

Office of the Information Commissioner

Guidance Note

Freedom of Information Act 2014
Section 31 – Parliamentary, Court
and Certain Other Matters

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 31 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 31 of the Act by the Commissioner. It provides a brief summary of relevant issues relating to this provision.

This Note is intended to provide general guidance only and is not legally binding. The application of the provision in any particular case will always depend on the particular record(s) and the relevant facts and circumstances.

1.0 Section 31: Parliamentary, Court and Certain Other Matters - Overview

The Main Features of the Section

1.1.1. Section 31 has two main parts. The first part (subsection (1)) is a mandatory exemption for records:

- to which legal professional privilege attaches (section 31(1)(a))
- where disclosure would constitute contempt of court (section 31(1)(b))
- consisting of certain private papers of MEP's and Councillors and certain parliamentary records comprising opinions, advice, recommendations or the results of consultations (section 31(1)(c)).

1.1.2 The second part (subsections (2) and (3)) is a discretionary exemption for certain records relating to the appointment or proposed appointment of, or the business or proceedings of :

- a tribunal to which the Tribunals of Inquiry (Evidence) Act 1921 applies (section 31(2)(a))
- other tribunals, bodies or individuals appointed by the Government or a Minister at least one member of which holds / held judicial office or is a barrister or solicitor (section 31(2)(b))
- tribunals, bodies or individuals appointed by either or both Houses of the Oireachtas (section 31(2)(c)).

The time at which the request is made is relevant to the application of this exemption. Records relating to the general administration of, or of any office of, such a tribunal, body or individual are not exempt.

1.1.3 The exemptions provided for in this section are not subject to a public interest test.

1.1.4 Section 31 includes a 'neither confirm nor deny' provision. However, its application may be considered only where subsection (1)(a) - legal professional privilege - applies, or would apply if the record(s) existed.

Relationship with Other Provisions of the FOI Act

1.2.1 In considering the application of section 31 to any records, it is useful to bear in mind that other provisions of the Act may also be relevant, including in particular section 32(1)(a)(iv) and section 42(a), 42(e), 42(f), 42(j), 42(k) and 42(l) – see further below.

FOI History and Warning regarding Commissioner's Decisions

1.3.1 Section 31 is similar to, although not the same as, section 22 of the FOI Act 1997. There are differences between the current wording of section 31 and the wording of section 22 as it was *before* it was amended in 2003. There are also some minor

differences between the current wording of section 31 and the wording of section 22 *after* it was amended in 2003.

1.3.2 This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 22 was considered under the FOI Act 1997 (or under the FOI Act 1997 as amended) in so far as they remain relevant. To simplify matters for the reader, all references to section 22 in those decisions have been replaced by the relevant provision of section 31 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.3.3 Reference may also be made in this Note to other provisions of the FOI Act 2014 which are relevant. Where reference is made to previous decisions of the Commissioner relating to the equivalent provisions under the FOI Act 1997 (or the FOI Act 1997 as amended), those provisions are replaced with the relevant provision in the 2014 Act. Again, where this occurs, such references are denoted by an asterisk (*).

1.3.4 It should be noted that a reference to the Commissioner in the context of the decisions referred to in this Guidance Note may include an officer to whom the function of making the decision had been delegated by the Commissioner.

1.3.5 The previous decisions of the Commissioner (or of the officer delegated to make the decision) are referred to in this Note by Case Number. The Cases may be found on the Commissioner's website at www.oic.ie

1.3.6 While references in this Note are made to previous decisions of the Commissioner in so far as they remain relevant, it is possible that other parts of these decisions no longer represent the current position – this could be due to factors such as a change in the legislation or decisions of the Courts. Caution should be exercised in referring to any decision of the Commissioner that was made under the FOI Act 1997, or under the FOI Acts 1997 & 2003, to ensure that all parts of the decision being referred to remain relevant (including such decisions as are published on the OIC website).

2.0 Section 31(1)(a): Legal Professional Privilege

What the Act states:

31 (1) A head shall refuse to grant an FOI request if the record concerned –
(a) would be exempt from production in proceedings in a court on the ground of legal professional privilege,

General Background

2.1.1 In deciding whether section 31(1)(a) is applicable, the issue to be considered is whether or not the record concerned would be withheld on the ground of legal professional privilege (LPP) in court proceedings.

2.1.2 LPP enables the client to maintain the confidentiality of two types of communication:

- confidential communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice (advice privilege)

and

- confidential communications made between the client and a professional legal adviser or the professional legal adviser and a third party or between the client and a third party, the dominant purpose of which is the preparation for contemplated/pending litigation (litigation privilege).

2.1.3 Where a claim for exemption is made on the basis that the records are covered by legal professional privilege, each record should be considered in its own right.

Example: In Case 020538 the Department of Social and Family Affairs drew attention to the fact that all of the records at issue were created within, or copied to, its Central Prosecution Unit. The Commissioner found that the FOI Act required that each individual record be considered in its own right and that the tests of legal professional privilege be applied on a record by record basis.

2.1.4 Subsection (4) contains a 'neither confirm nor deny' provision. It applies provided the requirements of that subsection are met. However, it may only operate in relation to records to which subsection (1)(a) applies or would, if the record existed, apply. See further below.

Attorney General & DPP

2.1.5 Section 42(f) may be relevant in relation to any record held or created by the Attorney General or the Director of Public Prosecutions. Section 42(f) provides that the FOI Act does not apply to a record held or created by the Attorney General or the

Director of Public Prosecutions or their offices, other than a record relating to general administration. (Note: the Chief State Solicitor's Office and the Office of the Parliamentary Counsel are constituent parts of the Office of the Attorney General.)

Legal Advice Privilege

2.2.1 This is the first type of LPP referred to above. Legal advice privilege attaches to confidential communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice.

2.2.2 The communication must be made between the client and his/her professional legal adviser in a situation where the legal adviser is acting in a professional capacity.

Example: In Case 98058 some of the records comprised correspondence from the Law Society to the Department of Justice, Equality & Law Reform in relation to the Solicitors Amendment Bill. The Commissioner found that the Law Society was not acting in a professional capacity in providing advice to the Department.

2.2.3 The relevant communication may include a conversation between the client and his/her legal adviser.

Example: In Case 98040 the Commissioner found that section 31(1)(a)* applied to certain records which were created in the context of the seeking of legal advice from a professionally qualified legal adviser. The records included a record of a telephone conversation with the legal adviser.

2.2.4 The concept of "once privileged always privileged" applies where privilege is based on legal advice privilege, but not where it is based on litigation privilege. Thus, unless otherwise lost or waived, legal advice privilege lasts indefinitely.

Legal Assistance

2.2.5 While LPP attaches to communications between the client and his/her legal adviser for the purpose of obtaining and/or giving legal advice, it does not apply to records of communications for the purpose of obtaining and / or giving legal assistance. A distinction should therefore be made between legal advice and legal assistance. This distinction was made by the Supreme Court in the case of *Smurfit Paribas Bank Limited v AAB Export Finance Limited* [1990] ILRM, 58 where the Court distinguished between communications for the purpose of obtaining legal advice and communications for the purpose of obtaining legal assistance other than advice.

2.2.6 The Commissioner's understanding of the Supreme Court's application of the term "legal assistance" in *Smurfit Paribas Bank Limited v A.A.B. Export Finance* is that it does not go beyond - in the words of McCarthy J's judgment - "communication of fact leading to the drafting of legal documents and requests for the preparation of such...". For example, the Commissioner takes the view that correspondence which is of an administrative nature, and does not involve the seeking or giving of legal advice, is not privileged.

Example # 1: In Case 080287 the Commissioner found that certain records which related to arrangements for a meeting and drafting of documents but did not disclose confidential legal advice either sought or given did not qualify for legal professional privilege.

Example # 2: In Case 120210 the Commissioner found that certain records which comprised translations by the FOI body's legal advisers of documents submitted in Irish by the applicant's legal team (or requests for same) amounted to requests for, or the provision of, legal assistance.

Individual Records in a Series of Communications

2.2.7 The Commissioner has considered records which may not, on an individual basis, satisfy the criteria for the attraction of LPP but which form part of a series of communications which was for the purpose of giving or receiving legal advice. In Case 020281 she referred to the following comments by Mr. Adrian Keane in "*The Modern Law of Evidence*" [(4th Ed.), Butterworths, 1996, at pp. 521-522]:

"Communications between a solicitor and his client may enjoy privilege even if they do not specifically seek or convey advice. In *Balabel v Air India* [(1988) Ch. 317; [1988] 2 All E.R., 246, CA.], ...[t]he Court of Appeal held that in most solicitor and client relationships, especially where a transaction involves protracted dealings, there will be a continuum of communications and meetings between the solicitor and client; and where information is passed between them as part of that continuum, the aim being to keep both informed so that advice may be sought and given as required, privilege will attach."

2.2.8 The Commissioner has adopted this approach and takes the view that privilege attaches to records that form part of a continuum of correspondence that results from the original request for advice.

Attachments / Pre-existing Documents

2.2.9 In certain cases documents which already exist may be attached to requests for legal advice or to legal advice provided. The normal principle is that a document is not privileged if it is not brought into existence for the purpose of seeking or giving legal advice. However, this is a complex area and the issues may not be clear cut.

2.2.10 In the past the Commissioner has dealt with the issue in the context of attachments to a request for legal advice.

Example: In Case 020281 the Commissioner found that, in general, LPP would not apply to an attachment to a request for legal advice unless it was a copy of a document that would not ordinarily be in the possession of the client (i.e. a copy of a document, the original of which was not held by the client, that the client had to take certain steps to acquire, possibly for the purposes of collecting evidence in anticipation of litigation) or unless release would result in the disclosure of legal advice previously received. (Note: this case dealt with attachments to a request for legal advice and did not deal with the issue of attachments to legal advice provided).

Litigation Privilege

2.3.1 Litigation privilege is the second type of LPP referred to above. It attaches to confidential communications made between the client and a professional legal adviser or the professional legal adviser and a third party or between the client and a third party, the dominant purpose of which is the preparation for contemplated/pending litigation.

In *Silver Hill Duckling v Minister for Agriculture* [1987] 1 I.R. 289, [1987] I.L.R.M. 516 O' Hanlon J. held :

"once litigation is apprehended or threatened, a party to such litigation is entitled to prepare his case, whether by means of communications passing between him and his legal advisers, or by means of communications passing between him and third parties, and to do so under the cloak of privilege."

Litigation

2.3.2 For litigation privilege to apply, there must be contemplated or pending litigation. Litigation encompasses not alone court proceedings but also proceedings before tribunals exercising judicial functions, such as the Appeal Commissioners.

Example: In Case 99017 the Commissioner found that the dominant purpose in creating documents which passed between various Revenue officials and the Revenue Solicitor and between other Revenue officials was preparation for a threatened appeal to the Appeal Commissioners and section 31(1)(a)* applied. The applicants had lodged appeals against certain opinions issued by the Revenue Commissioners. The Commissioner found that, at that point, proceedings, first before the Appeal Commissioners, and, in due course before the Circuit Court and possibly the higher courts, could fairly be regarded as having been apprehended or threatened. The communications did not contain legal advice.

2.3.3 Records prepared in contemplation of an appeal following the decision of a body such as the Office of the Director of Equality Investigations (ODEI) may attract litigation privilege.

Example: In Case 010420 a right of appeal existed from the ODEI to the Labour Court and to the High Court on a point of law. The Commissioner found that a Government Department in preparing its defence before the ODEI would have been aware of the further right of appeal to the High Court and that this would have been in its mind in preparing the relevant documents. He found, therefore, that litigation before the High Court was contemplated by the Department when the record was prepared. He noted however that this argument would not apply if there was clear evidence that any appeal or review mechanism was not going to be availed of by the Department.

2.3.4 The Commissioner has accepted that litigation would also include a prosecution under Food Hygiene Regulations (Case 000282).

Whether Litigation is Contemplated

2.3.5 For litigation privilege to apply litigation must be contemplated or pending. It will generally be straightforward for a public body to show that litigation is pending. Satisfying the Commissioner that litigation is contemplated, however, may be somewhat more problematic. The Commissioner takes the view that the mere possibility of proceedings is not sufficient. The particular facts and circumstances of the case will be relevant.

Example # 1: In Case 98036 the Commissioner found that certain records were clearly prepared for the purposes of litigation. The Department of Defence had received a letter from the applicant's solicitors informing the Department that they had been instructed to commence proceedings. The Commissioner found that the records subsequently placed on file were so placed in the context of the threat of litigation.

