



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN38: Section 42 (Legal Professional Privilege)

Document history

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What this is about:

This note provides an overview on exemption section 42 of the Freedom of Information (FOI) Act – information subject to legal professional privilege. It provides an outline of MOD compliance points to consider when engaging section 42 and other exemptions to consider.

Detail:

- Section 42 applies to information which is covered by legal professional privilege or, in Scotland, by confidentiality of communications between client and legal advisor (providing this claim could be maintained in court).
- Legal professional privilege covers any advice given by legal advisers, solicitors and barristers. This exemption can be applied to communication with external lawyers and with legal advisers from public authorities, including those internal to the MOD. It can also apply to legal advice relayed to Ministers in a submission, or contained in a summary.
- In certain circumstances third party communications may also fall within the scope of the exemption - for example, advice sought from an expert for the purposes of litigation.
- The exemption is **qualified** and therefore subject to a PIT although because it is a “class” exemption the same arguments can be used each time – see generic PIT below.

MOD compliance points:

- Lawyers and their clients have a general expectation that their communications will be confidential. There is a strong public interest in maintaining the MOD’s ability to seek and receive legal advice - only where there is a clear public interest in knowing this advice will the balance fall in favour of disclosure.
- Information may cease to be privileged if it is widely copied and shared with third parties. This does not mean that a sharing of information between, for example, government departments would result in the loss of legal privilege, but the preservation of confidentiality will have a bearing on deciding the balance of public interest. Legal advisers should be aware that the advice they provide is subject to the FOI Act, and if the balance of public interest finds in favour of disclosure, it may be disclosed.
- The duty to confirm or deny whether information is held does not arise where to do so would involve the disclosure of such information. Disclosure of the fact that legal advice has been sought could, in some circumstances, disclose something of the substance of the advice.

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- If you are considering disclosing such information you must seek consent from the provider of the advice. If it is not practicable to obtain the consent of the provider of the advice, the matter should be referred to the CIO.

Other exemptions to consider:

- Disclosing the fact that legal advice has been sought could in some circumstances disclose information relating to the formulation or development of government policy. This may require providing a neither confirm nor deny response, or engaging **section 35, Formulation of government policy**.
- Advice from the Law Officers must be considered under **section 35 (1) (c)**. This exemption applies to both legal and non-legal advice given by the Law Officers and any request for the provision of advice. When considering requests for advice given by the Law Officers, and whether to neither confirm nor deny, the matter must be referred to the Attorney General's Office through the CIO.
- If information covered by Legal Privilege has been obtained from a third party, it is simpler to apply **section 41, Information provided in confidence** instead, since to retain Legal Professional Privilege the information must have been provided in confidence.

MOD Casework Example:

- **Gurkha Policy on mixed marriages** – elements of advice provided by Treasury Solicitors were withheld.

PIT for section 42 (can be used each time)

Section 42(1) of the Act provides that information is exempt information if a claim for Legal Professional Privilege could be made in respect of it. Section 42 is subject to a balance of public interest test.

For release:

- *Promoting openness and transparency.*
- *Furthering understanding of government processes in decision making,*

Against release:

- *It is recognised that the concept of Legal Professional Privilege (LPP) reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients.*
- *Such confidentiality promotes respect for the rule of law by encouraging clients to seek legal advice and allowing for full and frank exchanges between clients and their lawyers.*
- *It is important that any advice given is fully informed and reasoned. Were the legal advice released*

Conclusion:

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It has been necessary to weigh the factors favouring disclosure on a case by case basis against the strong public interest in protecting the LPP which has been recognised by the courts and the Information Tribunal.

The balance of public interest lies in favour of withholding the information

For further information – see the ICO's detailed guidance:

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx