

# Parliamentary privilege (section 34)

## Freedom of Information Act

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### Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how to apply the exemption in section 34 of FOIA, which relates to parliamentary privilege.

## Overview

- Section 34 of FOIA provides an exemption for information if its disclosure would infringe parliamentary privilege.
- The duty to confirm or deny does not apply where the exemption is required in order to avoid an infringement of 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 should consider asking the relevant House for advice on whether the exemption applies.
- The Speaker of the House of Commons or the Clerk of the Parliaments in the House of Lords can issue a certificate which will conclusively confirm that the exemption applies.

## What FOIA says

5. Section 34 reads as follows:

**34.—**(1) Information is exempt information if exemption from section 1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

(2) The duty to confirm or deny does not apply if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

(3) A certificate signed by the appropriate authority

certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of avoiding an infringement of the privileges of either House of Parliament shall be conclusive evidence of that fact.

- (4) In subsection (3) "the appropriate authority" means—
- (a) in relation to the House of Commons, the Speaker of that House, and
  - (b) in relation to the House of Lords, the Clerk of the Parliaments.

6. Section 34 is an absolute exemption, so there is no need to apply the public interest test.

## What is parliamentary privilege?

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

### **The Bill of Rights 1689**

One aspect of Parliamentary privilege is encapsulated in Article 9 of the Bill of Rights 1689, which provided that:

"the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

8. There is no definitive guide as to what constitutes parliamentary privilege, although a helpful description can be found in the 1999 report of the [Joint Committee Reports on Parliamentary Privilege](#). This guidance aims to give you an overview of the application of section 34 of FOIA, but the

authority as to the application of parliamentary privilege is the relevant House itself.

9. Article 9 of the Bill of Rights means that no other authority, including a court, can challenge or interrogate statements made in the course of parliamentary proceedings. It means that MPs, Lords and other individuals participating in parliamentary proceedings (such as witnesses before select committees) enjoy freedom of speech within Parliament and cannot be sued or prosecuted as a result of something they say there.
10. As well as the protection offered by Article 9 of the Bill of Rights against the questioning of proceedings in Parliament, parliamentary privilege also protects the right of each House to manage its own affairs and to exercise sole jurisdiction over its own proceedings. This right is known as “exclusive cognizance”, which means “exclusive jurisdiction”. For the purposes of the FOIA, the key point is that, as part of its privilege, the relevant House has the right to control publication of its proceedings.
11. What constitutes “proceedings in Parliament” has never been precisely defined. It is well established that it is for the courts to decide on whether particular activities constitute “proceedings in Parliament”. At the same time, it is generally accepted that the term 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. Examples of proceedings in Parliament therefore include but are not limited to:
  - 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 and the House of Lords Commissioner for Standards; and
  - work undertaken by officials of either House arising directly out of proceedings of the relevant House or under the authority of that House (eg correspondence with

Government departments on behalf of select committees exercising a scrutiny function).

However the proceedings of All Party Parliamentary Groups are not "proceedings in parliament".

### **What sort of information may be covered by parliamentary privilege?**

12. 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.
13. Examples of the range of documents which could trigger the exemption include the following:
  - Committee reports and drafts not otherwise published.
  - Memos (or draft memos) submitted to committees.
  - Internal papers prepared by the officials of either House directly relating to House or committee proceedings, eg briefing papers or notes of committee meetings.
  - Correspondence between members, House officials, ministers and government officials, where the correspondence directly and specifically relates 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 Lords Commissioner for Standards, or concerning the Register of Members' Financial Interests (House of Commons) and Register of Lords' Interests (House of Lords).
  - Bills, amendments, questions and motions (including drafts) originating from Parliament or a member of either House, once they have been introduced into Parliament.
  - 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 or general matters, rather than to any anticipated proceedings of the House or committees, will not generally be covered.

### **Example**

In ICO decision notice [FS50116013](#) the complainant made a request to the House of Commons for access to three files relating to a House of Commons Treasury Committee inquiry. The House refused to disclose all the information in two of the files and some of the information in the third file. It stated that to disclose the information would infringe parliamentary privilege, and that it was therefore exempt under section 34 of FOIA.

The House eventually produced a certificate signed by the Speaker of the House of Commons, certifying that the withheld information was subject to parliamentary privilege. Production of a certificate under section 34(3) is conclusive evidence that exemption from disclosure is required to prevent infringement of parliamentary privilege; therefore the Commissioner found that section 34 was engaged and the withheld information was exempt from disclosure.

## General principles of section 34

14. Section 34 provides an exemption where the disclosure of requested information would infringe the privileges of either House of Parliament.
15. The exemption is designed to protect parliamentary privilege, which is, as explained above, 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.
16. The House of Commons and the House of Lords are, for limited purposes, public authorities subject to FOIA. If either House decides that disclosure of information would infringe its privileges, it will be able to use the section 34 exemption.

