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**CHAPTER 25
SECTION 10**

**USE OF EXEMPTIONS IN RESPECT OF COURT
RECORDS AND LEGAL PROFESSIONAL PRIVILEGE**

1. EXEMPTING INFORMATION CONTAINED IN COURT RECORDS

1.1 Background

Section 32 of the Freedom of Information Act 2000 (“the Act”) provides an exemption from disclosure as follows:

(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in-

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by-

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in-

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

The exemption under section 32 is an absolute one and is split into two parts. Part (1) deals with documents served in the course of proceedings and court records, and part (2) deals with inquiry and arbitration documents. Documents, for these purposes, may include books, maps, plans, drawings, photographs, graphs, discs, tapes, and films. As this is an absolute exemption staff are not required to conduct a public interest balancing test in order to apply it.

Point 1.2 of this guide provides staff with advice on the scope of each part of this exemption, while Points 1.3 and 1.4 explain the documents or circumstances in which information might fall to be exempted under each part.

The key working assumption for IND staff when considering the application of the exemption should always be: **whether IND holds the information only because it was contained in a document to which this exemption applies.**

The historical origin of the information concerned is crucial to the application of this exemption. For that reason, staff should initially check with the originator of the document to establish exactly where it has come from if they believe this exemption should be applied. If the information requested falls under any of the documents described in this exemption then the request should be refused and disclosure will be a matter for the court body in question.

Where IND Directorates are seeking to apply this exemption, it must be authorised at Grade 7/Assistant Director level or above, and the IND Central FOI Team must also approve its use.

1.2 Type of information captured by the exemption

Only where IND **solely** obtained information from a relevant document listed in section 32(1) or (2) will that information fall within this exemption. If IND has also obtained or been provided with the requested information through any other source or means, then this exemption will not apply to that information. For example, if IND previously held the information requested before it was in a court document, or it subsequently acquired it from an unrelated source, then the exemption here should not be applied to that information. This is an important qualification which should always be taken into account by staff when considering the applicability of this exemption .

Courts and tribunals- Part (1)

Part (1) of this exemption relates to documents filed with the court or served upon a public authority or '**created by a court**', for the purposes of '**proceedings in a particular cause or matter**'.

The term '**court**' is defined by the exemption as including '**any tribunal or body exercising the judicial power of the State**'. As well as the system of civil and criminal courts (magistrates' courts, county courts, the Crown Court, the High Court and the Court of Appeal) it includes the Judicial Committees of the House of Lords and the Privy Council and the judicial functions of coroners.

The inclusion of tribunals here within the definition of the term court brings in a number of bodies which have specific and limited statutory jurisdiction. This is usually based on the subject matter of the issue in question. One example of such a tribunal within the immigration sphere is the Immigration Appellate Authority (IAA).

Part (1) also refers to documents being filed, served or created for the '**purposes of proceedings in a particular cause or matter**'. This term predominantly includes litigation where a person seeks to invoke the jurisdiction of the court in relation to an action or dispute, or where a person asks the court to make a particular decision. The term includes not only the main action or matter itself but also any proceedings which are incidental to it, for example the enforcement of a court order, interim applications and costs.

Further details of when this part of the exemption might fall to be applied can be found at point 1.3.

Inquiries and Arbitration- Part (2)

Part (2) of this exemption applies **only** to the documents of inquiries or hearings which are held under any provision contained in an Act of Parliament. This might include, for example:

- Inquiries which are required to be held by virtue of a specific statutory provision;
- A discretionary inquiry or hearing designated by an order under section 16(2) of the Tribunals and Inquiries Act 1992;
- any inquiry set up by the exercise of a statutory power;

- any inquiry to which the provisions of the Tribunals of Inquiry (Evidence) Act 1921 apply.

Specific examples of recent inquiries set up under an Act of Parliament include:

- the Bloody Sunday inquiry (Tribunals of Inquiry (Evidence) Act 1921);
- the Marchioness Inquiry (Merchant Shipping Act 1995, s268);
- the Victoria Climbié Inquiry (Children Act 1989, s81, NHS Act 1977, s84 Police Act 1996, s49);

This part of the exemption will **not** apply to the documents of inquiries which do not owe their existence to statute, including those set up under the royal prerogative, even if a judge heads the inquiry. Examples of inquiries where the court records exemption could not be claimed would include:

- departmental 'leak' inquiries;
- Sir Alan Budd's December 2004 inquiry into an application for indefinite leave to remain.
- Sir Anthony Hammond KCB, QC's review of the circumstances surrounding S P Hinduja's application for naturalisation.

These inquiries may, however, be subject to other exemptions under the Act

Further details of when this part of the exemption might fall to be applied are provided at Point 1.4.

1.3 **Scope of the exemption in relation to courts and tribunals**

IND will **only** be able to exempt information under Part (1) of this exemption if it is contained in:

- (a) a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter;
- (b) a document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter; or
- (c) a document created by a court or a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter.

Categories (a) and (b) here are principally concerned with documents created by the parties to litigation. Category (c) focuses on documents created by or on behalf of the court or tribunal itself in connection with proceedings in a particular cause or matter.

Category (a) might include information contained in:

- Claim forms and statements of defence;
- Committal documents in criminal proceedings;
- Witness statements, medical or other expert reports and exhibits;

- Skeleton arguments;
- Public interest immunity certificates;
- Allocation questionnaires or pre-trial checklists (listing questionnaires);
- Notices of a part 36 payment into court (a payment of money into court which is made pursuant to Part 36 of the Civil Procedure Rules);
- Application notices;
- Public interest immunity applications;
- Applications under sections 76 and 78 of the Police and Criminal Evidence Act 1984;
- Trial bundles;
- Response to a Request for Further and Better Particulars (Civil Procedure Rules Part 18); and
- Any other documents which are placed before a court for the purpose of a decision or ruling.

Category (b) might cover information contained in:

- Documents falling under the first category which are also served on a public authority or are served by a public authority on another person;
- Standard disclosure lists (lists of documents).

Category (c) might include information contained in:

- Judgements and orders of the court which have not been published;
- Notebooks of judges, tribunal members, coroners and other judicial officers;
- Notices of hearings;
- Summaries prepared by judicial assistants; and
- Court or tribunal internal memoranda and correspondence which relate to particular proceedings.

The exemption here will not cease to apply to information because it is not subsequently used in the proceedings. For example, a party may file evidence at court which is later be found to be inadmissible and so will not be used in the proceedings. Courts often return inadmissible evidence to the parties, but if this information falls within the terms of section 32 it will not cease to be exempt even if subsequently it is not used in the proceedings.

1.4 **Scope of the exemption in relation to inquiries and arbitration**

IND will **only** be able to exempt information under Part (2) of this exemption if it is contained in:

- (a) a document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration; and
- (b) a document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

Category (a) will primarily include evidence which is filed by parties to the inquiry or arbitration.

Category (b) might include information contained in:

- Notes taken by an arbitrator or the head of an inquiry;
- Written decisions or reports of the inquiry;
- a written arbitration agreement that is created by a person conducting an arbitration;
- internal correspondence between persons involved in the conduct of an inquiry or arbitration; and
- a letter from a person conducting an inquiry requesting further evidence.

IND may also hold information within category (b) because it was the recipient of a document created by a person conducting an inquiry. However, unless the document was created by the person conducting the inquiry, the information cannot be excluded under this part of the exemption.

1.5 Duration of the exemption

If information is contained in a record which has been in existence for over thirty years (beginning with the year following that in which it was created), this exemption will not apply.

1.6 Relationship with other exemptions

Information which is not governed by the terms of this exemption but which relates to court and tribunal proceedings or inquests, inquiries and arbitration may still fall within another exemption. For example, if a party to litigation holds information contained in a document served by another party but does not **only** hold it for that reason, the exemption here will not apply but it will be necessary to consider whether another exemption does.

The following exemptions are likely to be particularly relevant in this context.

Information provided in confidence: If a public authority has obtained information from another person, that information will be exempt if its disclosure to the public by the public authority holding it would constitute a breach of confidence actionable by that other person. See Section 12 of this IDI Chapter for further details.

Legal professional privilege: Information which does not fall within the terms of this exemption, but which relates to litigation or legal advice, may still be exempt by virtue of legal professional privilege. See Point 2 for further details.

Legal prohibitions on disclosure: Section 44 of the Act creates an absolute exemption for information which is subject to certain forms of legal prohibitions on disclosure. In particular, public authorities must not disclose information if the disclosure is prohibited by a rule of court or a court order or the disclosure would constitute or would be punishable as a contempt of court. See Section 13 of this IDI Chapter for further details

2. EXEMPTING INFORMATION ON THE GROUNDS OF LEGAL PROFESSIONAL PRIVILEGE

2.1 Background

The exemption under section 42 of the Act provides that:

(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.

