



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Freedom of Information Act Awareness Guidance No. 28

Parliamentary Privilege

The Information Commissioner's Office (ICO) has produced this guidance as part of a series of good practice guidance designed to aid understanding and application of the Freedom of Information Act 2000. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in response to information requests.

The guidance will be developed over time in the light of practical experience.

Here we consider the exemption relating to parliamentary privilege which is set out at Section 34 of the FOI Act.

What does the Act say?

The Freedom of Information Act 2000 provides a right of access to information held by public authorities. Section 1 of the Act establishes this right to know by placing two related obligations on public authorities. Firstly, when an applicant (who can be anyone from anywhere in the world) requests information, a public authority has a duty to write to the applicant saying whether it holds the information. This is known as the duty to confirm or deny. Secondly, if the authority does hold the information, it must communicate it to the applicant.

Section 34 is an absolute exemption designed to protect parliamentary privilege. Information will be exempt from the Act if its withholding is necessary in order to avoid infringing the privileges of either the House of Commons or the House of Lords. The duty to confirm or deny does not apply therefore if, or to the extent that, exemption from the duty is required for the purpose of avoiding an infringement of the privileges of either House.

Both the House of Commons and the House of Lords are deemed to be public authorities for the purposes of the Act; however the individual members of both

Houses are not. It is also worth noting that S34 does not provide an equivalent exemption to the National Assemblies of Northern Ireland and Wales.

A) WHAT IS PARLIAMENTARY PRIVILEGE?

Parliamentary privilege is a matter of constitutional law going back to the seventeenth century which establishes the rights and immunities of both Houses of Parliament and their members. It extends beyond those privileges enjoyed by other bodies and individuals. Privilege is critical to the effective working of Parliament as it protects its right to operate independently without external interference.

Whilst there is no definitive guide to what constitutes parliamentary privilege, it is generally recognised that the term 'privilege' implies a special advantage, rather than a special protection. Parliamentary privilege comprises five main privileges:

- freedom of speech and proceedings in Parliament
- freedom of each House to control its own affairs (referred to as 'exclusive cognisance')
- to control publication of its proceedings
- freedom from arrest
- to punish for breach of privilege and contempt

The most significant rights however are those relating to freedom of speech and Parliament's control of its own proceedings.

Additional information on parliamentary privilege can be found at www.directgov.uk.

B) FREEDOM OF SPEECH

Parliamentary privilege which permits freedom of speech means that an MP cannot be sued or prosecuted for anything he or she says as part of the proceedings in Parliament. This ensures that an MP is able to speak up on behalf of constituents, or can express any opinion on a public issue, without fear of legal action. Anyone giving evidence to a committee of the House also has the absolute protection of privilege; no criminal or civil action can be brought against them on the basis of what they have said.

C) PROCEEDINGS IN PARLIAMENT

Whilst 'proceedings in Parliament' has never been precisely defined, it is generally accepted that it embraces some formal action (usually a decision) taken by the House in its collective capacity, the forms of business in which the

House takes action, and the whole process by which it takes a decision. Based on this definition, proceedings in Parliament will include:

- Motions, proceedings on bills, and votes
- Parliamentary questions
- Proceedings within committees formally appointed by the House (and their subcommittees), including oral and written evidence and deliberations Public petitions

It is important to note that reports of parliamentary proceedings are included within the definition of privilege and will therefore also be covered by this exemption.

D) THE CONCLUSIVE CERTIFICATE

An important aspect of S34 is the issue of a conclusive certificate, which will be taken as evidence that complying with the provisions of the FOI Act will constitute an infringement of the privileges of either House of Parliament. The Act requires that the certificate be signed by an appropriate authority – either the Speaker of the House of Commons or the Clerk of the Parliaments at the House of Lords. Significantly, there is no statutory appeal mechanism against the issue of a conclusive certificate – this is in line with the general principle that decisions taken by parliamentary officers are not subject to judicial review.

