Legal professional privilege (section 42)

Freedom of Information Act

Contents

Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

2. An overview of the main provisions of FOIA can be found in the Guide to freedom of information. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.

3. This guidance explains to public authorities the main provisions of section 42, the exemption for legal professional privilege (LPP), and how to apply it.

Overview

- Legal professional privilege (LPP) protects confidential communications between lawyers and clients: it is a fundamental principle of English law.
- Section 42 provides an exemption under FOIA for information protected by LPP.
- When considering whether s42 is engaged, the key to deciding whether the right to claim LPP has been lost will be to consider whether previous disclosures to the world at large mean that the information can no longer be said to be confidential.
- Section 42 is a qualified exemption, subject to the public interest test.

What FOIA says

4. Section 42 states:

> 42. - (1)Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

General principles of the section 42 exemption

5. Section 42 provides an exemption under FOIA for information which is subject to LPP.

6. The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings.

Example

In Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006) the Information Tribunal described LPP as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."

Two types of legal professional privilege

7. In the Bellamy decision, the Tribunal acknowledged that there are two types of privilege within the concept of LPP:

- litigation privilege; and,
- advice privilege

Litigation privilege

8. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

9. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.

Advice privilege

10. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.

11. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.

Example

Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48:

In this appeal, the House of Lords found that advice by the Bank of England's lawyers as to how best to present evidence to the Bingham Inquiry on the collapse of the Bank of Credit and Commerce International (BCCI) was covered by LPP, even though the inquiry was not a legal process. This was because the advice had a legal function; it was about whether the bank had properly discharged its functions under banking laws and about the potential public law remedies for challenging any unfavourable findings.

It is essential to establish who is the legal adviser and who is the client

12. In order for public authorities to determine whether LPP applies, they will need to be clear who the parties to the confidential communication are.

Who is the client?

13. Communications with third parties are not covered by advice privilege and are only covered by litigation privilege if they have been made for the purposes of the litigation, so it is important to determine who the lawyer's client is.

14. This will depend on the facts of the case. For instance, all of the authority's employees in a particular department might be considered to be the client of a lawyer, whereas the remaining staff of the authority might be considered to be third parties.

Who is the legal adviser?

15. For public authorities, establishing who is the legal adviser will be key to them identifying when a communication is legally privileged.

16. For the purpose of this guidance, the generic term "lawyer" means a legal adviser acting in a professional capacity and includes legal executives.

17. In Calland v Information Commissioner & the Financial Services Authority (EA/2007/0136, 8 August 2008) the Tribunal confirmed that legal advice and communications between in-house lawyers and external solicitors or barristers also attract LPP.

> **Example**
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> In a separate appeal relating to BCCI, Three Rivers District Council & Ors v The Governor & Company of the Bank of England (No.5) [2003] EWCA Civ 474, the Court of Appeal considered who was the client and therefore which correspondence was covered by LPP. In this case, the Court found that the client was the very small team of employees set up specifically to deal with the Bingham Inquiry, rather than the whole bank. Therefore correspondence between

lawyers and other bank employees was not covered by LPP.

The meaning of communications under section 42

18. A communication under s42 means a document that conveys information. It could take any form, including a letter, report, email, memo, photograph, note of a conversation, or an audio or visual recording. A document does not actually need to be sent for it to count as a communication for this purpose; a document that has been prepared to convey information, but is still on its creator's file, is still a communication. Communications might include draft documents prepared with the intention of putting them before a legal adviser, even if they are not subsequently sent to the adviser. An example might be a witness statement that was prepared, but not actually sent to a solicitor.

Enclosures and attachments to a communication, and pre-existing documents

19. Any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. The authority must consider each document individually.

20. If an enclosure existed before litigation was contemplated or before it was considered possible that legal advice might be needed, LPP will not usually apply to it. There is however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply.

Illustrative scenarios

21. The first scenario concerns instructions sent to counsel to ask for advice about liability and quantum (amount of damages) following a road traffic accident. The table below indicates which documents will be subject to LPP.