Example # 2: In Case 080216 the Commissioner found that the FOI body was justified in presuming that litigation was contemplated. It had received a letter from the applicant's solicitors which made various serious allegations against it and which stated that, if the "matters complained of recur proceedings as may be necessary" to protect the legal and constitutional rights of their client "will be pursued". The letter also told the addressee, an official in the FOI body, that he and the FOI body would be named as defendants in any such necessary proceedings. The applicant's solicitors argued that there was no actual or threatened litigation in the letter and that the threat arose in relation to any recurrence of the matters complained of. However, the Commissioner found that it was reasonable for the FOI body to have understood the letter to mean that if it continued along the lines of previous administrative actions (which she assumed the body considered to be in accordance with the law), legal action would ensue and the body was justified in presuming that litigation was contemplated.

Example # 3: In Case 010420 the Commissioner took the view that case law suggests that litigation is "contemplated" where there is a definite prospect, apprehension or threat of litigation and not a mere anticipation of it. Certain records related to the preparations by a Government Department for its submission to the Office of the Director of Equality Investigations (ODEI) in connection with the applicant's complaint to that Office. The Commissioner, in considering that the proceedings were before the ODEI, referred to the case of *Silver Hill Duckling v Minister for Agriculture & Anor* (referred to above) and stated that the only relevant criterion is whether or not the parties are involved in a dispute of some kind that has reached a stage at which it is apparent that the matter can only be resolved by means of proceedings in another forum, the nature of which need not be ascertained or identified at the time of the preparation of the relevant documents.

Example # 4: In Case 120210 the Commissioner was not satisfied that the FOI body had justified its contention that legal professional privilege applied. There had been earlier court proceedings between the FOI body and the applicant regarding procedural issues in a planning matter and the FOI body argued that there was the "possibility" that the substantive issue could come before the courts at a later date.

However, it did not otherwise explain how it felt that litigation privilege continued. The body did not refer the Commissioner to any steps that it had taken or was contemplating with regard to taking action against the applicant. The Commissioner found that the possibility that an event will occur at some unspecified point in time did not mean that it will happen on the balance of probabilities.

Dominant Purpose Test

2.3.6 For litigation privilege to apply the records must have been created for the dominant purpose of contemplated / pending litigation. The dominant purpose test was expressly adopted in Ireland by O'Hanlon J. in *Silver Hill Duckling Limited v Minister for Agriculture* (referred to above).

2.3.7 In the judgement of the High Court in *University College Cork – National University of Ireland v The Electricity Supply Board* ([2014] IEHC 135) Finlay Geoghegan J. stated -

"The document must have been created for the dominant purpose of the apprehended or threatened litigation; it is not sufficient that the document has two equal purposes, one of which is apprehended or threatened litigation."

In her judgment, Finlay Geoghegan J. held, on the facts before her, that there had been, at minimum, an equal purpose, apart from the purpose of preparation for apprehended or threatened litigation, for the creation of a record for which litigation privilege was claimed. She found that the defendant had not established, as a matter of probability, that the **dominant purpose** of the creation of the record was apprehended or threatened litigation.

2.3.8 While in many cases the determination of dominant purpose will be straightforward, this will not always be the case, particularly where there is more than one obvious purpose for the creation of the record.

Example: In Case 110238 the Commissioner found that certain records held by the Revenue Commissioners were created at least for the purpose of making a decision on the merits of the tax benefit being sought. While he accepted the Revenue's argument that apprehended litigation was also a purpose, he was not satisfied that this was the dominant purpose.

2.3.9 In Case 110238 the Commissioner referred to the comments of Finlay Geoghegan J in *University College Cork - National University of Ireland v The Electricity Supply Board* (referred to above) that the "onus is on the party asserting privilege to prove, on the balance of probabilities, that the dominant purpose for which the document was brought into existence was to ... enable his solicitor prosecute or defend an action."

2.3.10 Where there is a doubt as to the dominant purpose for the creation of a record, the FOI body should explain the basis on which it considers that the **dominant purpose** for the creation of the record was in preparation for contemplated/pending litigation as opposed to any other purpose for which the record was created. FOI bodies should

also be aware of the provisions of section 22(12)(b). If the FOI body cannot satisfy the Commissioner that the dominant purpose was preparation for contemplated/pending litigation, then the public body has not justified its decision to refuse access under section 31(1)(a).

Duration of Litigation Privilege

2.3.11 In the case of *University College Cork - National University of Ireland v The Electricity Supply Board* (referred to above) the High Court held that the concept of "once privileged always privileged" applies only to claims of privilege based on legal advice privilege, and not to litigation privilege. Where a party is entitled to claim litigation privilege, the privilege does not automatically continue beyond the final determination of the proceedings in which it originally applied.

2.3.12 If the proceedings in which litigation privilege originally applied have finally concluded, the privilege may not continue to apply. Relevant factors to be considered when examining claims for exemption under section 31(1)(a) on the grounds of litigation privilege in such situations include the subject matter of the proceedings and the identity of the parties to the litigation.

2.3.13 It is important to note, however, that communications between a client and his/her professional adviser in the course of, or in anticipation of, litigation may also benefit from legal advice privilege. In such circumstances, the concept of "once privileged always privileged" applies. (Legal advice privilege lasts indefinitely, even where the advice pertains to concluded litigation, or litigation that did not proceed.)

2.3.14 Where a claim is made for exemption under section 31(1)(a) on the grounds of litigation privilege and where the documents concerned were created or obtained in preparation for proceedings which did not proceed or have since concluded, the FOI body should show how, in light of the High Court judgment in the *UCC* case, litigation privilege would continue to apply.

2.3.15 The provisions of section 22(12)(b) require the FOI body to satisfy the Commissioner that its decision to refuse access was justified. The FOI body should, in particular, provide details of any other related proceedings in being, or contemplated, and to explain how those proceedings have a substantive or close connection with the earlier proceedings (whether by way of the subject matter of the proceedings, the parties to the proceedings or otherwise). The question of what constitutes a substantive or close connection with earlier proceedings will depend on the particular circumstances of each case.

Litigation Privilege and Internal Communications

2.3.16 The Commissioner has also accepted that in certain circumstances litigation privilege may attach to internal communications, provided that the dominant purpose for their creation is contemplated or pending litigation.

Example: In Case 030847 a Hospital claimed litigation privilege over its submission to an Inquiry (the Post Mortem Inquiry) and other records. Neither the submissions

nor the other records included communications from the Hospital's legal advisers; although the Commissioner accepted that some of the material may have been prepared with their input. The Commissioner had regard to the judgement in the case of *Silver Hill Duckling Limited v The Minister for Agriculture*, referred to above, where O'Hanlon J. held that the defendants were entitled to claim privilege in respect of internal documents prepared in connection with, and for the primary purpose of dealing with, the claim which was being formulated on behalf of the plaintiffs. She also had regard to the judgement of the Supreme Court in the case of *Gallagher v Stanley and the National Maternity Hospital* [1998] 2 I.R. 267 where it was held that the test in relation to privilege was whether the dominant purpose for which the particular internal documents came into being was in apprehension or anticipation of litigation. The Commissioner found that, in certain circumstances, legal professional privilege would apply to internal communications, not involving a legal adviser, provided such communications arose in the course of dealing with litigation, contemplated or pending.

The Requirement of Confidentiality

2.4.1 LPP attaches to 'confidential communications'. Where records are of communications which are not confidential, e.g. records of communications with the opposing party to a litigation, legal professional privilege does not attach to them.

Example # 1: In Case 120210 the Commissioner found that certain communications were not confidential and were not exempt under section 31(1)(a)*. The records comprised letters sent from the FOI body's legal advisers to the applicant's legal (or other) representatives, and/or vice versa. Other records comprised details of telephone conversations or discussions, in Court or elsewhere, between the FOI body's legal team and that of the applicant (or other representatives of the applicant) in relation to the litigation generally. The Commissioner found that such open communications could not be said to be confidential.

Example # 2: In Case 130313 the Commissioner found that the records were not confidential communications and, accordingly, a claim for LPP could not be upheld. The records withheld comprised notes of witness testimonies, directions of the Coroner and the outcome of an inquest into the deaths of the applicants' son. The notes had been taken by two army officers in their official capacity as legal officers of the Defence Forces' Legal Service. The Commissioner found that, while the two officers in question may have attended the Coroner's inquest in their official capacity, this, of itself, did not render their notes subject to LPP. He found that the relevant question to be addressed was whether, as a matter of fact, the notes of the Coroner's inquest contained any "original composition" or if they were a "mere transcript of that which was publici juris" (the inquest being an inquiry held in public by a Coroner, with witness testimony given on oath). The Commissioner did not find anything in the records which could be described as legal advice.

