

Freedom of Information Act Awareness Guidance No 4

Legal Professional Privilege

The right under the Freedom of Information Act to request official information held by public bodies (known as the **right to know**) 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 information which may be protected by legal professional privilege. The exemption is set out in section 42 of the 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. It is likely to be particularly important in this area that if there is any doubt about whether the exemption applies that legal advice is obtained.

This awareness guidance deals with the English law concept of legal professional privilege as opposed to the Scottish law concept of 'confidentiality of communications', to which section 42 also refers. Although the two concepts have much in common, you are strongly advised to take additional legal advice so far as Scotland is concerned. (It should also be noted that there is a separate FOI Act which applies to Scottish public authorities. For further information contact the Scottish Information Commissioner www.itpublicknowledge.info)

A) What does the Act say?

Section 42 sets out an exemption from the **right to know** if the information requested is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. The questions of what is privilege, who can claim and who can waive it, are considered later in this awareness guide.

The Act contains two types of exemption: class-based and prejudice-based. For a prejudice-based exemption to apply, it is necessary to consider whether a particular disclosure would be likely to cause prejudice before the exemption can be applied. The legal professional privilege exemption is class based. Therefore, for the exemption to apply, it is not necessary to demonstrate that any 'prejudice' may occur to the professional legal adviser /client relationship if information is disclosed. Rather, it is assumed that the disclosure of even quite trivial information might undermine the relationship of the lawyer and client.

Nevertheless, the exemption from the **right to know** is conditional and can only be relied upon where the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Issues concerning the 'public interest test' are discussed below. (See also [Awareness Guidance No 3.](#))

What is Legal Professional Privilege?

Legal professional privilege is a common law concept developed by the courts rather than one which is set out in an Act of Parliament. There is no attempt to define the term in the FOI Act. Common law concepts, by their very nature, are not defined in statute. The scope of the exemption may change, therefore, as the courts further develop the concept.

The principle is based upon the need to protect a client's confidence that any communication with his/her professional legal adviser (see 'Who is a professional legal adviser' below) will be treated in confidence and not revealed without consent. This is to ensure there is the greatest chance that justice is administered to the client.

Legal professional privilege protects communications between a professional legal adviser and client from being disclosed, even to a court of law. The emphasis should be on communications (for the purposes of FOI this means information rather than documents). Communications include oral as well as written correspondence. FOI is only concerned with 'recorded information' so oral communications, unless recorded, would not be disclosed in response to a request. However, an Employment Tribunal has held that privilege applies to written notes taken by a director of a company documenting the legal advice obtained in a meeting with the company's professional legal advisers.

Legal professional privilege is a different concept to that of the more general 'confidentiality of communications', so where legal professional privilege does not apply the information may still attract other exemptions, in particular 'information provided in confidence' defined in s.41 of the Act. (See [Awareness Guidance No 2](#)).

Who is a 'professional legal adviser'?

The term 'professional legal adviser' encompasses a number of different types of legally qualified individuals including both external and in-house lawyers. It will generally be clear who is a 'professional legal adviser'. Examples include qualified solicitors, barristers and licensed conveyancers.

Within the English legal system legal executives may assist solicitors in the provision of legal advice to clients. Increasingly legal executives hold professional qualifications recognised by the Institute of Legal Executives ('ILEX') but this is not always the case. English law makes no formal provision for the scope of privilege to be extended to cover communications between a client and legally qualified legal executive. Whilst this area of law is not settled the ILEX takes the view that, with regard to legal professional privilege, professionally qualified legal executives holding recognised legal qualifications retained by clients for the provision of legal advice are to be treated in the same manner as solicitors. For the purposes of the FOI legal professional privilege exemption the Commissioner agrees with ILEX on this matter.

Professional legal advisers from whom advice is sought, or with whom communications are made, will usually have a good understanding of legal professional privilege and their advice on whether privilege exists should be sought.

Who can claim privilege?

