



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 34 – Parliamentary
privilege

14 May 2008

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Introduction

Section 34 applies to information where disclosure would be an infringement of the privileges of either House of Parliament.

Section 34 needs to be considered where a public authority is required to lay information before Parliament before disclosing it to anyone else. Section 34 will not apply where the information has been published by Parliament.

Section 34(3) enables the parliamentary authorities conclusively to certify that material to which section 34 applies is exempt. The content of the information may also be relevant to other exemptions in the Act, but where parliamentary privilege is certified by the House authorities under section 34, it is unnecessary to cite any other exemption. You are strongly advised to consult officials from the relevant House before claiming exemption under section 34. **If the privilege exemption applies, the public authority will have no discretion to release voluntarily.**

Privilege is intended to protect the 'proceedings'¹ of the House as an institution and to provide what can be thought of as 'parliamentary service immunity'. It is of the utmost importance for the effective working of Parliament as it protects the freedom of each House of Parliament to control its own affairs and not have its proceedings questioned. The exemption prevents any other public authority from needing to adjudicate on Parliament's right to withhold information where that right is exercised on grounds of parliamentary privilege.

Privilege is exercised separately by each House. Accordingly, the privilege exemption can be certified only by authority of one or other of the two Houses. For the most part, the exemption is likely to be invoked in respect of information generated by and held by either of the Houses. There are, however, certain categories of documentary and other information which may be generated or held elsewhere (particularly, but not exclusively, in central government departments) which might be thought to relate to 'proceedings in Parliament', and which may therefore require the department or other body concerned to seek guidance from the appropriate House authorities.

In some circumstances it may be appropriate to neither confirm nor deny whether the requested information is held, see '**neither confirm nor deny**' on page 7.

¹ See 'information relating to proceedings in Parliament' on page 4.

Section 34 is **not** subject to the public interest test.

What information may be covered by this exemption?

What is parliamentary privilege²?

The core of parliamentary privilege is that each House has the freedom to control its own affairs, and that proceedings in Parliament cannot be impeached or questioned in the courts or similar institutions (such as tribunals). Members cannot be sued or prosecuted for anything they say or do in the House or a committee (although the same words used outside Parliament are vulnerable).

The protection of privilege applies only to proceedings in Parliament. It should therefore be noted that, while the House of Commons and the House of Lords are 'public authorities' for the purposes of the Act, individual Members of Parliament or members of the House of Lords are not.

Most importantly, a Member's correspondence (including correspondence with Ministers or other Members of either House, or their constituents) is not privileged, unless it relates to actual or potential proceedings of the relevant House or committee³. The ICO has produced guidance on MPs' correspondence: see ICO Freedom of Information Guidance, 'Guidance on dealing with requests for MPs' correspondence relating to constituents,' at www.ico.gov.uk. It is often exempt under other exemptions.

There is no definitive guide to what constitutes privilege. The arbiter is the House concerned, case by case. Erskine May, **Parliamentary Practice** provides as authoritative an account as possible of the present position and the Clerk of the Journals in each House is always willing to provide advice.

² Further information on the origins and extent of parliamentary privilege can be found in Erskine May, **Parliamentary Practice**; or in the Report of the Joint Committee on Parliamentary Privilege (Session 1998-99, HL Paper 43-I/HC 214-I).

³ Unlike in most European national parliaments, parliamentary privilege in the United Kingdom eschews any concept of the personal immunity or 'inviolability' of individual Members except in so far as is necessary to enable the relevant House to perform its functions and exercise its collective privileges.

Parliamentary publication of privileged information

Much information, which is privileged, is now routinely published by Parliament itself. Both Houses, like all bodies covered by the Act, have publication schemes under section 19. The fact that Parliament has chosen to publish certain information does not mean that it has ceased to be privileged, but simply that Parliament has chosen not to exercise the section 34 exemption. In many cases, this information will fall under section 21, as information that is 'exempt' from the Act because it is 'reasonably accessible' elsewhere; if section 21 does not apply, advice should be sought from the House concerned.

Information relating to 'proceedings in Parliament'

Parliament's right to control its own procedures means that information should not be disclosed which relates directly to the proceedings of either House and its committees, other than material whose release has been authorised by resolutions or orders of the House. 'Proceedings in Parliament' have never been precisely defined, but they include 'some formal action (usually a decision) taken by the House in its collective capacity ... the forms of business in which the House takes action, and the whole process by which it takes a decision.' (Erskine May, **Parliamentary Practice**, 23rd edition, page 111). Proceedings include actions taken by committees as well as by the House itself.

The Parliamentary privilege exemption is most likely to be relevant to information contained in documents in the following categories, when they are unpublished:

- memoranda submitted to committees
- internal papers prepared by the officials of either House directly related to the proceedings of the House or committees (including advice of all kinds to the Speaker or other occupants of the Chair in either House, briefs for the chairmen and other members of committees, and informal notes of deliberative meetings of committees)
- papers prepared by the Libraries of either House, or by other House agencies, either for general dissemination to Members or to assist individual Members, which relate to, or anticipate, debates and other

proceedings of the relevant House or its committees, and are intended to assist Members in preparation for such proceedings

- correspondence between Members, officials of either House, Ministers and government officials directly related to House proceedings, including exchanges between Counsel to the Chairman of Committees and those drafting bills and statutory instruments
- papers relating to investigations by the Parliamentary Commissioner for Standards
- papers relating to the Registers of Members' Interests
- bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from Parliamentary counsel or another government department

Privileged information which is likely to be in departments' hands

Information which may be covered by parliamentary privilege may also fall under other exemptions, depending on the subject matter. It is important, however, that privilege is asserted wherever it is applicable. Particular care will therefore need to be taken in relation to requests for information about, or contained in:

- any of the unpublished working papers of a select committee of either House, including factual briefs or briefs of suggested questions prepared by the committee staff for the use of committee chairmen and/or other members, and draft reports: these should only be in the possession of a department as a result of a Minister being, or having been, a member of such a committee
- any legal advice submitted in confidence by the Law Officers or by the legal branch of any other department to the Speaker, a committee chairman or a committee, or any official of either House (even if section 42 (legal professional privilege) would be likely to apply)
- drafts of motions, bills or amendments, which have not otherwise been published or laid on the Table of either House
- any unpublished correspondence between Ministers (or departmental officials) and any Member or official of either House, relating

specifically to proceedings on any Question, draft bill or instrument, motion or amendment, either in the relevant House, or in a committee

- any correspondence with or relating to the Registrar of Lords' Interests, the proceedings of the Parliamentary Commissioner for Standards or the Registrar of Members' Interests in the House of Commons

Information relating to matters not regarded as 'proceedings in Parliament'

Other information arising from or related to a wide range of activities within Parliament is not regarded as privileged, although other exemptions may be relevant. The most significant categories are:

- Papers prepared by the Libraries of either House, or other House agencies, intended to provide general or specific background information on matters not currently under examination, or expected or planned to be considered, in formal proceedings of either House or their committees.
- Members' correspondence and other communications not specifically related to proceedings of either House or of one of its formally constituted committees. For example, correspondence between a Member and a Minister about a constituency issue that is not the subject of proceedings is not privileged, but correspondence about a draft motion, amendment or Question is privileged.
- The deliberations of parliamentary bodies established by statute (although if they are discussing matters relating to the preparation of formal proceedings in Parliament, those deliberations may be privileged).
- Meetings of political parties and their committees.
- Meetings of all-party groups.

A certificate signed by the appropriate authority

Where a request is made for information which may be covered by parliamentary privilege which has not been published by either House, departments are strongly advised to seek advice from the relevant officials of the House concerned. For both Houses this is, in the first instance, the Clerk of the Journals. Departments' own parliamentary branches or freedom of information units should have set up mechanisms for consultation with the relevant House authorities. If the exemption applies, a certificate signed by the Speaker in the House of Commons or the Clerk of the Parliaments in the House of Lords is conclusive evidence of that fact. A certificate is not usually issued until a request reaches the Information Commissioners Office.

Only the parliamentary authorities can certify this exemption. The exemption is subject to the usual 20 working-day limit for responses. You need to approach the relevant parliamentary authorities in good time for them to consider whether the exemption applies and still give yourselves time to respond to the request for the information within the 20-day limit. This should therefore be done in parallel with any consideration as to whether any other exemptions may apply.

Public interest test

Section 34 is an absolute exemption and not subject to the public interest test in section 2. It applies where it is required to avoid a disclosure which would 'infringe' the privileges of either House of Parliament.

Neither confirm nor deny

Section 34(2) provides for an exemption to the duty to confirm or deny whether the requested information is held if, or to the extent that, this is required to avoid an infringement of the privileges of either House of Parliament. This might include, for example, unpublished advice provided to a select committee chairman when confirmation might give rise to questions about the process or outcome of a particular committee inquiry, or evidence

submitted to the Parliamentary Commissioner for Standards where acknowledging that it is held would in itself be prejudicial to the conduct of such proceedings or to the individuals involved.

Duration of the exemption

Section 34 is not subject to section 63. This means that there is no date at which the exemption ceases to apply. In practice, privileged information is normally released when it is more than 30 years old. But it remains a matter for the House authorities.

Other relevant exemptions

Section 34 deals with information which relates in a particular way to the proceedings of Parliament. The content of the information may also be relevant to other exemptions in the Act, but where parliamentary privilege is certified by the House authorities under section 34, it is unnecessary to cite any other exemption, see page 1.

In relation to a government department, sections 35 and 36 are very likely to be relevant. Section 35 concerns, amongst other things, Ministerial communications and information relating to the formulation of government policy. The following points in relation to section 36 should be noted in particular.

Section 36 deals with the effective conduct of public affairs. Information is exempt if in the reasonable opinion of a qualified person its disclosure would prejudice the effective conduct of public affairs. Normally, section 36 is subject to the public interest test.

Communications between MPs and Ministers about constituents' issues may be exempt under section 40 to the extent that they constitute personal information⁴ or under section 41 (information provided in confidence). The ICO has produced: 'Guidance on dealing with requests for MPs' correspondence relating to constituents', available at www.ico.gov.uk.

Section 42 (legal professional privilege) may also apply to some of the material covered by section 34.

⁴ The Data Protection (Processing of Sensitive Personal Data)(Elected Representatives) Order 2002 (SI 2002/2905) provides that sensitive personal data may be processed by Members of the House of Commons for the purpose of dealing with concerns raised by their constituents. This Order adds to the conditions listed in Schedule 3 to the Data Protection Act 1998 and may be relevant when assessing whether information is exempt under section 40(3)(a)(i) because disclosure would breach the first data protection principle.