Whilst a conclusive certificate is evidence of the fact that a particular disclosure of information would infringe an established privilege it is not conclusive evidence of the scope of parliamentary privilege. It is important to note that while Parliament has sole authority to determine whether a breach of privilege has taken place, it does not however have authority to create new forms of privilege. The courts are entitled to define the scope of existing parliamentary privileges.

E) WHO CAN USE THIS EXEMPTION?

In recent years Parliament has routinely published much information which falls within the definition of privileged. The range of information extends beyond records of internal proceedings to include internal administrative documents and most recently details of members' expenditure against parliamentary allowances. It is likely that this approach will continue with more information becoming routinely available. It is worth noting however that when Parliament does decide to release such information it is acknowledged to be on the basis that while it has chosen to do so the information remains privileged. Within the context of the Act however this does mean that disclosure of such published information cannot be considered an infringement of parliamentary privilege.

In practice this exemption is likely to have the greatest applicability to central government departments outside of Parliament itself; although other public

authorities may hold limited information to which this exemption relates. Significantly however, only the appropriate House authority can conclusively certify that the exemption applies.

The Information Commissioner advises that as a matter of good practice, where a public authority is considering relying on S34 to withhold information, it should on all occasions contact the Freedom of Information Officer at the appropriate House of Parliament to discuss the details of the request. Individuals whose application for information is refused should make their request for a review of the decision to the public authority and not to either House of Parliament.

F) WHAT INFORMATION WILL LIKELY BE COVERED BY THIS EXEMPTION?

It seems likely that the most frequent circumstances in which information will be considered exempt will be where Parliament relies on the exemption to avoid infringing its right to control the publication of its proceedings. Having said that the exemption is most likely to have the greatest relevance to central government departments outside of Parliament itself, it is useful to identify the range of information to which the exemption will apply:

- Committee reports and drafts not otherwise published
- Memos (and drafts) to committees of Parliament
- Internal papers prepared by the Officers of either House directly relating to House or committee proceedings
- Correspondence between Members, Officers, Ministers and Government officials directly relating to House proceedings
- Papers concerning investigations by the Parliamentary Commissioner for Standards
- Bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from Parliamentary Counsel or a government department
- Papers (including drafts) prepared by external special advisers and academics appointed for the specific expertise in a given area.

Papers prepared by the Libraries of either House at the request of a member which relate to constituency matters will not be covered by this exemption - however privilege would apply if the subject matter was concerned with a forthcoming debate or parliamentary committee.

G) WHAT INFORMATION SHOULD BE RELEASED?

It is important to recognise that there is much information arising from or related to Parliament's wide range of activities that will not be considered privileged in that it does not relate to proceedings in Parliament. It is likely that this information will in the main be held by non-parliamentary government departments and other public authorities. Examples of information where parliamentary privilege will not apply include:

- Members' correspondence and other communications not specifically related to proceedings of either House or a formally constituted committee
- Any of the unpublished working papers of a select committee of either House, including factual briefings or briefings of suggested questions prepared by the committee staff for the use of committee chairmen and members, and draft reports. These are most likely to be in the possession of a department as a result of a Minister being, or having been, a member of such a committee
- Any legal advice submitted in confidence by the Law Officer or by the legal branch of any other department to the Speaker, a committee chairman or a committee, or any official of either House
- Drafts of motions, bills or amendments which have not otherwise been published or laid on the Table of either House
- Any unpublished correspondence between Ministers, department officials or any member of either House, relating specifically to proceedings on any Question, draft bill, motion or amendment, either in the relevant House, or in a committee
- Any correspondence with or relating to the proceedings of the Parliamentary Commissioner for Standards or the Registrar of Members' Interests in the House of Commons.

While it may be appropriate to consider other exemptions to the Act when considering requests for such information, the Information Commissioner has advised that wherever possible information should be disclosed.