2.4.2 The matter of confidentiality of privileged information was dealt with by the High Court in its decision in *Woori Bank & Hanvit LSP Finance Limited v KDB Ireland Limited* [2005] IEHC 451. In that case, Finlay Geoghegan J. stated

"It is undisputed on behalf of the plaintiff that confidentiality of communication between client and lawyer is a prerequisite to claim privilege where the communication is within the "legal advice principle". I am not aware of any authority or principle which distinguishes the position in relation to communication between a client and lawyer in a litigation context... It does not appear to form any part of the general principle to render confidential to the party claiming privilege communications either with its lawyer or third parties which are not already confidential to it."

Thus, the requirement of confidentiality applies to both legal advice privilege and litigation privilege.

Loss of Privilege

2.5.1 LPP belongs to the client and the client has the right to waive this privilege if the client so wishes. Waiver may also be implied in certain circumstances (see further below). However, LPP may still apply where the client is dead (Case 000137).

Waiver

2.5.2 As stated above, LPP belongs to the client and the client has the right to waive this privilege if s/he so wishes. Waiver by the client may be done expressly, but it may also be implied from the circumstances.

2.5.3 The Commissioner takes the view that the Irish courts (e.g. *Bula Ltd v Crowley* [1994] 2 I.R. 54) would be slow to infer that there was a waiver of privilege, other than in clear cut cases. He considers that he would not be justified in concluding that, as a general proposition, privilege does not extend to records in the possession of an FOI body simply on the grounds that the body is not the client to whom privilege belongs.

2.5.4 As stated above, one of the factors necessary to establish that LPP arises is that the communication concerned is confidential. Where the communication ceases to be confidential, waiver of privilege may result. The steps taken to preserve the confidentiality of the communication may be relevant in considering whether there has been a waiver of privilege.

Example: In Case 000282 the Commissioner found that privilege, which had attached to a certain record, was waived by the FOI body when its solicitors sent a copy of the record to the solicitors for the defendant in the intended proceedings (a prosecution under the Food Hygiene Regulations). The Commissioner found that this action was deliberate and not in any sense arising from a mistake or a misunderstanding. He found that the communication (record) ceased to be a confidential one as it had been made available to the defendant and his solicitors without any attempt to put any limits on the use to which the defendant or his solicitors could put the record.

2.5.5 In 090077 the Commissioner explained that his approach concerning the disclosure of a record to a third party is that it generally amounts to a waiver of privilege, except where there is "limited disclosure for a particular purpose, or to parties with a common interest", as per the Supreme Court judgment in the case of *Redfern Limited v O'Mahony* [2009] IESC 18.

Example: In Case 090138 certain records comprising legal advice and proposals for requests for legal advice were shared between the FOI body and the Central Bank of Ireland. However, the Commissioner accepted that these parties had a common interest with respect to the matter concerned. He found no evidence to suggest that there had been any disclosure that would have resulted in a waiver of privilege. He found, on the contrary, that there was an understanding of confidence between the FOI body and the Central Bank in relation to the limited disclosures that were made.

2.5.6 The Commissioner has considered the concept of waiver both in the context of an FOI body sharing its legal advice as a client with a third party (see above) and in the context of legal advice being shared with an FOI body where the FOI body was not the client.

Example: In Case 98058 the Commissioner found that the Law Society had not waived privilege in relation to legal advice which it had received and had communicated to the Department of Justice, Equality and Law Reform in confidence.

In-House Legal Staff

2.6.1 The Commissioner accepts that, provided the ingredients of the relevant type of LPP (legal advice privilege or litigation privilege) are present in any given case, the fact that the professional legal adviser concerned is employed as an in-house legal adviser does not prevent the client from being able to assert the privilege over the communications at issue.

2.6.2 The question arises as to whether LPP attaches to records of communications between in-house legal staff who are not professionally legally qualified and other persons in-house.