Privilege attaches to the information itself and belongs to the client. It applies in circumstances explained in Section C of this guidance. Although there are circumstances under which a professional legal adviser ceases to be bound by privilege (see “Cases where privilege ceases to exist”, below), it cannot otherwise be waived by the professional legal adviser without instructions from the client. The FOI Act will not change this rule and it will continue to be the case that a professional legal adviser may face disciplinary action and could be subject to a civil action if privileged information is unjustifiably disclosed.

B) Categories of legal professional privilege

There are two categories of legal professional privilege:

- Advice privilege – where no litigation is contemplated or pending
- Litigation privilege – where litigation is contemplated or pending

Litigation refers to the taking of a legal action by one party against another in which an issue is being taken to a court of law for a judge or magistrate to decide.

Advice privilege

This category of privilege attaches to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information in question must be communicated in a professional capacity. Consequently, not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege.

As is the case with medical information or banking information where an obligation of confidentiality arises out of the special relationships between doctors and patients or bankers and customers, legal professional privilege arises from the nature of the relationship between the professional legal adviser and his or her client. Generally the information covered by privilege will have the same characteristics as other confidential information: for instance, it will be of limited availability.

Communication also needs to be made for the principal or ‘dominant’ purpose of seeking or giving legal advice. This concept also applies to litigation privilege and is discussed below.

Litigation privilege

This category of privilege arises where litigation is contemplated or is in fact underway. When this is the case, privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of the proposed or on-going litigation. This clearly includes not only the communications between a professional legal adviser and his or her client but also a variety of other documents.

This privilege is wider than advice privilege described above as it includes not only communications between professional legal adviser and client but extends to communications made with third parties. For example, a public authority in preparing for a case requires a third party expert opinion about scientific data in a particular report. A letter is sent from the authority's legal counsel to the expert and the opinion is given. All notes of correspondence, in this example, would attract litigation privilege as would the expert opinion. Any information being relied upon in proceedings would, however, have to be disclosed to the relevant parties through the normal rules of the court under which parties to litigation must disclose the basis of their case to the other side.

C) Establishing the existence of privilege

In deciding whether in fact information is privileged, it is necessary to ask two further questions.

- What is the purpose for which the information was created or communicated? In other words what is its principal or 'dominant' purpose? Known as the 'Purpose Test'.
- In the case of litigation privilege only, how likely is the prospect of litigation? Known as the 'Likelihood Test'.

The 'Purpose Test'

For legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or the seeking or provision of legal advice.

With regard to 'advice privilege' the dominant purpose of the communication between client and professional legal adviser must be that of seeking or providing legal advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents in question. It may also be helpful to consult the professional legal adviser who created the information or the client. Information does not attract privilege simply by being handed to a professional legal adviser amongst other communications. The test is whether the information was passed to a professional legal adviser for the sole or dominant purpose of obtaining legal advice.

The issue of 'dominant purpose' of communications was considered by the Three Rivers (No5) case. The Court of Appeal confirmed that the purpose and scope of advice privilege is to enable legal advice to be sought and given in confidence about legal rights and obligations because this is the subject matter that may form the basis of litigation. The emphasis in this case was on the distinction between advice regarding presentational issues, and thus not privileged, and advice concerning the substantive rights and obligations of the Bank, which was privileged.

For example, a local authority social service department conducts a case conference, between a range of professional organisations, to discuss strategies for dealing with a particular issue. An in-house lawyer is invited to these proceedings. The dominant purpose of this conference is not to seek advice about legal rights and obligations but rather to seek a way forward on a particular issue. It is unlikely that information collected at this meeting would attract advice privilege.

With regard to 'litigation privilege' the information must have been created for the purpose of on-going litigation or contemplated litigation. Again, inspection of the documents will often reveal the dominant purpose although occasionally the answer will not be clear-cut. There are occasions where individual pieces of information were created before any litigation was anticipated or commenced. However, a claim for litigation privilege can still be made if those pieces of information have been brought together with others for the purpose of litigation. In general, where the professional legal adviser has exercised skill and judgement in selecting information and not simply copied information wholesale or inserted irrelevant information, a claim for privilege is likely to be upheld by a court.