H) THE INFORMATION COMMISSIONER'S ROLE

The issue of a conclusive certificate places a limit on the Information Commissioner's role and powers to take action and investigate a claim that information has been withheld. Evidence will not be required to establish that the House of Commons Speaker or the House of Lords Clerk has issued the certificate based on reasonable opinion or sound judgement. The Commissioner will be able to ask that the certificate be produced to verify its existence and authenticity but will have no authority to overrule it. He will however be able to investigate any complaints which arise under other parts of the Act in relation to

that application – for example under Part One of the Act concerning fees, time limits and the provision of advice and assistance.

Where however a conclusive certificate has not been issued the Information Commissioner will be able to consider the details of the complaint and the information requested. It will be most likely that he will wish to discuss and review these details with the appropriate House authority.

It is interesting to note that whilst both Houses have agreed that they are likely to take a common approach when seeking to rely on the exemption, they have however acknowledged that the range and nature of the information disclosed will not necessarily be the same for both Houses. The Information Commissioner will monitor the approach taken by both.

Summary

- S34 is an absolute exemption designed to protect parliamentary privilege, it is not subject to the public interest test
- The authorised person in both Houses may issue a conclusive certificate stating in effect that disclosure of information will infringe parliamentary privilege
- The Information Commissioner advises that authorities should discuss any requests for information to which s34 will or might apply with the appropriate House's FOI officer
- Where a conclusive certificate has been issued, the Information Commissioner's role is limited to verification of its existence and authenticity.

SCOPING DOCUMENT

FOI Good Practice Scoping Document

Title of guidance:	The exemption for parliamentary privilege
Ref number:	FEP036
FOI section/ EIR regulation:	s34
Type of guidance:	exemption guidance - technical and practical
Target audience:	Practitioner
Proposed publishing date:	October 2008
Author:	Lynsey Smith

What questions are we posing/answering?

Meaning of the s34 exemption - a review of Awareness Guidance 28 (which was pulled from website in Feb 2007)

What key messages do we need to convey?

General overview of the exemption
Examples of what may be covered - but that will need to contact relevant House asap to get their advice.
A certificate from either House is conclusive evidence s34 applies (but procedural breaches still possible).
No discretion to release.

Which Lines To Take, DNs, ITDs are relevant?

LTTs:
DNs: FS50116013
ITDs:
High Court decision in OGC summarises scope of privilege (even though not in the context of s34 itself).

What research if any needs to be undertaken?

Will also look at MoJ guidance and parliamentary publications on scope of privilege.

What existing guidance interfaces with this and may require review? Should this guidance be a separate guidance note or a rewrite of existing guidance?

Rewrite of AG28

Any other queries, concerns, observations

Concerned about section G) of AG28 and how we can justify many of these examples. Seems that many of them would relate to proceedings in Parliament (and that not up to us to say what would not breach). Proposing to remove almost all of this section.

Expect that redraft will be shorter and more procedural given that we can't really opine on what constitutes a breach of privilege and also that this isn't an exemption that comes up much.

EIR: we should indicate which exception to specify in EIR refusal notice if House confirms would infringe privilege. I assume the relevant exception would be 12(5)(d) confidentiality of proceedings - although unsure on the impact of the PIT here (or would 12(4)(e) apply)?

Policy response (to be completed by FOI Policy team)

As identified above, there are no LTTs on s.34 (other than LTT107 which applies to all class based exemptions) and it seems there has only been one DN. Therefore the policy team has not given s.34 much, if any, consideration (although there have been a few more cases of the side issue of parliamentary questions) and thus I am unable to contribute to this scoping document.

Helen Davenport
30 September 2008

NEW DRAFT GUIDANCE – LATEST DRAFT

Document history and version control:

Intended audience | practitioners (specialist)

Reference	FEP036				
		Version number	Status	Date	Substantive changes/Decisions and reason
Author	Lynsey Smith	1.1	Draft	12 September 2008	Review AG28 – new format and style, remove section (G)
Amended by	Lynsey Smith	1.2	Draft	9 October 2008	Incorporate peer review comments
Amended by	Lynsey Smith	1.3	Draft	11 Nov 2008	GT comments – minor wording changes
Amended by	Lynsey Smith	1.4	Draft	25 Nov 2008	Comments from SW; add EIR
Validated by	Validation Subgroup		Draft		
Approved by	Policy /Urgency Committee	2	Final	Target date	
Published				Target date/Date posted on web	

Please give a document a new version number if you make any changes to it. The exception will be where it has been circulated to several people. In this case please send comments back to the author who will renumber having incorporated the reviewers' comments. (This is to avoid reviewers inadvertently adopting the same version number.)

