



EXEMPTION NOTE

Section 40 Legal professional privilege

This note is one of a series intended to provide practical guidance on the exemptions set out in the Isle of Man Freedom of Information Act 2015 (FOI).

Requests for information must be considered on a case by case basis and the Information Commissioner will review decisions on the facts of each case.

THE EXEMPTION

Section 40 states:

40 Legal professional privilege

Information is qualified exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings

THE MAIN POINTS

1. This is a qualified exemption.
2. It is a class-based exemption and only applies to the specified category or class of information.
3. If the PA determines that it can be applied to some, or all, of the information sought in a request, the PA must still go on to consider the public interest in the information and determine whether "the public interest in maintaining the exemption outweighs the public interest in disclosing the information".
4. The Information Commissioner has published guidance on the public interest and further advice is contained in Section 3 of the Code of Practice.
5. Legal professional privilege can be split into legal advice privilege and litigation privilege.

Legal Advice Privilege

6. Legal advice privilege covers communications between lawyers and their clients where legal advice is sought or given. The communications do not have to be connected with litigation (although they may well be). Legal advice privilege will only apply to communications made for the purpose of seeking and giving legal advice.
7. 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.
8. The protection applies only to those communications which directly seek or provide advice or which are given in a legal context, that involves the lawyer using his legal skills and which are directly related to the performance of the lawyer's professional duties. [*Passmore on Privilege 2nd edition 2006*].
9. There are certain requirements which must be met for legal advice privilege to apply:
 - (i) The withheld information must relate to communications with a legal adviser.

Legal professional privilege does not extend to communications in connection with advice given by professionals other than lawyers. However, communications between a PA's in-house legal advisers in-house lawyers and external legal advisers are covered.

- (ii) The communication between the client and the legal adviser must take place in circumstances where the legal adviser is acting in their capacity as a legal adviser.
- (iii) The information must be confidential.

The information must have been, and continue to be, confidential between a legal adviser

and their client. Privilege does not apply to information known to the legal adviser through sources other than the client, or to information which is not actually confidential.

10. Legal advice privilege is wide and includes:

- (i) Communications where legal advice is sought.
- (ii) Notes made by a legal adviser.
- (iii) Witness statements.
- (iv) Advice about how to present evidence.

11. Legal advice privilege continues to operate even after the professional relationship between the lawyer and the client has terminated.



Litigation Privilege

12. Litigation privilege is a distinct aspect of legal professional privilege. It is wider than communications between solicitor and client. It applies to information created in contemplation of litigation (legal action) and to communications when litigation is either pending or being considered.
13. Litigation privilege applies to documents created by the party contemplating the potential litigation, to expert reports prepared on their behalf and to legal advice given in relation to potential litigation.
14. The timing of the creation of the information is relevant to whether litigation privilege applies. The possibility of future litigation or that someone might, at some point in the future, raise a court action, is not sufficient.
15. However, litigation does not actually need to take place for the privilege to apply, and the privilege continues to apply after any litigation has been concluded.
16. While the scope of litigation privilege is wide, it is an overly simplistic approach for a public authority to withhold the entire contents of a legal file on the basis of section 36(1). While such a file may include material which is exempt in terms of section 36(1), it does not necessarily follow that every item within the file consists of information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This means that you should consider each piece of information in a file to make this assessment.

Who can claim legal professional privilege?

17. Only the client who has sought or received advice, or on whose behalf documents have been prepared in contemplation of litigation, can claim legal professional privilege. Legal professional privilege cannot be claimed by the legal adviser who gave the advice or prepared the document, nor can the legal adviser refuse to disclose it if the client is happy for the information to be disclosed.

Exceptions to legal professional privilege

18. There are some situations in which legal professional privilege may not apply in the FOI context.
19. PAs should 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.
20. 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.
21. 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. However it is only the information actually disclosed in open court that will lose its protection for FOI purposes; so any residual information (that has only been disclosed to the court and the opponent) will still be protected.
22. Where legal advice is disclosed outside litigation without any restrictions, it is no longer confidential and therefore is no longer protected.
23. A restricted disclosure is 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.
24. PAs can disclose privileged information to others with a common interest in the information without losing confidentiality or waiving privilege (e.g. where one PA shares legal advice in confidence with

another PA). This will arise only where the common interest existed at the time the privileged information was created.

25. A restricted disclosure may be made inside or outside the litigation context.

OTHER CONSIDERATIONS

1. It will be for the PA to evidence to the IC that legal professional privilege attaches to the information.
2. For a communication to be privileged it must be confidential.
3. In order for PAs to determine whether legal professional privilege applies, they will need to be clear who the parties to the confidential communication are. Establishing who the 'legal adviser' is and who the 'client' is will be key to the PA being able to identify when a communication is legally privileged.
4. 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. 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.
5. There is a public interest in maintaining the right to confidentiality of communications between a legal adviser and their client. This has been recognised by the Courts, for example in the Three Rivers District Council case (see Appendix 1 -Resources).
6. Circumstances do arise where the public interest in disclosure of information outweighs the public interest in withholding it. For example, in the Mersey Tunnel Users Association case (see Appendix 1 – Resources), the (UK) Information Rights Tribunal took into account the fact that there were legitimate questions as to whether the course of action taken by Merseytravel was correct. The Tribunal also considered the age of the legal advice, and the context within which the advice had been given, in coming to its decision. The Tribunal commented that if the issues addressed in the advice do not affect individuals significantly, there is less weight attached to the public interest in non-disclosure.

