

Freedom of Information Awareness Guidance No 28

Parliamentary Privilege

The right under the Freedom of Information Act to request official information held by public bodies comes into force in January 2005. The Awareness Guidance series is published by the Information Commissioner to assist public authorities and, in particular, staff who may not have access to specialist advice in thinking about some of the issues. Here we consider the exemption relating to parliamentary privilege which is set out at Section 34 of the FOI Act. The aim of the series is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in preparing for implementation.

What does the Act say?

The Freedom of Information Act 2000 provides a right of access to information held by public authorities. Section 1 of the Act establishes this right to know by placing two related obligations on public authorities. Firstly, when an applicant (who can be anyone from anywhere in the world) requests information, a public authority has a duty to write to the applicant saying whether it holds the information. This is known as 'the duty to confirm or deny'. Secondly, if the authority does hold the information it must communicate it to the applicant.

Section 34 is an absolute exemption designed to protect parliamentary privilege. As such, information will be exempt from the Act if its withholding is necessary in order to avoid infringing the privileges of either the House of Commons or Lords. The duty to confirm or deny does not apply therefore if, or to the extent that, exemption from the duty is required for the purpose of avoiding an infringement of the privileges of either House.

Both the House of Commons and the House of Lords are deemed to be public authorities for the purposes of the Act; however the individual members of both Houses are not. It is also worth noting that S34 does not provide an equivalent exemption to the National Assemblies of Northern Ireland and Wales.

What is Parliamentary Privilege?

Parliamentary privilege is a matter of constitutional law going back to the seventeenth century which establishes the rights and immunities of both Houses of Parliament and their members. It extends beyond those privileges enjoyed by other bodies and individuals. Privilege is critical to the effective working of Parliament as it protects its right to operate independently without external interference.

Whilst there is no definitive guide to what constitutes parliamentary privilege, it is generally recognised that the term 'privilege' implies a special advantage, rather than a special protection. Parliamentary privilege comprises five main privileges:

- freedom of speech and proceedings in Parliament
- freedom of each House to control its own affairs (referred to as 'exclusive cognisance')
- to control publication of its proceedings
- freedom from arrest
- to punish for breach of privilege and contempt

The most significant rights however are those relating to freedom of speech and Parliament's control of its own proceedings.

Additional information on parliamentary privilege can be found at www.directgov.uk

Freedom of Speech

Parliamentary privilege which permits freedom of speech means that an MP cannot be sued or prosecuted for anything he or she says as part of the proceedings in Parliament. This ensures that an MP is able to speak up on behalf of constituents, or can express any opinion on a public issue, without fear of legal action. Anyone giving evidence to a committee of the House also has the absolute protection of privilege; no criminal or civil action can be brought against them on the basis of what they have said.

Proceedings in Parliament

Whilst 'proceedings in Parliament' has never been precisely defined, it is generally accepted that it embraces '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 'Treatise on the Law, Privileges, Proceedings and Usage of Parliament' - generally agreed to be the definitive guide to Parliament).

Based on this definition proceedings in Parliament will include:

- Motions, proceedings on bills, and votes
- Parliamentary questions
- Proceedings within committees formally appointed by the House (and their subcommittees), including oral and written evidence and deliberations
- Public petitions

It is important to note that reports of parliamentary proceedings are included within the definition of privilege and will therefore also be covered by this exemption.

The Conclusive Certificate

An important aspect of S34 is the issue of a 'conclusive certificate' which will be taken as evidence that complying with the provisions of the FOI Act will constitute an infringement of the privileges of either House of Parliament. The Act requires that the certificate be signed by an 'appropriate authority' – either the Speaker of the House of Commons or the Clerk of the Parliaments at the House of Lords. Significantly, there is no statutory appeal mechanism against the issue of a conclusive certificate – this is in line with the general principle that decisions taken by parliamentary officers are not subject to judicial review.

Whilst a conclusive certificate is evidence of the fact that a particular disclosure of information would infringe an established privilege it is not conclusive evidence of the scope of parliamentary privilege per se. It is important to note that whilst Parliament has sole authority to determine whether a breach of privilege has taken place, it does not however have authority to create new forms of privilege. The courts are entitled to define the scope of existing parliamentary privileges.

Who can use this exemption?

