



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 42: Legal Professional Privilege

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Introduction

Section 42 applies to information that would be subject to legal professional privilege if litigation were in progress. Legal professional privilege covers confidential communications between lawyers and clients and certain other information that is created for the purposes of litigation. Section 42 ensures that the confidential relationship between lawyer and client is protected.

Whether information is subject to legal professional privilege is a **question of law** and it will very often be necessary to consult legal advisers in connection with this.

Section 42 is subject to a public interest balance. However, the Tribunal has recognised that there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material, and that as such equally weighty factors in favour of release must be present for the public interest to favour disclosure.¹

Where compliance with the duty to confirm or deny would in itself involve the disclosure of information which is subject to LPP, the duty to confirm or deny does not arise if the public interest in maintaining the exclusion of the duty outweighs the public interest in disclosing whether the public authority holds the information.

Information to which section 42 applies is very likely to attract other exemptions. In particular, section 35 (formulation of government policy) will often need to be considered because the purpose of seeking legal advice within government is usually to inform policy decision-making.

Advice from the Law Officers is also covered by section 35 and the Law Officers should be consulted where their advice is the subject of a request (see the section 35 exemption guidance and the legal advice working assumption).

¹ Dr John Pugh MP v Information Commissioner and Ministry of Defence (EA/2007/0055) (17 December 2007).

What information may be covered by this exemption?

Legal Professional Privilege

Legal Professional Privilege (LPP) is a rule of litigation that protects, in general terms, confidential communications between lawyers and their clients. It may also cover some communications between a lawyer and third parties (see 'what material is subject to LPP?' on the following page) for the purpose of preparing litigation. Under the litigation rule, if material is subject to LPP, a party generally does not have to disclose it during the course of legal proceedings (see below).

The principle of LPP has been established by the Courts in recognition of the fact that there is an important public interest in a person being able to consult his or her lawyer in confidence. The courts do not distinguish between private litigants and public authorities in the context of LPP. Just as there is public interest in individuals being able to consult their lawyers in confidence, there is public interest in public authorities being able to do so.

Section 42 applies to information in respect of which a claim to LPP **could** be maintained in legal proceedings. It does not require that any legal proceedings are in fact in progress, although it will certainly be of potential relevance where that is the case. The exemption focuses instead on the kind of information that would be protected if legal proceedings were in progress.

As LPP attaches to information rather than documents, section 42 will protect instances where privileged information is recounted – for example, where a policy official relays legal advice to a Minister via a submission.²

LPP can be waived, both intentionally and unintentionally. As privilege belongs to the client not the lawyer, it is for the client to choose whether to waive privilege and disclose legal advice. Prior to the Freedom of Information Act, intentional waiver would generally occur in the context of litigation, and based upon the government's assessment of the interests of justice in a particular case. Waiver can also occur in part, where advice is disclosed to a third party under strict conditions. Special rules also apply

² See *Mr M Shipton v The Information Commissioner and National Assembly of Wales* (11 January 2007) (EA/2006/0028) and *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch).

where legal advice is relied upon in the course of Court proceedings.³ Legal advice should be sought where issues of waiver arise.

Waiver may also result from unintentional or erroneous disclosure. For example, revealing the substance of legal advice when explaining a decision may constitute waiver. It is important to consider the consequences of disclosing legal advice, and further legal advice sought where appropriate.

Where LPP is waived, the advice is no longer privileged and section 42 cannot be relied upon.

What material is subject to LPP?

LPP predominantly attaches to communications with lawyers. This may include communications between a public authority and:

- external lawyers in private practice (solicitors or counsel)
- its own salaried in-house legal advisers, including those retained or employed by public authorities such as government departments in their own legal departments
- lawyers employed by other public authorities (including for example by the Treasury Solicitor's Department).

In certain circumstances legal communications with third parties may attract LPP, for example when seeking evidence from an expert for the purposes of litigation.⁴

Just because a document has been to or comes from a lawyer does not necessarily mean it will be protected by LPP. It will need to come within one of the two categories of LPP: **advice privilege and litigation privilege**.

- **Advice privilege** relates to communications between a person and his lawyer provided they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and

³ See *Foreign and Commonwealth Office v The Information Commissioner* (29 April 2008) (EA/2007/0092).

