appeals lodged in cassation? And by whom (public prosecution or the privileged party)?</p>	<p>amount of cases. We can answer who usually lodges an appeal in cassation, based on the Supreme Court cases that were analysed. In most cases this is the complainant, that also submitted the complaint to the court against the decision of the examining magistrate.</p>	
<p>8. How often are the complaints or appeals (ultimately) sustained or rejected? And what considerations apply?</p>	<p>The analysis of Supreme Court cases shows that in a small majority of cases the complaint was rejected in court. Reasons for rejection include a suspicion of corpora or instrumenta delicti, or other aspects of the relevant legal framework regarding legal privilege. Appeals in cassation succeed in a small majority of the cases (54%). Considerations given by the Supreme Court to sustain appeals are that the court had not adequately motivated its decision or that the court had acted unjustly. In cases where appeals were rejected, the opposite was true. Courts adequately motivated their decision and the correct procedure was followed.</p>	<p>2.3.3, pp. 27-31.</p>
Consequences		
<p>9. What are the consequences of the duration of legal privilege procedures for criminal cases when an appeal to the right of non-disclosure is made, from the moment the appeal is made to the moment a definite ruling is made regarding the claim?</p>	<p>Analysis of the Supreme Court cases shows that procedures regarding legal privilege can take a long time. In these cases it took an average of 211 days from the search to the moment a formal decision of the examining magistrate was available. Bringing the case before the court and subsequently the Supreme Court both took over 200 days on average in these cases as well. The interviews and the extra cases that were discussed show that the procedure can cause a lot of delay in criminal investigations. Especially in cases that involve large companies and where no alternative for prosecution exists, should the confiscated material not be disclosed.</p>	<p>2.3.3, pp. 27-31 and 3.3, pp. 39-41.</p>
<p>10. What is the (average) processing time for each phase of the procedure (examining magistrate, court and Supreme Court) to arrive at a decision? Are the legally prescribed deadlines met?</p>	<p>The average time that passes before a decision by an examining magistrate is made after a search, is 211 days in the cases studied (approximately 7 months). The time that passes from the moment a complaint is filed with the court until it is reviewed by the council of the court is on average 123 days. In the sample of cases it takes on average 223 days from the moment the written documents are filed until the court has reached a decision (more than 7 months). Of the cases that were studied, a few had a very long total duration. At the Supreme Court it took on average 101 days from the moment the appeal was lodged in cassation until the case was reviewed by the judges. It took on average 168 days from the moment the appeal was lodged until the Court's decision. The legal deadlines set for the procedure at the court (30 days) and at the Supreme Court (90 days after receiving the appeal) are not met in most cases.</p>	<p>2.3.3, pp. 27-31.</p>
<p>If not, what are the most important reasons for this?</p>	<p>Several bottlenecks arise from our research that can delay procedures regarding legal privilege. Individual staff members of the bodies that are involved in the procedure do not work with appeals to the right of non-disclosure on a regular basis. This causes little accumulation of knowledge of the procedure and its legal framework. Additionally, because of digitization confiscations have become very large in scope, as large amounts of data are seized. The cabinet of the examining magistrate is not equipped to deal with this development. This has caused the filtering of privileged information from confiscated material to become a very time-consuming undertaking. A certain amount of ambiguity still remains regarding the procedure and the scope of legal privilege.</p>	<p>3.2, pp. 35-39.</p>



Research question	Conclusion	Place in the main report
	Finally, a hardening of the discussion on the topic of legal privilege between the public prosecutor's office and lawyers impedes a faster and more practical procedure.	