Check:

Is there a regional aspect to this guidance including, for example, referring to public authorities using regional terminology?

Are there any equality or diversity issues you need to consider when drafting this guidance (eg form, format, language)?

Freedom of Information Act Environmental Information Regulations



Information Commissioner's Office
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The exemption for parliamentary privilege

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities. This is part of a series of guidance notes to help public authorities understand their obligations and to promote good practice.

This guidance will explain the concept of parliamentary privilege. It will help public authorities understand when and how to apply the exemption in section 34 of the FOIA and related provisions in the EIR.

This guidance replaces Awareness Guidance 28.

Overview

- Section 34 sets out an exemption from the right to know if disclosure would infringe parliamentary privilege. The exemption is absolute, which means there is no public interest test.
- Parliamentary privilege protects the independence of Parliament. It gives each House of Parliament the exclusive right to oversee its own affairs. This includes the right to control publication of parliamentary proceedings and the final decision on what would infringe privilege.
- Other public authorities holding information relating to parliamentary proceedings will therefore need to ask the relevant House for advice on whether the exemption applies.
- The Speaker of the House of Commons or the Clerk of the Parliaments of the House of Lords can issue a certificate which will conclusively confirm that the exemption applies.
- The EIR do not apply to the Houses of Parliament if disclosure of environmental information would infringe parliamentary privilege. For other public authorities, regulation 12(5)(d) of the EIR sets out an exception if disclosure would adversely affect the confidentiality of proceedings provided by law. The exception is subject to a public interest test.

General principles of exemption

Section 34 sets out an exemption where disclosure of the information would infringe the privileges of either House of Parliament. The exemption is

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absolute, which means that if the information falls within the section there is no need to consider the public interest test.

The exemption is designed to protect parliamentary privilege, which is a set of constitutional principles preserving the independence of Parliament. The exemption will most commonly be used by the Houses of Parliament themselves, but can also be relevant to other public authorities.

The House of Commons and the House of Lords are public authorities subject to the FOIA. If either House decides that disclosure of information would infringe its privileges, it will be able to use the section 34 exemption. However, as the privilege belongs to the relevant House, it can also choose to voluntarily publish privileged information if it wishes. Much privileged information is now published as a matter of course. Examples include Hansard reports of debates and committee documents.

The exemption will also be relevant to other public authorities holding information relating to parliamentary proceedings, most commonly central government departments. It is important for these authorities to apply section 34 correctly, as wrongly withholding information will breach the FOIA, while wrongly releasing information will infringe parliamentary privilege.

Only the relevant House can conclusively certify what would infringe its privileges or can approve the publication of privileged information about its proceedings. If you hold relevant information you should contact the relevant House for advice before deciding whether to disclose the information or apply the exemption.

The exemption applies only to privileges of the House of Lords or House of Commons. It does not cover proceedings of the National Assemblies of Wales or Northern Ireland.

The duty to confirm or deny

You should also remember your duty to confirm or deny whether you hold the information. Even if the information itself is exempt from disclosure, you may still need to confirm that you hold the information unless the confirmation itself would be exempt. Equally, if you do not hold the information you must say this unless the denial itself would be exempt.

Section 34(2) sets out an exemption from the duty to confirm or deny if the confirmation or denial would itself infringe the privileges of either House. Again, you will need to contact the relevant House for advice if you think this might be the case.

For further information on the duty to confirm or deny, see [The duty to confirm or deny: Awareness Guidance 21](#).

What is parliamentary privilege?

Parliamentary privilege is not defined in the FOIA. It is a set of constitutional law principles going back to the 17th century which provide certain rights (or privileges) to allow Parliament to work effectively and independently, without interference from the courts or other authorities.

There is no definitive guide to what constitutes parliamentary privilege. This guidance aims to give you a general overview, but the final authority in any particular case will be the relevant House itself.

Parliamentary privilege protects proceedings in the Houses of Parliament. Essentially, each House of Parliament has the right to control its own affairs (known as "exclusive cognisance"). This means that no other authority, including a court, can interfere with or question the legitimacy of parliamentary proceedings. Although privilege protects each House as a whole and not individual members, it does mean that MPs or other individuals participating in parliamentary proceedings enjoy freedom of speech within Parliament and cannot be sued or prosecuted as a result of something they say.

For the purposes of the FOIA, the key point will generally be that, as part of its privilege, the relevant House has the right to control publication of its proceedings. Disclosure by any other public authority of any information relating to parliamentary proceedings may therefore interfere with parliamentary privilege, and trigger the section 34 exemption.

What constitutes "proceedings in Parliament" has never been precisely defined. It is generally accepted that it embraces some formal action (usually a decision) taken by the House of Commons or the House of Lords in its collective capacity, the forms of business in which the House takes action, and the whole process by which it takes a decision. Proceedings in Parliament will therefore include:

- motions, debates, and votes
- parliamentary questions
- proceedings within committees formally appointed by the House (and their subcommittees), including oral and written evidence and deliberations
- the work of the Parliamentary Commissioner for Standards.

What sort of information may be covered?

As each House has the right to control its own affairs, including the right to control publication of its proceedings, any unpublished information relating to proceedings in Parliament may be covered by the exemption. Central government departments may hold documents of this type, for example, when a minister is or has been a member of a parliamentary committee.

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Examples of the range of documents which could trigger the exemption include:

- Committee reports and drafts not otherwise published.
- Memos (or draft memos) submitted to committees.
- Internal papers prepared by the officers of either House directly relating to House or committee proceedings, eg briefing papers or notes of committee meetings.
- Correspondence between members, officers, ministers and government officials directly relating to House or committee proceedings. However, members' correspondence and other communications not specifically related to these proceedings (for example, on constituency business) will not generally be covered.
- Papers concerning investigations by the Parliamentary Commissioner for Standards or concerning the registers of members' interests.
- Bills, amendments and motions (including drafts) originating from Parliament or a member.
- Papers (including drafts) prepared by external special advisers to Parliament and academics appointed for specific expertise in a given area.
- Papers prepared by the libraries of either House relating to a forthcoming debate or committee or other proceeding. However, papers prepared at the request of an individual member relating to constituency matters, rather than to any anticipated proceedings of the House or committees, will not generally be covered.

Comment [LS1]: MOJ guidance implies that bills, amendments and motions that originated from parliamentary counsel or a government department would not be covered. Is this correct? Is it just where they are still in draft and not yet before the House?

If the information has already been published, disclosure is less likely to infringe privilege. In these cases you may be able to use the section 21 exemption for information which is reasonably accessible elsewhere. For more information on section 21, see [Information reasonably accessible to the applicant by other means: Awareness guidance 6](#). However, if the section 21 exemption does not apply, parliamentary privilege may still be an issue.

If you think the exemption for parliamentary privilege may apply, you should contact the relevant House for advice. As each House controls its own affairs, only the House itself can confirm whether disclosure would infringe its privilege.

Conclusive certificates

Under section 34(3), the relevant House can issue a certificate to confirm that disclosure (or compliance with the duty to confirm or deny) would infringe its

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privilege. The certificate must be signed by "the appropriate authority": the Speaker of the House of Commons, or the Clerk of the Parliaments at the House of Lords.

A certificate will be conclusive evidence that the exemption applies. This means that, if a complaint is made to the ICO, we will investigate whether the certificate exists, but will not reconsider the merits of the decision. This is because parliamentary privilege itself prevents the ICO (or the Tribunal or courts) from questioning or overruling the relevant House's decision.