Example enclosure	Privileged	Not privileged
(a) Car service records		(a) (b) and (c)

		are not covered by LPP. They existed before the accident so were not created for use in litigation. They are documents that were already held by the client, which the lawyer selected using their skill and judgement for the purposes of litigation.
(b) MOT		see (a) above
(c) GP's medical records		see (a) above
(d) Medical expert's report on injuries sustained	(d) and (e) are covered by LPP (created by third parties when litigation was contemplated, for use in the litigation)	
(e) Witness statements sent from independent witnesses	see (d) above	
(f) Photo of scene of accident taken by client	(f) is covered by LPP (created for use in prospective litigation)	
(g) Police accident report		(g) not covered by LPP (created by police to investigate accident)

(h) Correspondence between the parties to the litigation	(h) could be covered by LPP for the purposes of FOIA (documentation created for purpose of prospective litigation) – unless in public domain (see 'loss of LPP' below)	

22. In the second scenario, counsel responds to the instructions, advising how to proceed and enclosing decided legal cases that he proposes to rely upon to support a particular line of legal reasoning. These enclosures weren't already held by the client and counsel has selected them using his skill and judgement. They are therefore covered by LPP.

LPP and communications relating to crime

23. LPP will not cover communications made to further a criminal purpose; ie to enable a client to commit crime or fraud. This applies whether or not the lawyer is aware of the wrongdoing.

24. However, LPP will normally still apply to legal advice given after the commission of a crime.

Loss of legal professional privilege and why 'waiver' isn't relevant to disclosures under FOIA

25. Once the public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures.

26. Waiver is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings. In this context

'cherry picking', or only revealing part of the advice given, isn't permitted.

27. However, arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under FOIA. This is because under FOIA we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.

28. We would therefore recommend that public authorities avoid referring to or thinking about whether privilege has previously been waived, and instead focus on the key question of whether privilege has been lost because previous disclosures to the world at large mean the information can no longer be considered to be confidential.

29. In order to assess this question, the authority must investigate whether or not the disclosure has been made in a restricted or an unrestricted way. This guidance considers these concepts, both within and outside the context of litigation.

Unrestricted disclosure

30. This refers to a disclosure of information made to the world at large or without any restriction on its future use. This would mean that it is capable of entering the public domain (see below). As a result, the original holder or owner of the information (eg the legal advice) can no longer expect it to remain confidential. An unrestricted disclosure can be made either inside or outside the context of litigation (such as in open court - see below). Where confidentiality is lost, the authority cannot claim that s42 applies.

31. A disclosure of information made in open court is an unrestricted disclosure. That information has lost its quality of confidence and will no longer be protected by privilege. Where there is any doubt as to whether information was or was not disclosed in open court, the Information Commissioner will only consider documents to have lost confidentiality when a judge has allowed disclosure on an unrestricted basis. However it is only the information actually disclosed in open court that will lose its LPP protection for freedom of information purposes; so any residual information (that has only been disclosed to the court and the opponent) will still be protected.

32. Information disclosed in open court does not automatically remain in the public domain indefinitely, but the ICO's view is that, as a result, the client has effectively lost control over the information, so it can no longer be considered to have the necessary quality of confidence.

33. Where legal advice is disclosed outside litigation without any restrictions, it is no longer confidential and therefore is no longer protected by LPP. If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its LPP protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege.

> **Example**
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> This point was illustrated in Mersey Tunnel Users' Association (MTUA) v Information Commissioner and Merseytravel (EA/2007/0052, 15 February 2008). The public authority had obtained legal advice some time earlier on how to spend revenue, and had referred to it when dealing with the MTUA. The Tribunal found that: "None of the references …… reveal the full advice, or anything approaching that, or quote directly from it" and that the disclosed information did not reveal "…the reasoning behind the legal advice or the other options considered".

Restricted disclosure

34. This means a disclosure of information to a limited audience, with restrictions on the further use of the information; for example, a disclosure made on a confidential basis. The information would therefore remain confidential from the world at large, thus retaining its legally privileged status. As above, a restricted disclosure may be made inside or outside the litigation context.

35. Making a disclosure only to a party's opponent and to the court is an example of a restricted disclosure in the litigation context. In litigation, the parties have to disclose the information they intend to rely on in court to their opponent and to the court.

Disclosures made only to the court and to an opponent are 'restricted disclosures', which remain confidential from the rest of the world, unless the information is later disclosed in open court. Since these disclosures do not enter the public domain, they may continue to be protected by LPP for the purposes of FOIA.

36. Outside litigation, making a disclosure to a business partner might be a restricted disclosure.

Intention is irrelevant

37. The fact that an authority or one of its staff did not intend to relinquish its right to claim LPP is irrelevant. For example, an employee of the public authority relies on legal advice the authority has received, and reveals the substance of the advice, when speaking in public. As a result, the information can no longer be regarded as confidential, and the public authority would not be able to claim LPP. This would be the case, even if the officer did not realise the effect that his actions would have.