This exemption protects the rights of access to information under the Act by reference to a particular rule of litigation, known as legal professional privilege (“LPP”). LPP protects confidential communications between lawyer and client and certain other material created for the purpose of the litigation. It applies equally to communications entered to Government Departments just as it would to private individuals.

For this exemption to apply there is not a requirement that any legal proceedings will have commenced, although that will certainly be of relevance where this is the case. This exemption applies to the types of information which would be protected if legal proceedings were commenced and applies the LPP test in the separate context of the Act.

This exemption is a qualified one. This means that staff must carry out a public interest balancing test even if requested information falls under the terms of LPP. For the exemption to be applied, the public interest considerations in not releasing the information requested must outweigh the public interest considerations in favour of disclosing that information. However, the overall public interest in non-disclosure of material subject to a claim to LPP is a strong one.

The operation of this exemption in some instances will be complex and in some respects potentially uncertain as LPP is a principle of common law and the precise details of this principle are still evolving. When seeking to apply this exemption, staff should always seek initial advice from IND’s Central FOI Team who will also refer complex or precedent-setting queries to Legal Advisers Branch (LAB).

Where IND Directorates are seeking to apply this exemption, it must be authorised at Grade 7/Assistant Director level or above, and the IND Central FOI Team must also approve its use.

2.2 Scope of the exemption

LPP predominantly attaches to communications with lawyers. This may include for IND's purposes communications between staff and:

- the Home Office's Legal Adviser's Branch (LAB);
- lawyers employed by other public authorities (including for example by the Treasury Solicitor's Department); and
- external lawyers in private practice (solicitors or counsel).

In certain circumstances communications between staff and third parties may also attract LPP, for example when seeking evidence from an expert for the purposes of litigation.

Just because information has been to or comes from a lawyer does not, however, automatically mean it will be protected by LPP. It will need to come within one of the two categories of LPP: **advice privilege** and **litigation privilege**.

- **Advice privilege** relates to communications between a client and lawyer provided they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations. The majority of IND's communication with lawyers is likely to fall into this category.
- **Litigation privilege** attaches to confidential communications that come into existence, after litigation is in reasonable prospect or is pending, for the dominant purpose of being used in connection with the litigation.

The basic rule is that if material attracts LPP it will always attract LPP. This means that if a claim for LPP can be made in respect of information in one case, it can be made in respect of the information in any subsequent case in which the document is relevant, whether by the person who was originally entitled to claim LPP or by his or her successor in title.

Where IND staff have received legal advice from LAB or other legal practitioners, and this advice is then repeated or summarised in other documents, it may still fall to be exempt if it retains the properties of LPP. For example, where advice is sought by IND officials from LAB about IND's particular legal position in developing policy, and the advice from LAB is then put forward by IND to a Minister in a submission, the relevant part of the submission stating the legal position may also attract LPP. IND Directorates should, therefore, ensure that where they receive advice from LAB or other legal practitioners that this is clearly marked as legal advice. This will ensure that legal advice can be easily identified in future as possibly being subject to LPP and coming under the scope of this exemption. IND Directorates should also be careful to ensure that when they use advice supplied to them by LAB in another document that they distinguish clearly between the legal advice from LAB and any other advice put forward in a document.

For a claim for LPP to be maintained, the information in question must be confidential. Confidential information may lose its confidential quality where the information is so generally accessible that in all the circumstances it can no longer be regarded as confidential. In the normal course, communications between solicitor and client will be presumed to be confidential. Correspondence between lawyers acting for the same client will also attract LPP.

Information which is protected by LPP may be disclosed to one person on terms that it is to be treated as confidential so that the quality of confidentiality is not lost as against another person. Where this is the case, LPP can still be claimed against that other person. This means that disclosure of legal advice in one set of proceedings does not necessarily constitute waiver of LPP for the purposes of subsequent proceedings, so long as the advice retains its quality of confidentiality between the parties to the subsequent proceedings at the time of those proceedings.

2.3 Applying the public interest balancing test

General considerations

The exemption under section 42 is qualified and each case must be considered against the backdrop of the public interest balancing test. However, information which has the quality of LPP is recognised by the courts as requiring protection, and this points to a significant overall public interest in non-disclosure.

On the other hand, staff should also bear in mind that LPP can always be waived and the public interest balance in the case of this exemption should take account of this fact. If it is likely that the Department or Government would waive LPP if litigation were afoot, this would be relevant to the exercise of the public interest balance but would not automatically lead to disclosure. It should be remembered however that if LPP is waived this might lead to the quality of confidentiality in the material being lost, in which case no further claim for LPP can be made in respect of that material – including in subsequent legal proceedings.

Public interest in protecting legal advice

When applying the public interest balancing test and assessing reasons for non-disclosure, staff should consider the overriding principle attached to the operation of this exemption; namely that it is in the public interest that the decisions taken by Government are taken in a fully informed legal context where relevant.

In many areas of IND's work high quality comprehensive legal advice is often sought. The legal advice in question needs to be able to present a full picture to IND, not only of the arguments in support of final conclusions but also the arguments that may be made against these. Legal advice will often set out the perceived weaknesses of IND's position. Without such comprehensive advice the quality of the IND's decision-making would be much reduced because it would not be fully informed and this would be contrary to the public interest.

Disclosure of legal advice by IND also has a high potential to prejudice the ability to defend the legal interests of both the Department and the Government as a whole. This may be either directly by unfairly exposing our legal position to challenge, or indirectly by diminishing the reliance we can place on advice having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter could easily result in poorer decision-making as decisions may not be taken on a fully informed basis.

It is also very important for staff to bear in mind that the seeking and giving of legal advice is seldom an isolated activity. It is likely that legal advice given in one context will be helpful or relevant to subsequent issues. The full context therefore needs to be considered when considering disclosure, not just the immediate context of the piece of advice in question. This means not only considering the circumstances in

which future legal interests could be prejudiced but also bearing in mind that the public interest in protecting the confidential relationship with legal advisors is a long term public interest which could be damaged by individual disclosures.

The disclosure of legal advice even when no litigation is in prospect may also disadvantage the Government in future litigation. It is quite possible that legal advice in connection with one department will have wider implications for other departments so it is important that decisions on disclosure are not taken in isolation.

Public interest in disclosure of legal advice

In some circumstances the public interest will require the disclosure of LPP material and this is likely to be in those circumstances where IND and the Department would waive its privilege during the litigation process.

Staff will need to give consideration to other factors when applying the public interest test which place the public interest balance in favour of the disclosure of confidential legal advice. There is a public interest in IND being accountable for the quality of its decision making and ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.

The weight to be attached to these public interest factors will differ according to the case in question. However, given the very substantial public interest in maintaining the confidentiality of LPP material, it is likely to be only in exceptional circumstances that it will give way to the public interest in disclosure.

Civil litigation and the public interest balance

Particular public interest considerations arise where civil litigation is under way or in contemplation. Litigation is adversarial rather than inquisitorial and in broad terms this means that each side sets out its own case to the best of its ability and the Judge determines what in his view is the just and true result. Disadvantaging the Department's case in the conduct of its litigation by disclosing information would not be in the public interest. In broad terms, it is in the public interest that the Government is able to act in litigation on the same terms as its opponents. Therefore, although the public interest for and against disclosure must be considered on a case by case basis, where litigation is in process or is anticipated staff should give significant weight to the public interest in not releasing privileged information.

If, however, advice is disclosed to an opposing party in litigation this might suggest that the weight of the public interest in maintaining the exemption is reduced. An example of a case in which the Government might decide to waive LPP for the purposes of legal proceedings is where it is the subject of proceedings for failure to implement or implement properly European Community obligations and the case on its facts turns on the legal advice which was given to the Government, such as the case in *Factortame*. If advice is disclosed to an opposing party in litigation this will usually be because it was decided by the public authority that it would not be in the public interest for LPP to be maintained in the advice for the purposes of the proceedings. Depending on the facts of the case there might be a public interest in the advice being made available more generally and it might help explain why the decision was taken to waive LPP in the case in question.

2.4 Applying the exemption

If staff withhold information on the grounds of the exemption under section 42, then the response to the applicant should state the exemption itself and explain why it applies to the information requested, and demonstrate that a public interest test has been carried out and why this favours non-disclosure. A standard template letter at **Appendix A** is attached for IND Directorates to adapt as necessary in these circumstances. This is entitled: ***'Standard template for applying an exemption under section 42 where information is subject to LPP and the duty to communicate has been exempted'***.