Example: In Case 020281 the records included correspondence between in-house legal staff in the Department of Education & Science who were not professionally legally qualified and other officials in the Department. The Commissioner found that, in general, the records at issue attracted LPP - principally on the basis that given the delegation and supervision/oversight which was exercised by the head of the Unit (who was a barrister), and given his status as a professionally qualified lawyer, staff in the Unit might be said to have been his agents for both the receiving of requests for, and the communication of, legal advice

2.6.3 Issues may also arise concerning the role in which a legal adviser is acting where the legal adviser concerned has other roles in addition to legal adviser. In considering whether LPP attaches to communications with a legal adviser who has additional roles it

is important to note the following. LPP attaches to a communication between a client and the legal adviser where the legal adviser is acting in a professional legal capacity and where the communication is for the purpose of giving or receiving legal advice.

Example: In Case 130181 the applicant questioned the legitimacy of the County Solicitor providing legal advice given the County Solicitor's direct involvement in the subject matter of the advice. The records related to correspondence between the County Solicitor, who was also applicant's manager, and officials in the personnel section who were dealing with a disciplinary matter involving the applicant. Following contact from the Commissioner's Office, the Council contended that, in this instance, the County Solicitor was providing legal advice to Council. The Commissioner was not aware of any legal principle that prohibited the advice given being afforded the protection of advice privilege and found that section 31(1)(a)* applied.

2.6.4 The European Court of Justice in the case of *Akzo Nobel v the European Commission* held that legal advice privilege does not apply to communications with in-house lawyers on European competition law issues. In Case 080216 the Commissioner found that the judgment in *Akzo Nobel* has limited effect in that, in principle, it applies only to the exercise by the European Commission of specific powers under European competition law. She found that the *Akzo Nobel* judgment did not require her to find that records of advice received, or sought, from an in-house legal advisor cannot attract LPP.

LPP Exceptions

2.7.1 There are some situations in which the exemption at section 31(1)(a) will not apply because LPP does not attach to the communications concerned, for example: non-confidential communications; legal assistance other than the giving of advice; and, communications in furtherance of a criminal offence.

2.7.2 The LPP exemption contains no public interest balancing test. However, in exceptional circumstances, the courts may refuse a claim of privilege on public policy grounds. For instance, as mentioned above, it is an established legal principle that privilege may not attach to communications in furtherance of a criminal offence.

Without Prejudice Communications

2.8.1 The Commissioner has drawn a distinction between records which are "without prejudice" communications and records which are covered by LPP.

Example: In Case 010314 the Commissioner found that records comprising contacts between the applicant's solicitor and the solicitors for the FOI body with a view to a possible settlement of the applicant's action were not covered by LPP. The records comprised letters marked "Without Prejudice" and a note of a telephone call which the Commissioner accepted could be treated in the same manner. He accepted that the records created in the context of an attempted

settlement of the action were of a type that could not be introduced in a court of law. However, he made it clear that, while such records may be covered by privilege, this privilege is a separate category from that of LPP and section 31(1)(a)* did not apply to them.

2.8.2 It is possible that certain records relating to a settlement or proposed settlement may attract LPP if they contain or disclose legal advice on the settlement or proposed settlement.

3.0 Section 31(1)(b) Contempt of Court

What the Act states:

31 (1) A head shall refuse to grant an FOI request if the record concerned -

... (b) is such that the head knows or ought reasonably to have known that its disclosure would constitute contempt of court, ...

General Background

3.1.1 Contempt of court can arise in a number of ways. There is criminal contempt and civil contempt.

“Criminal contempt comprises contempt in the face of the court (*in facie curiae*), scandalising the court, breaches of the *sub judice* rule and other interferences with the administration of justice, such as threatening a witness. Civil contempt consists of defiance of a court order, whether by positive conduct or by the neglect or refusal to obey an injunction or other order of the court. “

(*Report on Contempt of Court* (LRC 46–1994) the Law Reform Commission).

3.1.2 In Case 070332 the Commissioner stated that her understanding of contempt of court was that for contempt to have occurred a party would have to contravene a court order or undertaking made to a court, commit an act of resistance to the court or engage in conduct liable to prejudice the trial of an accused person.

3.1.3 The equivalent provision of the 1997 Act prior to its amendment in 2003 provided that an FOI body shall refuse to grant a request if the record concerned “is such that its disclosure would constitute contempt of court”. This was amended in 2003 to read that the record “is such that the FOI body knows or ought reasonably to have known that its disclosure would constitute contempt of court”. Caution should be exercised in referring to any decision of the Commissioner relating to this provision (and to the wording of the relevant provision) which was made prior to the 2003 Amendment Act.