17. 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.
18. 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 FOIA, while wrongly releasing information will infringe parliamentary privilege. Public authorities other than the Houses of Parliament do not have any discretion to release voluntarily any privileged information.
19. Only the "appropriate authority" of the relevant House can conclusively certify what would infringe its privileges under section 34. When responding to a request for information, a public authority that holds any relevant information should consider contacting the relevant House for advice before deciding whether to disclose the information or apply the exemption.
20. The exemption applies only to privileges of the House of Lords or House of Commons. It does not cover proceedings of the National Assembly for Wales or the Northern Ireland Assembly.
21. The exemption does not apply to individual Members of Parliament or members of the House of Lords, who are not public authorities in any event. However they are able to speak freely in parliamentary proceedings without fear of litigation because those proceedings are protected by parliamentary privilege.

### Conclusive certificates under section 34(3)

22. The relevant House can issue a certificate under section 34(3) to confirm that disclosure (or compliance with the duty to confirm or deny) would infringe its privilege. The certificate must be signed by "the appropriate authority": the Speaker of the House of Commons, or the Clerk of the Parliaments on behalf of the House of Lords.

23. A certificate can be issued at any stage:
- while the public authority is dealing with the request; or
  - when the Commissioner is considering a complaint.
24. A certificate will be conclusive evidence that the exemption applies.

### **Example**

In ICO decision notice [FS50224829](#), the complainant requested correspondence and documentation regarding the House of Commons' Register of Members' Interests, with specific reference to rules governing the declaration or otherwise of overseas trips organised and funded by The British Council. The House of Commons withheld the information under section 34(1) of the Act. When the complainant brought the matter to the Commissioner, the Speaker of the House of Commons issued a certificate under section 34(3) of the Act. The Commissioner's decision was that the certificate issued by the Speaker of the House of Commons under the provisions of section 34(3) of the Act served as conclusive evidence of exemption from the duty to disclose the information it held under section 1(1)(b) and that no further action was required.

## **Correspondence from MPs and members of the House of Lords**

25. Members' correspondence to public authorities or to constituents on constituency business, where such information is held by a public authority, is not covered by parliamentary privilege, nor is their general correspondence with ministers or other members. However correspondence relating to current or potential proceedings of the relevant House or of a parliamentary committee may be privileged. Public authorities should therefore take care when an MP or member of the House of Lords is a member of a relevant parliamentary committee, and should consult the authorities of the relevant House to clarify whether section 34 applies to the information in question.
26. MPs' correspondence relating to constituents may receive protection from other exemptions under FOIA. Please refer to: [Guidance on dealing with requests for MPs' correspondence](#)



[relating to constituents](#) and to other guidance on specific exemptions in our [Guidance index](#).

## Information published by Parliament

27. Parliament now routinely publishes a significant amount of information itself. This does not necessarily mean that the information is no longer privileged. If the information has already been published, disclosure is less likely to infringe privilege. In these cases, a public authority might be able to use the section 21 exemption for information which is reasonably accessible elsewhere. For more information on section 21, see ICO guidance: [Information reasonably accessible to the applicant by other means](#). However, if the section 21 exemption does not apply, parliamentary privilege might still be an issue and a public authority should seek advice from the relevant House.
28. If a public authority has received a request for information to which it thinks the exemption for parliamentary privilege may apply, it 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.

## The duty to confirm or deny

29. Section 1(1)(a) of FOIA requires a public authority to inform the requester "whether it holds information of the description specified in the request". This is known as the duty to confirm or deny. This duty applies even if the information itself is exempt from disclosure, unless that duty is excluded.
30. In respect of parliamentary privilege, section 34(2) removes the duty to confirm or deny "if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament". If a public authority thinks that this might be the case, it should contact the relevant House for advice.
31. For further details of the duty to confirm or deny, see the ICO's guidance: [When to refuse to confirm or deny information is held](#).

## Other considerations

### Environmental information

32. If the information that is the subject of a request is environmental information, a public authority must consider it under the provisions of the EIR rather than FOIA. For more information on this, please see the [Guide to the Environmental Information Regulations](#).
33. Regulation 3(4) of the EIR states that the EIR will not apply to the Houses of Parliament themselves if complying would infringe parliamentary privilege. This means that the House of Commons or the House of Lords, on receiving a request for environmental information, must instead consider it under FOIA, and may find it exempt under section 34 as set out above.
34. However, the EIR will still apply to other public authorities holding environmental information relating to parliamentary proceedings. Public authorities should consult the authorities of the relevant House to clarify the position.

### More information

36. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that have been referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
37. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
38. If you need any more information about this or any other aspect of freedom of information, please [contact us: see our website \[www.ico.org.uk\]\(http://www.ico.org.uk\)](#).