FURTHER RESOURCES

APPENDIX 1: IOM Commissioner Decisions & IOM Case law

APPENDIX 2: Other Commissioner Decisions & Case law

APPENDIX 1 IOM Commissioner Decisions & Case law

IOM Commissioner Decisions

Issue Date	Decision Number	Public Authority
26 October 2016	2016/0003	Cabinet Office
22 December 2017	2017/0002	Cabinet Office

IOM Case law

None



APPENDIX 2 Other Commissioner Decisions & Case law

Note

Neither the Commissioner nor the Court are obliged to follow decisions or case law from other jurisdictions.

UK Information Commissioner Decisions

Date	Reference	Public Authority
14 July 2016	FS50596845	Cabinet Office
11 February 2016	FS50581094	Kent County Council
30 July 2015	FS50568993	Competition and Markets Authority

Scottish Information Commissioner (SIC) Decisions

The SIC's decisions are available at: www.itspublicknowledge.info/decisions

Decision Number	Parties	Summary
109/2010	Iain McKie and the Scottish Ministers	This decision looks at whether the Scottish Ministers' legal file relating to Shirley McKie should be disclosed. The SIC considered the public interest in favour of disclosure and in favour of withholding information which is legally privileged. On balance, the SIC concluded that the public interest favoured withholding the information.
020/2008	Robert Henery and the Scottish Ministers	A local authority provided a summary of legal advice to the Convention of Scottish Local Authorities (COSLA). The SIC found that, although the Council had shared the advice with COSLA (who then passed it to the Scottish Ministers), it was apparent that the information was shared between these parties on the basis that each had a common interest in it, and there was no expectation that the advice would be further shared beyond these parties. It remained privileged.
023/2005	David Emslie and Communities Scotland	The SIC stated there will always be a strong public interest in maintaining the right to confidentiality of communications between a legal adviser and their client. While each case will be considered on an individual basis, the SIC is only likely to order the release of such communications in highly compelling cases.
096/2007	John Sexton and the Scottish Ministers	Precognitions (witness statements) can be privileged.
209/2007	Adam Ingram MSP and the Scottish Parliamentary Corporate Body	Where it was known that advice had been received from a legal adviser to the authority, the identity of the adviser was not privileged.
213/2007	Rory Speirs and East Renfrewshire Council	Mr Speirs asked for a report prepared by the Council in response to an insurance claim he had made. The Council argued that the report was prepared in contemplation of litigation, in that it had previously been informed by Mr Speirs that he intended to seek legal advice regarding his claim against the Council. The SIC, having considered both the timing of the report and its content, accepted that it was created by the Council after it had received Mr Speirs' insurance claim and after it had been advised that Mr Speirs was considering legal action. In the light of these facts, the SIC found that the report had been prepared in contemplation of litigation and was therefore subject to litigation privilege.

252/2011	Roy Macdonald and Dundee City Council	Mr Macdonald asked the Council for various pieces of information relating to an injury he had suffered at work. The SIC agreed that some, but not all, the information had been prepared in contemplation of litigation.
146/2007	Alexander Doherty and the Common Services Agency for the Scottish Health Service	The SIC concluded that some information contained within a legal file, including press releases, did not fall within the exemption.
056/2010	William Lonsdale and the Scottish Further and Higher	Where legal advice has been partially released into the public domain, that part of the advice will no longer be
087/2006	Elizabeth Marriott and Glasgow City Council	The communication between the client and the legal adviser must take place in circumstances where the legal adviser is acting in their capacity as a legal adviser. The legal adviser may either be in private practice or an in-house solicitor. A PA should be aware that there may be instances where a PA official is a qualified solicitor but also has other duties (e.g. as a manager). Where advice is sought from that official in the capacity of manager, rather than as legal adviser, then that advice will not be privileged. Unless a legally qualified member of staff is employed as a solicitor by a PA, there will be a question mark over whether any advice they provide is covered by legal advice privilege.
078/2005	Mr W and NHS Borders	NHS Borders refused to disclose documents they had sent to Mr W's solicitors. The information in the documents was not confidential so the SIC found that the exemption could not apply.
132/2006	John Egan and West Dunbartonshire Council	An email to a solicitor in the Council's legal department seeking legal advice attracted legal professional privilege, as did a document copied to the solicitor with additional information on the subject about which the advice was being sought.
001/2007	Lynn Fulton and West Dunbartonshire Council	Notes of telephone calls and summaries of a case file with opinions and suggestions made by a legal adviser are likely to be covered by the exemption. This might not be the case for covering notes or memos relating to administrative matters which are not confidential in nature

Case law

UK Tribunal decisions

Upper Tier Tribunal

Date	Citation	Parties
14 December 2017	[2017] UKUT 495 (AAC)	Corderoy & Ahmed v Information Commissioner
19 July 2016	[2016] UKUT 0344 (AAC)	Kirkhope v Information Commissioner and the Cabinet Office
30 March 2015	[2015] UKUT 0159 (AAC)	Department of Health v Information Commissioner & Lewis
20 October 2014	[2014] UKUT 0461 (AAC)	Cabinet Office v Information Commissioner

First Tier Tribunal

Date	Citation	Parties
8 June 2016	EA/2015/0270	Paul v IC
23 March 2016	EA/2015/0160	Ministry of Justice v IC & Shaw
5 August 2008	EA/2008/0005	Fuller v IC
29 November 2007	EA/2007/0043	Kessler v IC & HMRC