However, we can still investigate any procedural issues relating to, for example, time limits, the refusal notice or the duty to provide advice and assistance.

If no certificate has been issued, we will consider the full details of any complaint, but we are likely to discuss the applicability of the exemption with the relevant House as the final authority on the infringement of privilege.

Environmental Information

If the information being considered is environmental information, disclosure must be considered under the provisions of the EIR rather than the FOIA. For more information on what constitutes environmental information, see our guidance: [What is environmental information?](#)

Regulation 3(4) states that the EIR will not apply to the Houses of Parliament themselves if complying would infringe parliamentary privilege. This means that the request would be dealt with under the FOIA, but would be exempt under section 34 as set out above.

However, the EIR will still apply to other public authorities holding environmental information relating to parliamentary proceedings.

There is no equivalent exception under the EIR directly relating to parliamentary privilege. However, we advise public authorities to consider regulation 12(5)(d). This sets out an exception if disclosure of information would adversely affect the confidentiality of proceedings:

12.—(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

As with all EIR exceptions, this is subject to the public interest test set out in regulation 12(1)(b). A public authority can only refuse to disclose the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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Other considerations

If section 34 does not apply but you nevertheless believe there are good reasons for withholding the information, you might want to consider the section 35 exemption for information relating to the formulation of government policy or ministerial communications, or the section 36 exemption for information whose disclosure might prejudice the effective conduct of public affairs.

Additional guidance is available if you need further information on:

- Requests for MPs' correspondence
⇒ see Guidance on dealing with requests for MPs' correspondence relating to constituents
- The section 35 exemption for policy formulation
⇒ see Policy formulation, Ministerial communications, Law Officers' advice and the operation of the Ministerial Private Office: Awareness guidance 24
- The section 36 exemption for effective conduct of public affairs
⇒ see Effective conduct of public affairs: Awareness guidance 25

More information

This guidance will be reviewed from time to time in line with new decisions of the Information Commissioner, Tribunal and courts on freedom of information cases. It is a guide to our general recommended approach to this area, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please contact us.

Phone: 08456 30 60 60
01625 54 57 45

Email: please use the online enquiry form on our website

Website: www.ico.gov.uk

EMAILS

Angela Ellison

From: Lynsey Smith
Sent: 28 October 2008 09:53
To: Lynsey Smith
Subject: FW: Parliamentary privilege guidance

FILE NOTE:

Ged reading today to decide whether needs amendments before going to Graham (DC). Graham then to approve draft (as he was looking at previous guidance when taken off website).

Once Ged and Graham happy, send to Parliament contacts.

-----Original Message-----

From: Dawn Monaghan
Sent: 28 October 2008 09:28
To: Lynsey Smith
Subject: RE: Parliamentary privilege guidance

I'm happy have you had other comments?

-----Original Message-----

From: Lynsey Smith
Sent: 09 October 2008 12:13
To: Gerrard Tracey; Sue Markey; David Evans; John-Pierre Lamb
Cc: Dawn Monaghan
Subject: Parliamentary privilege guidance

I attach a copy of the draft guidance on the parliamentary privilege exemption. This has now been through peer review and would normally go to validation now, but we want to run a finalised version past our contacts at the Houses of Parliament before final sign-off and publication.

Can you review this and let me have any comments? Alternatively, let me know if you want to discuss at the next validation meeting before we send it to Parliament.

Thanks,
Lynsey

Lynsey Smith

FOI Good Practice
Information Commissioner's Office

Angela Ellison

From: Lynsey Smith
Sent: 20 November 2008 11:25
To: Gerrard Tracey
Subject: FW: Draft guidance - parliamentary privilege

FYI

My preference would be to not include reference to the DN as it doesn't really say anything useful.

-----Original Message-----

From: Steve Wood
Sent: 13 November 2008 14:56
To: Lynsey Smith; Graham Smith (Deputy Commissioner)
Cc: Dawn Monaghan
Subject: RE: Draft guidance - parliamentary privilege

Hi Lynsey,

Many thanks for sending this. I can't class myself an expert in the topic (I need to brush up on my 17th century history!) but I have made a few comments on the text (see attached).

A few other general comments:

- The guidance could make clear the exemption can't apply to the Welsh or NI Assemblies
- It could also make reference to the parallel provision in the EIRs Regulation 3(4)

In terms of members of the public reading the guidance an example of a DN might be useful to illustrate that we have upheld the use of the exemption, I think there has just been one: FS50116013.

I also think there may be a need for a further technical guidance note on these wider issues relating PP and FOI:

- The difference between PQs and FOI requests
- Reliance on Parliamentary materials as evidence in cases before the Commissioner

The above issues are drawn out in the recent OGC High Court decision: the Judge was clear that to treat PQs as FOI requests would be breach of PP and the Tribunal's reliance on Select Committee was also a breach of PP. It may be that we need to make sure that via the House MPs and their staff are made aware of the first point, I'm sure there is some awareness but it may be worth reinforcing.

Hope this assists. Happy to discuss further if needed.

Regards

16/02/2009

Steve

-----Original Message-----

From: Lynsey Smith

Sent: 11 November 2008 15:29

To: Graham Smith (Deputy Commissioner)

Cc: Steve Wood; Dawn Monaghan

Subject: Draft guidance - parliamentary privilege

Graham,

You may remember that we withdrew the awareness guidance on parliamentary privilege from our website in February 2007, after some inaccuracies were brought to our attention. As part of our project to update the old guidance we have now drafted a new replacement guidance note on this exemption. Ged has asked me to run this by you before contacting the Houses for their comments.

I attach a copy of the new draft guidance, along with a copy of the old guidance (AG28) for reference. I would be grateful if you could have a look at the draft and let me have any comments by next Tuesday, 18 November.

Steve – I've copied you in for info. As this is not an area on which we have any LTTs, please do let me know if you have any comments from a policy perspective.

Please let me know if you have any questions or would like to discuss.

Thanks,
Lynsey

Angela Ellison

From: Lynsey Smith
Sent: 20 November 2008 09:23
To: Gerrard Tracey
Subject: RE: Parl Priv

Yes, with deadline stated as last Tuesday. I had some useful comments back from Steve but nothing back from Graham yet.

Lynsey

-----Original Message-----

From: Gerrard Tracey
Sent: 20 November 2008 09:17
To: Lynsey Smith
Subject: Parl Priv

Lynsey,

Did the PP guidance go to Graham?

Thanks
Ged

Angela Ellison

From: Lynsey Smith
Sent: 10 February 2009 16:54
To: Graham Smith (Deputy Commissioner)
Subject: FW: Draft guidance - parliamentary privilege

Graham,

Just wondering if you've had a chance to look at this redrafted guidance yet? As I mentioned before, as soon as you're happy with it the plan is to forward it to the Houses for their comments.

FYI - I noticed on WhatDoTheyKnow that we have received an FOI request for the old withdrawn guidance along with any new drafts. Although I doubt we would send out the drafts it has prompted me to try and get this finalised if possible!

Many thanks,
Lynsey

Lynsey Smith
FOI Good Practice and Enforcement Officer
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-----Original Message-----

From: Lynsey Smith
Sent: 26 November 2008 13:03
To: Gerrard Tracey
Cc: Dawn Monaghan
Subject: FW: Draft guidance - parliamentary privilege

Ged,

As discussed I attach an updated draft of the PP guidance which now incorporates Steve's comments (see email string below). Changes are marked. I'm not sure if you wanted to send this on to Graham while we wait for him to get back to us?