The 'Likelihood Test' – only applies to Litigation Privilege

For information to attract litigation privilege it must have been created or brought together for the purposes of litigation or anticipated litigation. The courts have ruled that there must be a 'reasonable prospect of litigation' at the time of the information was created or brought together.

It has been held in law that 'litigation cannot be anticipated until a cause of action, or part of it, has arisen'. This includes cases where there is a reasonable prospect that such a cause may arise. For example, a local authority may receive a notice that a pressure group intends to disrupt a peaceful march through its city centre. Any advice which it sought or obtained as to what legal action to pursue in the event of disruption might attract litigation privilege even though the "cause of action" had not yet occurred.

The effect of copying or sharing information

Information may cease to be privileged if it is copied and shared with third parties. The question here will be how widely any copies have been distributed. For example, a local authority, in taking legal proceedings, compiles a report which is afforded the

protection of litigation privilege. Where this is copied and sent internally to a selected few, and accordingly retains its confidentiality, the copy will be afforded the protection of privilege. By contrast if the local authority copied and used the report externally, for example, as part of commercial dealings, privilege would be likely to be lost.

A consideration of who is the client will also be relevant here. The client may not include every employee of a large organisation but may be confined to an identifiable team within such a body. If the client is deemed to be a large team, or even a department of a public authority, then the information will be likely to remain privileged if copied amongst this large number of people.

There will be cases in which a public authority holds information subject to privilege owed to a third party. For instance a NHS Trust may have been provided, on a confidential basis, with a copy of legal advice obtained by a Health Authority. In this example the NHS Trust are not owed the privilege and so therefore are not able to waive it. While it would certainly be possible to analyse such cases with reference to the concept of legal professional privilege, it may be simpler to consider the question of confidentiality. (See also [Awareness Guidance No 2 on Information Provided in Confidence](#).)

Cases where privilege ceases to exist

Privilege exists in order to advance justice. It does not apply to information that conceals fraud, crime or the innocence of an individual. Loss of the privilege occurs even where the professional legal adviser is unaware of the wrongdoing. Advice warning a client about the danger of prosecution would normally attract privilege since the fraud or crime has yet to be committed but once a professional legal adviser becomes aware of the wrongdoing the associated information ceases to be privileged. Furthermore, a distinction must be drawn between legal advice given after a wrongdoing has been committed, which would normally attract privilege, and advice given with the intention of furthering a criminal purpose before a wrongdoing, which does not.

D) The 'Public Interest Test'

The legal professional privilege exemption is subject to the public interest test. (See also [Awareness Guidance 3](#) which gives some general advice on this subject.) As explained earlier, the Act cannot be used to force professional legal advisers to disclose privileged information without the consent of the clients to whom the privilege belongs.

The concept of legal professional privilege contains its own built-in public interest test. The privilege may not be claimed where communications are made with a professional legal adviser with the intention of furthering a criminal purpose or are directed to the commission of a crime or fraud.

The Act broadens the scope of consideration of the public interest beyond preventing that which is unlawful to weighing the public interest in disclosing communications and not disclosing them. The Act can, however, be used to oblige an authority with a claim to legal professional privilege to review its decision to maintain the privilege on public interest grounds. All requests must be judged on their own merits. This section of the guidance discusses some of the public interest considerations that will influence a public authority's decision to waive or to maintain its privilege.

Timing of disclosure

Where legal advice has served its purpose, litigation has ended or the possibility of litigation has ended the public authority may be more inclined to disclosure. Although legal privilege could still be claimed, there may be a stronger public interest argument in favour of disclosure particularly if, in fact, no harm would be created. Insofar as the legal advice had been supported by a court and there is no likelihood of appeal, it may be in the public interest to make the full advice more available.