38. If an authority inadvertently discloses information to a limited audience (for example by enclosing the wrong documents with a covering letter) it may be possible to get it returned and to reassert the original confidentiality and LPP. However this is unlikely to be possible if a disclosure is made into the public domain, which is the key issue under FOIA.

A lawyer's selection of documents can be covered by LPP, even if the documents selected are publicly available from elsewhere

39. Again there is one exception to the general rule that publicly available information cannot attract privilege because it is not confidential. This applies when LPP is claimed for documents which the lawyer has used his or her skill and judgement to select and which would indicate the trend of the legal advice given or the trend of litigation arguments. In this case privilege can be claimed for the selected documents even if they were publicly available, because disclosing them would reveal the substance of the advice given.

40. The same protection is not available for the selection of documents sent by a client to a legal adviser however, and LPP cannot apply where the selection of documents is made from documents already held by the client.

Documents marked 'without prejudice'

41. In correspondence relating to litigation, the term 'without prejudice' is often marked on correspondence as part of negotiations on a settlement. Public authorities should not take this as meaning that LPP applies. This marking means that the information is privileged under the Civil Procedure Rules, but does not necessarily mean that it is privileged under s42 of FOIA.

The duty to confirm or deny

42. Section 1(1)(a) FOIA requires a public authority to confirm or deny whether or not it holds information. Section 42(2) removes the duty to confirm or deny, if to do so would involve the disclosure of any legally privileged information. It is subject to the public interest test.

43. Legal professional privilege protects the confidentiality of communications between a client and their legal adviser, but what it specifically protects is the substance of those communications. This interpretation is supported by the comment of Mr Justice Mann in USP Strategies v London General Holdings Ltd [2004] EWHC 373 (Ch), that "The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice" (paragraph 20). The fact of whether a public authority has sought or received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance of those communications.

44. This means that a public authority can only refuse to confirm or deny whether it holds information about legal advice it has sought or received if to do so would itself reveal something about the substance of that advice. 'Substance' means the content, rather than simply the general subject of the advice. This is shown in the following hypothetical examples:

Example: section 42(2) may apply	Example: section 42(2) does not apply
Mrs Brown asks Borsetshire County Council for "a copy of any legal advice you have obtained that would allow you to sell the kitchens of Borset High School to a private catering company". The council has obtained legal advice on the subject of selling off school kitchens to a private supplier, who would then provide school dinners to the pupils. The advice confirms that it is legally permissible to sell some kitchens, including those of Borset High School. The council holds a copy of the requested information. The advice is covered by LPP and is exempt under s42(1). For the council to confirm or deny whether it holds the information requested would reveal the content of the legal advice. The council might therefore be able to cite section 42(2), but it must first apply the public interest test.	Mrs Brown asks Borsetshire County Council for "a copy of any legal advice you have obtained about selling the kitchens of Borset High School to a private catering company". The council has obtained legal advice on the subject of selling off school kitchens to a private supplier. For the council to simply confirm that it holds advice about selling the High School kitchens to a private company would not reveal the content of that advice. Since confirming or denying would not disclose any legally privileged information, the council cannot use section 42(2).

45. Even if it cannot claim section 42(2), a public authority may still consider that to disclose whether or not it has received legal advice would cause some harm or prejudice, for example to the exercise of its statutory functions, to commercial interests or more generally to the conduct of public affairs. In that case it should decide exactly what harm or prejudice it envisages, and then consider whether the neither confirm nor deny provisions in a different exemption may apply.

46. A public authority can only use section 42(2) if there is some information that is legally privileged. The exemption refers to information "whether or not already recorded", but it still only applies if there is some legally privileged information to disclose. If a public authority has not sought or obtained legal advice on the issue that is the subject of the request, then it cannot use section 42(2), because to confirm or deny would not involve the disclosure of legally privileged information.

47. However, there may be a situation in which a public authority has not obtained the specific advice requested, but it has obtained some advice on the issue in question. In that case, depending on the circumstances, it may be possible to apply section 42(2), even though the public authority does not hold the requested information.

> **Example**
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> A public authority has obtained legal advice that to sell a piece of land would be illegal in a particular case. It subsequently receives a request for "advice that the sale of land would be legal". If the PA said it did not hold such information, then that could be seen as revealing that it had received advice to the contrary. In that situation, it may be able to neither confirm nor deny (subject to the public interest test), even though it does not hold the specific information that the requester has asked for.