⁴ See, for example, *Anderson v Bank of British Columbia* (1876) 2 CH D 644

obligations. The leading judgement is that of the House of Lords in *Three Rivers*.⁵

- **Litigation privilege** attaches to confidential communications that come into existence when litigation is in reasonable prospect or is pending, for the dominant purpose of giving or getting advice in regard to the litigation or collecting evidence for use in the litigation. It applies to communications between the client and his lawyer, whether direct or through an agent, or between any one of them and a third party.

Legal communications must retain a quality of confidence to attract LPP. Communications will be 'confidential' if they have taken place in circumstances where a relationship of confidence is express or can be implied. Both lawyer and client generally expect their communications to be confidential. Indeed, professionally, lawyers owe their clients a duty of confidence. Correspondence between lawyers acting for the same client may also attract LPP.

Information which is protected by LPP may be disclosed to one person on terms that it is to be treated as confidential so that the quality of LPP is not lost.

Within government, the involvement of several departments in such communications will not erode the quality of confidence but if legal advice received by a department is widely shared beyond government and its agencies, consideration will need to be given as to whether it is still confidential for these purposes. Whether or not LPP has been waived, thereby losing the protection of the privilege, is a complex question of law which will turn on the specific facts of the case.

It should also be remembered that LPP may apply to a summary of legal advice, even where the source of that summary is not the advising lawyer. In *USP Strategies v London General Holding Ltd* [2004] EWHC 373 (Ch), Mr Justice Mann held that privilege extends to material which 'evidences or reveals the substance of legal advice'. The Tribunal followed this approach in the case of *Mr M Shipton v Information Commissioner and National Assembly of Wales* [EA/2006/0028], finding that a civil servant's submission to a Minister which summarised the legal advice that had been received was also covered by LPP.

Section 42 also refers to the Scottish rule of confidentiality of communications. Further guidance on this is given in Annex A.

⁵ *Three Rivers District Council & ors v Governor and Company of the Bank of England* [2004] UKHL 48

The public interest test

Section 42 is subject to a public interest balance. Therefore, if it has been decided that information falls within the terms of section 42, it is necessary to consider whether or not the public interest in withholding the information outweighs the public interest in disclosing it.

The Courts have historically recognised the important public interest in the proper administration of justice, and have noted the key role LPP plays in maintaining this.⁶ In *Derby Magistrates*, Lord Taylor CJ observed that 'The principle that runs through all these cases ...is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent'.⁷ The consequences of disclosure were noted by Lord Taylor CJ at 508: '...once any exception to the general rule is allowed, the client's confidence is necessarily lost'.

In the case of *Mr Christopher Bellamy v The Information Commissioner and DTI* (EA/2006/0023), the Tribunal considered the case law on LPP, finding that '...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'. The Tribunal has consistently followed this approach in further cases.⁸

Therefore, although the exemption in section 42 is qualified and each case must be considered on its own merits, where information is withheld using this exemption it will be by virtue of the strong public interest consideration which is recognised by the courts and the Tribunal.

Information to which this exemption applies may also be relevant to section 35 (formulation of government policy), because the purpose of seeking legal advice within government is often to inform policy decision-making. The legal advice itself may set out the policy considerations to determine what legal implications might apply. Legal advice may be sought early on in the

⁶ See, for example, *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 507 where Lord Taylor CJ described LPP as 'a fundamental condition on which the administration of justice as a whole rests'.

⁷ *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 507

⁸ See, for example, *Mr T Kitchener v The Information Commissioner and Derby County Council* (20 December 2006) (EA/2006/0044) and *Mr F Adlam v Information Commissioner and HM Treasury* (5 November 2007) (EA/2006/0079).

policy development and to disclose it may undermine the effectiveness of the policy position that was finally reached.

Additional considerations apply where the advice in question is that of the Law Officers. Law Officers' advice is covered by section 42, however, the 'neither confirm nor deny' provision at section 35(3) is ordinarily used alongside this exemption. The section 35 guidance and the Working Assumption on Legal Advice deal with Law Officers' advice in further detail.

For information regarding requests for whether or not legal advice was sought see the Working Assumption on Legal Advice.

