

Section 40 Legal Professional Privilege (“LPP”)

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 40 qualified exemption for legal professional privilege. It is not intended to be a comprehensive assessment of the law in this area and a public authority is required to assess each request on the basis of its own individual facts.

Section 40 is a class based qualified exemption and **cannot** be engaged unless the information concerned falls within the class of information described by the exemption.

The first step in applying class based qualified exemptions is to establish whether the information concerned falls within the class of information described by the exemption. If a public authority cannot establish this then it will not be able to rely upon the exemption when answering a freedom of information request. If a public authority is satisfied that the information does fall within this class, it will then have to carry out the public interest test to determine whether the public interest in withholding the information is equal to or greater than the public interest in releasing the information (see part 3 of the Freedom of Information Act 2015 Code of Practice).

A public authority should consider whether other exemptions, in addition to this one, may also apply to the requested information, bearing in mind that other exemptions might be more appropriate (see other exemptions guidance). Different exemptions may apply to different aspects of the requested information, although only one exemption needs to be engaged for information to be withheld.

A public authority may also need to consider whether to neither confirm nor deny that the information is held, if to do so would, in itself, be absolutely exempt or qualified exempt information under this section.¹

About the exemption

- It is a fundamental principle that legal professional privilege protects confidential communications between lawyers and clients. This is to ensure fairness in legal proceedings.
- Information is qualified exempt information if it is in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- It protects material from disclosure on the ground that a client must be sure that what they and their lawyer discuss in confidence will not be disclosed to third parties without their consent.
- Privilege can be both waived and lost depending upon the circumstances.
- It is divided into two categories; legal advice privilege and litigation privilege.
- It will cover advice from in-house and external lawyers.
- The in-built public interest in non-disclosure already carries significant weight

¹ s19 of the Act and further guidance on NCND
Section 40 Legal professional privilege
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Does a communication engage legal advice privilege?	
Who is the client? If the communication is with a third party it cannot be covered by advice privilege. It can however be covered by litigation privilege. See below.	
<p>Test - Is the communication a confidential communication between the client and lawyer in order to get or give legal advice? This is construed broadly. There will be various stages of proceedings and various meetings and communications. Ask, is the communication part of the exchange of information where the object is the giving of legal advice?</p> <p>Communications include drafts. If the communication contains enclosures and attachments, consider these separately and ask – have they been created with the intention of seeking advice or for use in litigation?</p>	
Is the advice sought/given in a legal context, which explains why the client needs the advice or is it on an operational or a strategic issue? (If the advice is on an operational or strategic issue then it is unlikely to be privileged unless it also covers legal concerns).	
Has the advice been given as to what should prudently and sensibly be done in relation to rights, liabilities, obligations or remedies of the client?	
Does the advice amount to advice on presentational and other matters?	
If it is a borderline case you may want to ask if it is reasonable for the client to consult the special professional knowledge and skill of a lawyer?	
Is the lawyer giving advice in their capacity as a lawyer or in some other capacity?	

Does a communication engage litigation privilege?	
Does the information amount to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation? Note, communications can be with third parties here.	
Is there a real prospect or likelihood of litigation rather than just a fear or possibility?	
Was the information created for the main purpose of giving or obtaining legal advice or for lawyers to use in preparing a case for litigation?	
Was the communication made: <ul style="list-style-type: none"> • Confidentially - For the sole or dominant purpose of obtaining evidence or to provide advice in relation to litigation by or against the client; and • Where the litigation is actual, pending or contemplated? 	
Are the proceedings adversarial, such as court proceedings or arbitration? The answer must be yes. Non-adversarial proceedings such as inquiries or investigations will not be covered.	
If the litigation does not commence ask whether there was a real likelihood that the litigation was a reasonable prospect rather than just a mere possibility. Ask are the parties aware that litigation is a likelihood?	

Has the privilege been lost or waived?	
Has there already been a disclosure to the world at large so the information can no longer be classed as confidential?	
Has any disclosure been in a restricted or unrestricted way? A restricted disclosure can still have confidentiality attached to it, whereas an unrestricted disclosure which has entered the public domain is less likely to be considered confidential.	

Apply the public interest test²	
Public interest factors in favour of disclosure	Public interest factors in favour of maintaining the exemption
There is a clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute.	The concept of legal professional privilege and the rationale behind the concept i.e. ensuring frankness between lawyer and client which goes to serve the wider administration of justice etc.
Accountability, transparency and furthering public debate etc.	Decisions by public authorities must be taken in a fully informed legal context.
Circumstances are such that the government would waive privilege as a tactic to discourage anticipated litigation.	Without such comprehensive advice, decision making may be compromised because it would not be fully informed.
Departments should be accountable for the quality of their decision making and this may require transparency in the decision making process and access to the information on which decisions were made.	Authorities require legal advice for the effective performance of their operations and that advice must be given by lawyers who are fully appraised of the factual background.
Tribunal judgments have clarified cases in which the public interest may favour disclosure and that such factors need not be exceptional, just more weighty than those in favour of maintaining the exemption: <ul style="list-style-type: none"> • Where a significant number of individuals were affected by the legal advice; • Where a significant amount of money was involved; • Where there was a lack of public authority transparency; • Where an authority has misrepresented the legal advice; • Selective disclosure of only part of advice that was given. 	Legal advisers must be able to present the full picture, which will include arguments in support of their final conclusions and arguments that may be made against these. It is the nature of legal advice that it will set out the arguments both for and against a particular view, weighing up their relative merits, and highlighting perceived weaknesses in any position.
	Even where litigation is not in prospect, disclosure of legal advice may carry a risk of prejudicing an authority in future litigation, and legal advice connected with one department could have wider implications for other departments.
In some cases there may be a public interest in knowing whether or not legal advice was followed.	Disclosure of legal advice could materially prejudice an authority's ability to protect and defend its legal interests.
	Disclosure might unfairly expose a legal position to challenge and diminish the reliance which may be placed on the advice.
	Additional weight may be added to the above factors if the advice is recent, live or protects the rights of individuals.

² Examples of public interest arguments are listed for illustrative purposes and each request should be looked at on the basis of its own individual facts. Further guidance on carrying out the public interest test can be found in Part 3 of the Freedom of Information Act 2015 Code of Practice.

Further Information

The Information Commissioner has published guidance on the application of this exemption.
https://www.inforights.im/media/1307/exempt40g_lpp.pdf