By contrast, where litigation is ongoing and where its disclosure would undermine the prospects of success by the authority, there will be very strong arguments against disclosure.

Legal privilege has classically been applied to information in perpetuity. Under FOI, this is no longer the case and the exemption cannot be applied to information which is deemed to part of a 'historical record', defined in the Act as a record which is 30 years old. In the past privileged documents held by public authorities would have been subject to the National Archives' 30 year rule disclosure provisions, and if extended closure was sought an application was made to the Advisory Council on National Records and Archives. With the implementation of the FOI Act, if it is anticipated that harm may still occur after 30 years as a result of disclosure, and that harm is real, then other exemptions must be sought in order to protect the information.

Policy Advice

Legal departments and professional legal advisers are becoming increasingly involved in policy development. The disclosure of such communications would allow individuals to understand the reasons for decisions made by the respective authority. This was implicitly acknowledged by the High Court in *Three Rivers District Council v Bank of England (No10)* which considered the advice sought by the client team of the Bank as 'presentational assistance' rather than advice sought about 'the Banks substantive rights and obligations which might in due course be the subject matter of adversarial litigation'. Similarly, policy advice from professional legal advisers not about the substantive rights and obligations of an authority should not be considered privileged.

Traditionally this 'advice' could be considered as protected by legal professional privilege and so not disclosed. One of the themes of the Act is to make public 'reasons for decisions' made by an authority and the Information Commissioner would expect public authorities to re-consider this position in the light of this developing case law and the new environment of openness. In making its decision, the authority will have to weigh up the significance of its decision, including the number of people affected, the public interest in promoting public debate and increasing accountability, against the importance of maintaining the privilege.

Access to justice and the right to a fair trial

Legal professional privilege is one of the guarantees of a fair trial and as such there are powerful public interest arguments in support of not waiving privilege in many cases. The Commissioner would not expect privilege to be waived in cases where disclosure might prejudice the rights either of the authority itself or any third party to obtain access to justice.

Interaction with other FOI exemptions

Legal advice will often contain confidential information about third parties. Under the Act there is an absolute exemption in respect of information whose disclosure would give rise to an actionable breach of confidence. (See also [Awareness Guidance No 2 on Information Provided in Confidence.](#))

Where privileged information contains personal data relating to third parties for instance litigants or witnesses, then it will generally be unfair to those third parties to disclose information. (See also [Awareness Guidance No 1 on Personal Information.](#))

Many public authorities have investigative or law enforcement functions. In cases where disclosure would fall within either the investigations and proceeding or law enforcement exemptions (s. 30 and s.31) of the Act, it may be simpler to apply those exemptions than the legal professional privilege exemption.

E) Issues for implementation

The law on legal professional privilege is complex. This Awareness Guidance does not attempt to deal with all the issues. It is intended to draw attention to the commonly encountered issues in the application of legal professional privilege by the courts.

- As noted above, legal professionals are increasingly involved in providing policy advice. Where this occurs on a regular basis, it may simplify the process of responding to requests for information if a system of marking legal and non-legal advice given by legal staff.
- FOI staff should make all professional legal advisors aware that information 'held' by the authority is subject to FOI and as such any advice given by them may be released at some time in the future.
- It may be helpful to structure legal advice given in particular cases in order to separate information which should not be disclosed, for instance information where disclosure would prejudice the right to a fair trial or the chances of the authority bring a successful prosecution, from more general advice whose publication would increase the public understanding of the reasons for decisions made by the authority.
- Authorities that have significant regulatory or law enforcement functions may wish to consider whether there is general legal advice which they have obtained in the past whose publication might increase public understanding of their policies and practices.
- FOI officers should agree policies with the legal teams of public authorities for when and how to apply the exemption. It would be likely to increase public understanding of decisions to refuse requests if criteria were made public, for instance through the authority's publication scheme.