In recent years Parliament has routinely published much information which falls within the definition of privileged. The range of information extends beyond records of internal proceedings to include internal administrative documents and most recently details of members' expenditure against parliamentary allowances. It is likely that this approach will continue with more information becoming routinely available. It is worth noting however that when Parliament does decide to release such information it is acknowledged to be on the basis that whilst it has chosen to do so the information remains privileged. Within the context of the Act however this does mean that disclosure of such published information cannot be considered an infringement of parliamentary privilege.

In practice this exemption is likely to have the greatest applicability to central government departments outside of Parliament itself; although other public authorities may hold limited information to which this exemption relates. Significantly however, only the appropriate House authority can conclusively certify that the exemption applies.

The Information Commissioner advises that as a matter of good practice, where a public authority is considering relying on S34 to withhold information, it should on all occasions contact the Freedom of Information Officer at the appropriate House of Parliament to discuss the details of the request. Individuals whose application for information is refused should make their request for a review of the decision to the public authority and not to either House of Parliament.

What information will likely be covered by this exemption?

It seems likely that the most frequent circumstances in which information will be considered exempt will be where Parliament relies on the exemption to avoid infringing its right to control the publication of its proceedings. Having said that the exemption is most likely to have the greatest relevance to central government departments outside of Parliament itself, it is useful to identify the range of information to which the exemption will apply:

- Committee reports and drafts not otherwise published
- Memos (and drafts) to committees of Parliament
- Internal papers prepared by the Officers of either House directly relating to House or committee proceedings
- Correspondence between Members, Officers, Ministers and Government officials directly relating to House proceedings
- Papers concerning investigations by the Parliamentary Commissioner for Standards
- Bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from Parliamentary Counsel or a government department
- Papers (including drafts) prepared by external special advisers and academics appointed for the specific expertise in a given area.
- Papers prepared by the Libraries of either House for example at the request of a MP which relate to constituency matters - however privilege would apply if the subject matter was concerned with a forthcoming debate or parliamentary committee.

What information should be released?

It is important to recognise that there is much information arising from or related to Parliament's wide range of activities that will not be considered privileged in that it does not relate to proceedings in Parliament. It is likely that this information will in the main be held by non-parliamentary government departments and other public authorities. Examples of information where parliamentary privilege will not apply include:

- Members' correspondence and other communications not specifically related to proceedings of either House or a formally constituted committee
- Any of the unpublished working papers of a select committee of either House, including factual briefings or briefings of suggested questions prepared by the committee staff for the use of committee chairmen and / or members, and draft reports. These are most likely to 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 Officer or by the legal branch of any other department to the Speaker, a committee chairman or a committee, or any official of either House
- 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, department officials or any member of either House, relating specifically to proceedings on any Question, draft bill, motion or amendment, either in the relevant House, or in a committee
- Any correspondence with or relating to the proceedings of the Parliamentary Commissioner for Standards or the Registrar of Members' Interests in the House of Commons.

Whilst it may be appropriate to consider other exemptions to the Act when considering requests for such information, the Information Commissioner has advised that wherever possible information should be disclosed.

The Information Commissioner's Role

The issue of a conclusive certificate places a limit on the Information Commissioner's role and powers to take action and investigate a claim that information has been withheld. Evidence will not be required to establish that the House of Commons Speaker or the House of Lords Clerk has issued the certificate based on reasonable opinion or sound judgement. The Commissioner will be able to ask that the certificate be produced to verify its existence and authenticity but will have no authority to overrule it. He will however be able to investigate any complaints which arise under other parts of the Act in relation to that application – for example under Part One of the Act concerning fees, time limits and the provision of advice and assistance.

Where however a conclusive certificate has not been issued the Information Commissioner will be able to consider the details of the complaint and the information requested. It will be most likely that he will wish to discuss and review these details with the appropriate House authority.

It is interesting to note that whilst both Houses have agreed that they are likely to take a common approach when seeking to rely on the exemption, they have however acknowledged that the range and nature of the information disclosed will not necessarily be the same for both Houses. The Information Commissioner will monitor the approach taken by both.

Summary

- S34 is an absolute exemption designed to protect parliamentary privilege i.e. not subject to the public interest test
- The authorised person in both Houses may issue a conclusive certificate stating in effect that disclosure of information will infringe parliamentary privilege
- The Information Commissioner advises that authorities should discuss any requests for information to which s34 will or might apply with the appropriate House's FOI officer
- Where a conclusive certificate has been issued, the Information Commissioner's role is limited to verification of its existence and authenticity.