Public interest in protecting legal advice

It is in the public interest that the decisions taken by government are taken in a fully informed legal context where relevant. Government departments therefore need high quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of the facts.

The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position.

Without such comprehensive advice the quality of the government's decision-making would be much reduced because it would not be fully informed and this would be contrary to the public interest.

Disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis.

There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is sought or given or make only a partial record.

This too would be contrary to the public interest. It is in the public interest that the provision of legal advice is fully recorded in writing and that the process of decision-making is described accurately and fully. As policy develops or litigation decisions are made it will be important to be able to refer back to advice given along the way.

At worst there may even be a reluctance to seek the advice at all. This could lead to decisions being made that are legally unsound and that attract successful legal challenges, which could otherwise have been avoided. Government's willingness to seek frank legal advice is essential in upholding the rule of the law.

It is likely that legal advice given in one context will be helpful or relevant to subsequent issues. This means not only considering the circumstances in which future legal interests could be prejudiced but also bearing in mind that the public interest in protecting the confidential relationship between lawyer and client is a long term public interest which could be damaged by individual disclosures. The disclosure of legal advice even when no litigation is in prospect may disadvantage the government in future litigation. It is quite possible that legal advice in connection with one department will have wider implications for other departments so it is important that decisions on disclosure are considered in their full context.

Public interest in disclosure of legal advice

In some circumstances the public interest will require the disclosure of LPP material. This is likely to be in those circumstances where the government would waive its privilege if litigation were in progress. Legal advice should be taken if it is anticipated that such circumstances might arise.

Consideration will need to be given to other factors which need to be balanced against the public interest in the continuing confidentiality of legal advice. There is a public interest in public authorities being accountable for the quality of their decision-making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision-making process and access to the information upon which decisions have been made can enhance accountability.

It could be argued that there is a public interest in some cases in knowing whether or not legal advice has been followed. However, the factual position is unlikely to be so simple. Legal advice is often complex and involves a fine balance of risks. Instances of departments overriding unequivocal legal advice will be very rare.

The weight to be attached to these public interest factors will differ according to the case in question. However, given the very substantial public interest in maintaining the confidentiality of LPP material, it is likely to be only in exceptional circumstances that it will give way to the public interest in disclosure.

Neither confirm nor deny

Where compliance with the duty to confirm or deny would in itself involve the disclosure of information which is subject to LPP, the duty to confirm or deny does not arise if the public interest in maintaining the exclusion of the duty outweighs the public interest in disclosing whether the public authority holds the information.

Consultation

The balance of the public interest test in relation to this exemption is likely to be complex. It is important that legal advisers are consulted where it appears that information which is the subject of a request might fall within section 42.

The Law Officers should also be consulted where it appears that their advice is the subject of a request. For more information on advice from the Law Officers see the section 35 (formulation of government policy) guidance and the Working Assumption on Legal Advice.

Duration of the exemption

After 30 years, beginning with the year after the year in which the record was created, information becomes a 'historical record' and can no longer be exempt by virtue of section 42.

Relationship with other exemptions

- **Section 30 – investigations and proceedings conducted by public authorities**
In some circumstances the relationship between the CPS and the police will not be that of a solicitor and client. It is likely however even where this is the case that other exemptions such as those in sections 30, 31 and 41 (see below) will apply to communications between the CPS and the police.
- **Section 31 – law enforcement**
This section may also be relevant even where the information does not come within section 42.
- **Section 32 – court records, etc.**
Where for example the information requested is a court document or has been served for the purposes of legal proceedings it should be considered whether section 32 will apply. If section 32 does apply this confers an absolute exemption.
- **Section 35 – formulation of government policy, etc.**
Where the information relates to the provision of advice by any of the Law Officers or any request for the provision of such advice, this will also fall within section 35(1)(c). It should be noted that section 35(1)(c) may be relevant and so will need to be considered even where the information in question does not fall within section 42. Where a request relates to the provision of advice by the Law Officers it should be referred to the office of the relevant law officer.