Using a neither confirm nor deny response to the applicant

Where even complying with the duty to confirm that IND holds the information requested would in itself involve the disclosure of information which is subject to LPP, a neither confirm nor deny answer can be used to respond to an applicant. This must be a separate decision that requires an assessment about whether there is a public interest in maintaining the exclusion of this duty which outweighs the public interest in disclosing whether or not IND holds the information. It will, however, only rarely be the case that disclosing the fact that legal advice has been taken will in itself disclose the content of the legal advice given. IND Directorates should contact the IND Central FOI Team, where they believe this to be the case, who will provide assistance in drawing up a response.

2.5 Duration of the exemption

The weight to be given to the factors against disclosure of information which is subject to LPP is likely to change as a result of the passage of time. In very broad terms, as the advice becomes older the weight that can be given to the public interest in maintaining the exemption is likely to decrease. After 30 years beginning with the year after the record was created the advice becomes a "historical record", and can no longer be exempt by virtue of section 42. As this point becomes nearer the public interest in maintaining the exemption is likely to decrease.

2.6 Relationship with other exemptions

Information captured by this exemption may also fall to be exempted under other exemptions within the Act as follows:

Court records, etc.

Where for example the information requested is a court document or has been served for the purposes of legal proceedings it should be considered whether section 32 will apply. See point 1 above for further details.

Formulation of government policy etc.

Where the information relates to the provision of advice by any of the Law Officers or any request for the provision of such advice, this will also fall within section 35(1)(c) of the Act which relates to the formulation of government policy. It should be noted that section 35(1)(c) may be relevant and so will need to be considered even where the information in question does not fall within section 42.

The other parts of section 35 may also be relevant, particularly section 35(1)(a) as LAB and Treasury Counsel are often consulted regarding the formulation or development of Government policy. This section may also be relevant where compliance with the duty to confirm would not in itself disclose information which is subject to LPP, but would be information relating to the formulation or development of

government policy. Legal advice may be sought early on in the policy development and to disclose it may undermine the effectiveness of the policy position that was finally reached. See Section 11 of this IDI Chapter for further information on applying this exemption.

Information provided in confidence.

Section 41 of the Act applies to information obtained by a public authority from another person where the disclosure of the information to the public would constitute a breach of confidence. For example, where a public authority holds legal advice received by another person sections 41 and 42 may both apply. Section 41 may also be relevant even though the information in question does not fall within section 42. See Section 12 of this IDI Chapter for further information on applying the exemption under section 41.

CHAPTER 25
SECTION 10STANDARD TEMPLATESTANDARD TEMPLATE FOR APPLYING AN EXEMPTION UNDER SECTION 42 WHERE
INFORMATION IS SUBJECT TO LPP AND THE DUTY TO COMMUNICATE HAS BEEN
EXEMPTED

Dear **[enter applicant name here]**,

Thank you for your *letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]**. This falls to be dealt with under the Freedom of Information Act 2000.

I can confirm that this information is held by *IND/IND Directorate* **[delete and or insert relevant Directorate name as appropriate]** .

I have decided, however, not to communicate this information to you pursuant to the exemption under section 42(1) of the Freedom of Information Act 2000. This allows us to exempt information if a claim to legal professional privilege could be maintained in legal proceedings. **[IND Directorates to then go on to explain why the information requested is subject to LPP as far as this is possible without disclosing exempt information]**

The use of this exemption requires us to consider whether in all the circumstances of the case the public interest in maintaining the exemption stated above outweighs the public interest in disclosing the information.

We have considered the public interest there may be in the circumstances of this case in disclosing the information to you. There may be a public interest in **[IND Directorates to insert the public interest test argument in favour of disclosure on particular request. Refer to point 2.3 for details of this]**

We have also considered the public interest there may be in maintaining the exemption to the duty to communicate. **[IND Directorates to insert the public interest considerations against disclosure on particular request. Refer to point 2.3 for details of this]**

We have considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. We have concluded that the balance of the public interests identified lies in favour of maintaining the exemption **[IND Directorates need to insert reasons for concluding that the arguments for withholding the information requested outweighs the arguments for disclosure]**.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]

[Insert full name of IND staff member dealing with request]

[Insert IND Directorate]