You'll see I've added in a brief section on the EIR. I have highlighted that there's a PIT but haven't discussed how it would work in practice, mainly because I'm not sure! It seems to me that if the disclosure would infringe PP, an authority could not legitimately decide to disclose anyway in the public interest without the House's consent. Surely a decision to disclose in the public interest would also breach PP, and any guidance we give saying that they should evaluate the public interest in disclosure might itself breach PP (as the House should have exclusive cognisance over disclosure)?! This problem is essentially why I left the EIR out of the guidance to start with. However, I'm not sure we need to take any position on this given that it has never come up in any DNs to date so I've just left it as a factual statement that there is a PIT.

This might be something to flag to the Houses when we send the guidance out for their

16/02/2009

comments?

Thanks,
Lynsey

Lynsey Smith
FOI Enforcement Officer
Information Commissioner's Office
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www.ico.gov.uk

-----Original Message-----

From: Steve Wood
Sent: 25 November 2008 21:22
To: Lynsey Smith
Subject: RE: Draft guidance - parliamentary privilege

Lynsey,

I would agree 12(5)(d) would cover it for other PAs as 3(4) would only cover the Houses, though the approach will need to be different than for s.34 as the exception is qualified.

Steve

-----Original Message-----

From: Lynsey Smith
Sent: 25 November 2008 16:02
To: Steve Wood
Subject: RE: Draft guidance - parliamentary privilege

Steve,

Thanks again for your comments on this. I've passed on your proposals for further guidance on PQs and parliamentary materials as evidence to Ged and Dawn.

I also just had a follow-up question on the EIR provisions on parliamentary privilege: am I right in reading regulation 3(4) as only disapplying the EIR for the Houses themselves? If another public authority received an EIR request, I assume they wouldn't be able to rely on this even if disclosure would infringe parliamentary privilege. Is there a parallel exception that would cover it (eg reg 12(5)(d))?

Thanks for your help.

Lynsey

-----Original Message-----

From: Steve Wood
Sent: 13 November 2008 14:56
To: Lynsey Smith; Graham Smith (Deputy Commissioner)
Cc: Dawn Monaghan
Subject: RE: Draft guidance - parliamentary privilege

Hi Lynsey,

Many thanks for sending this. I can't class myself an expert in the topic (I need to brush up on my 17th century history!) but I have made a few comments on the text (see attached).

A few other general comments:

- The guidance could make clear the exemption can't apply to the Welsh or NI Assemblies
- It could also make reference to the parallel provision in the EIRs Regulation 3(4)

In terms of members of the public reading the guidance an example of a DN might be useful to illustrate that we have upheld the use of the exemption, I think there has just been one: FS50116013.

I also think there may be a need for a further technical guidance note on these wider issues relating PP and FOI:

- The difference between PQs and FOI requests
- Reliance on Parliamentary materials as evidence in cases before the Commissioner

The above issues are drawn out in the recent OGC High Court decision: the Judge was clear that to treat PQs as FOI requests would be breach of PP and the Tribunal's reliance on Select Committee was also a breach of PP. It may be that we need to make sure that via the House MPs and their staff are made aware of the first point, I'm sure there is some awareness but it may be worth reinforcing.

Hope this assists. Happy to discuss further if needed.

Regards

Steve

-----Original Message-----

From: Lynsey Smith

Sent: 11 November 2008 15:29

To: Graham Smith (Deputy Commissioner)

Cc: Steve Wood; Dawn Monaghan

Subject: Draft guidance - parliamentary privilege

Graham,

You may remember that we withdrew the awareness guidance on parliamentary privilege from our website in February 2007, after some inaccuracies were brought to our attention. As part of our project to update the old guidance we have now drafted a new replacement guidance note on this exemption. Ged has asked me to run this by you before contacting the Houses for their comments.

I attach a copy of the new draft guidance, along with a copy of the old

guidance (AG28) for reference. I would be grateful if you could have a look at the draft and let me have any comments by next Tuesday, 18 November.

Steve – I've copied you in for info. As this is not an area on which we have any LTTs, please do let me know if you have any comments from a policy perspective.

Please let me know if you have any questions or would like to discuss.

Thanks,
Lynsey