The other parts of section 35 may also be relevant, particularly section 35(1)(a) as departmental lawyers and Treasury Counsel are often consulted regarding the formulation or development of government policy. This section may also be relevant where compliance with the duty to confirm or deny would not in itself disclose information which is subject to LPP but would be information relating to the formulation or development of government policy.
- **Section 41 – information provided in confidence**
Section 41 applies to information obtained by a public authority from another person where the disclosure of the information to the public would constitute a breach of confidence. For example, where a public authority holds legal advice received by another person sections 41 and 42 may both apply. Section 41 may also be relevant even though the information in question does not fall within section 42.

Annex A: Summary of rule of Confidentiality of Communications in Scotland

Although the phrase 'legal professional privilege' has been used in some statutes which have effect in Scotland, the more appropriate term in Scotland is 'confidentiality of communications'. In addition, it would be wrong to assume that the Scottish term means the same as LPP in England and Wales. The principles are subtly different and interpretation of the concept in Scotland will not always follow the approach of the authorities in English law. The infrequency of reported cases means that some aspects of the privilege have not been judicially considered in as much detail as in England and Wales.

The operation of this exemption is complex and in some respects potentially uncertain. Confidentiality of communications is a principle founded on Scots common law, and its precise details continue to evolve through case law. It is important that legal advice is taken where it appears that information which is the subject of a request might fall within section 42.

The principle of privileged communications in Scotland embraces two concepts – the confidentiality of communications between a legal adviser and client, and the privilege of communications made post litem motam (in contemplation of litigation).

Confidentiality of communications between legal adviser and client:

- The privilege covers communications by solicitors, advocates, solicitor-advocates and advocate-clerks. It probably covers in-house lawyers and lawyers working for one public authority providing advice to another public authority.
- The legal adviser must be acting in his professional capacity and the communications must occur in the context of his professional relationship with his client.
- It is likely that communications are privileged whether or not they relate to pending or contemplated litigation.
- The privilege does not extend to matters known to the legal adviser through sources other than the client or to matters in respect of which there is no reason for secrecy. Communications which are intended

to be 'confidential' in a non-legal sense are likely to attract the privilege.

- The privilege does not extend to communications which relate to fraud or the commission of an offence.
- Documents held by the legal adviser but prepared by others are not privileged (including communications between the client and third parties), but legal advice given by the legal adviser to client concerning the same documents is privileged.
- The fact that advice was sought is not necessarily privileged.

Privilege of communications made post litem motam:

- This privilege covers communications which take place in anticipation of civil litigation
- Litigation need not have started, but there should be a threat of litigation, and the privilege subsist even if litigation never in fact takes place or is concluded
- The point in time when the privilege starts is not settled and may occur as early as immediately following upon the events to which the communication relates
- The privilege covers any communication to or by a litigant in connection with the preparation of his case. The exception is that of reports prepared by employees who were present at the time of an accident for the benefit of their employers, even where the report is passed to the employers' insurers with a view to litigation starting.
- The communications should have some substance, as a chance remark about a case is not privileged
- A communication which is passed to a third party loses its confidential status
- If a communication, which is otherwise privileged, is to be founded upon in pleadings to the litigation or led as evidence, it will have to be disclosed in accordance with usual Scots law civil procedure
- Admitting that the communication exists does not automatically waive its confidential status.

The concept of confidential communications will apply to the Scottish bodies listed in Schedule 1 to the Act. It should be noted that a similar exemption for confidential communications in Scotland (section 36) and

a test of public interest (section 3) are available under the Freedom of Information (Scotland) Act 2002 to the devolved bodies listed in Schedule 1 to that Act. In addition, the 2002 Act does not apply to information which has been supplied to a Scottish public authority in confidence by a Minister of the Crown or by a United Kingdom government department, which could include legal advice shared with a Scottish body by a United Kingdom government department or by a United Kingdom government lawyers.

In the context of litigation, confidentiality of communications may arise either in relation to the disclosure of documents in support of a party's case, or where one party seeks to recover evidence from another party to the litigation, or from a third party. In accordance with usual Scots law rules on evidence, if communications are to be founded upon in pleadings, or led in evidence, they will have to be disclosed. A party may seek to recover evidence relevant to his case by means of a Commission and Diligence. The person/body holding the evidence is entitled to challenge the obligation to disclose the evidence to a Commissioner who has been appointed by the court to oversee the recovery process and the confidential status of the evidence can be raised at this stage.