48. Therefore the key question is whether confirming or denying that information is held would disclose any legally privileged information. If it would, then the public authority must still carry out the public interest test to decide whether to refuse to confirm or deny.

49. Further advice on neither confirm nor deny provisions in FOIA is available in our guidance document on When to refuse to confirm or deny information is held.

No need to demonstrate prejudice /adverse effect

50. There is no requirement to demonstrate any prejudice or adverse effect when applying s42, since it is a class-based exemption: ie there is no need to show that any harm would occur from disclosure of the information. However, arguments

about prejudice and harm are, of course, relevant when considering the public interest test; see below.

The public interest test

51. Once an authority has established that s42(1) or s42(2) is engaged, it then needs to apply the public interest test (PIT) Please also refer to our separate guidance on this subject (see paragraph 49, below).

52. The authority must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

53. The following Tribunal decisions help to illustrate how to apply the PIT.

Example

In Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/0145) the Tribunal stated:

"Our starting point, therefore, is that the exemption is qualified, not absolute, but that Mrs Crawford must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute… " and it concluded: "In the circumstances Mrs Crawford has not persuaded us that the factors she relies on give rise to a public interest that equals or outweighs the public interest in maintaining the section 42 exemption."

Example

The Tribunal explained the balance of factors to consider when assessing the PIT in Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006): "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".

54. Note that the Tribunal stated above that the "countervailing considerations" must be "strong", rather than indicating that they should be exceptional.

Example

In Calland v Information Commissioner & the Financial Services Authority (EA/2007/0136, 8 August 2008), the Tribunal commented:

"The general public interest in disclosure of communications within public authorities has been referred to, usually under the headings of "transparency" and "informing the public debate", in a number of decisions of this Tribunal. What is quite plain, from a series of decisions beginning with *Bellamy v IC EA/2005/0023*, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."

Example

In Szucs v Information Commissioner (EA/2011/0072, 16 August 2011) the Tribunal upheld the Information Commissioner's decision that requested information was covered by LPP and that the public authority had correctly applied s42(1) to it. The information was legal advice that the authority had commissioned about request handling. The Tribunal approved the Information Commissioner's view that the fact the advice was still live carried significant weight.

Factors to consider when applying the PIT in section 42

Factor in favour of maintaining the exemption	Factor in favour of disclosure
The concept of legal professional privilege and the rationale behind the concept (ie ensuring frankness between lawyer and client which goes to serve the wider administration of justice etc).	The assumption in favour of disclosure and the rationale behind the assumption (ie accountability, transparency, furthering public debate etc).
Additional weight may be added to the above factor if the advice is:- • recent; • live; • protects the rights of individuals.	Additional weight may be added to the above factor if the following issues are relevant in the particular case: • large amount of money involved; • large number of people affected; • lack of transparency in the public authority's actions; • misrepresentation of advice that was given; • selective disclosure of only part of advice that was given.

55. It is also important to take into account the significance of the actual information and what it reveals.

Example

The Tribunal's deliberations in its decision in Mersey Tunnel Users' Association v Information Commissioner and

Merseytravel (referenced above) illustrate how it applied the PIT factors:

"Finally, we come to strike the balance in the particular circumstances of this case. Weighed in the round, and considering all the aspects discussed above, we are not persuaded that the public interest in maintaining the exemption is as weighty as in the other cases considered by the Tribunal; and in the opposing scales, the factors that favour disclosure are not just equally weighty, they are heavier. We find, listing just the more important factors, that considering the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining the exemption, which is all the stronger in this case because the opinion is still live… The opinion should be disclosed."

Other considerations

56. As an alternative to using section 42, a public authority might instead wish to consider using section 41 (the exemption for information provided in confidence).

57. This guidance deals only with the exemption for legal professional privilege under FOIA. The equivalent exception under the EIR is regulation 12(5)(b); please refer to the ICO's separate guidance: The course of justice and inquiries exception (regulation 12(5)(b)). Note that this guidance refers to the question of whether or not information is confidential from the world at large: whether it has entered the public domain. Further, detailed guidance on this specific question will be produced in the future.

58. Additional guidance is also available, if you need further information:

The public interest test
The duty to confirm or deny
Section 41: information provided in confidence

More information

59. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

60. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances

61. If you need any more information about this or any other aspect of freedom of information or data protection, please Contact us: see our website www//ico.gov.uk