Discovery

3.2.1 Breach of an undertaking given to the court (whether express or implied) is a contempt of court. Documents disclosed on discovery in the context of court proceedings are subject to an implied undertaking given to the court and to the other party by the party to whom the documents are produced, that the documents disclosed shall not be used otherwise than within and for the purpose of the action in which they were disclosed.

3.2.2 In *E.H. v The Information Commissioner* [2001] 2 I.R. 463, O’Neill J stated :

“ Breach of the implied undertaking given in respect of discovered documents is a contempt of court. Notwithstanding that the undertaking benefits solely the party making

discovery, the undertaking is given to the court and like all undertakings given to a court, breach of it is a contempt of the court ...

... Undertakings given to a court can only be discharged either in the case of the usual undertaking in relation to discovery by waiver of the party making discovery or otherwise by the express permission of the court itself.”

3.2.3 In Cases 99276 and 050166 the Commissioner addressed a number of important issues regarding the implications of discovery for the seeking of access to records under FOI. Principles emerging from these cases include:

- Where an FOI body furnishes records to a party to proceedings on foot of discovery in a case involving only the usual, implied undertaking, the waiver or modification of that undertaking is a matter wholly within the power of the FOI body. Thus, the question of whether or not disclosure of the records would constitute contempt of court is a matter within the control of the FOI body. It is possible for the FOI body to waive or modify the undertaking in relation to certain, specified records and to leave it in place in relation to others.
- Where discovery has been made by an FOI body to a party to the proceedings, release under the FOI Act to that party, as opposed to a third party, would result in a contempt of court arising. This is because release under the FOI Act, which places no restrictions on the future use of records disclosed, would constitute a breach of the party's implied undertaking to the FOI body and the court not to disclose the documents or information contained therein to any third party. However, no such breach, or contempt of court, can arise if records held in the ordinary course by the FOI body are released to a third party who has not given any undertaking.
- Examples of instances in which a contempt of court might arise include the following:
 - (a) where FOI body A obtains documents on discovery from B and discloses them under FOI to C; and
 - (b) where B obtains documents on discovery from FOI body A and FOI body A grants B's request for access to the same documents pursuant to an FOI request.
- The implied undertaking does not apply to documents not obtained on discovery. Where an FOI body has, prior to making discovery, freely exchanged records with the other party, it would be inconsistent with the rationale for the undertaking to consider the implied undertaking given by the party obtaining discovery as extending to or covering such records. The undertaking may reasonably be regarded as having been impliedly waived in relation to the records which had been freely exchanged between the parties prior to discovery.
- The word "document", in discovery law, has a wide meaning. If the FOI body has given an implied undertaking and received documents from the other party under discovery, it would be precluded from releasing such documents under FOI but would be free to release documents that it already held in the ordinary course that contain identical information. Documents held by the FOI body and not obtained by way of discovery are separate and distinct from copy or copy originals of those documents subsequently produced to the body on discovery.

- While an Order of Discovery had been made in Case 050166, no Affidavit of Discovery had been sworn by either party pursuant to the Order. In the particular circumstances of that case, the Commissioner found that an implied undertaking was not given and/or received at the time that an Order of Discovery was made by the Court. As it did not arise in the circumstances of that particular review, she did not make any findings in relation to the wider question of whether such an undertaking is given when a list of documents to be discovered is served or when such documents are in fact produced on discovery.

3.2.4 Where records have been subject to a court ruling regarding their release on discovery, careful consideration should be given to the extent or implications of any such order.

Example: In Case 040334 a record was subject to a High Court ruling (upheld by the Supreme Court) that it should not be released to the applicant through discovery. The Commissioner found that the Courts had ruled that the record in question should not be released on the grounds that it was not relevant to the judicial review the applicant had initiated. She found that, in effect, the record was left outside discovery and, if there were no other impediments under the FOI Acts, it could safely be released without causing a contempt of court and that section 31(1)(b)* did not apply.

3.2.5 The mere fact that at some future date a court may make an order or give directions regarding the production or release of a record does not mean that such a record is exempt under section 31(1)(b). The fact that there may be another procedure through which an applicant may seek access to the records (other than pursuant to an FOI request) does not mean that his or her right of access to the record under the FOI Act no longer applies. (Case 99175).

The *In Camera* Rule

3.3.1 It is a contempt of court for any person to disseminate information emanating or derived from proceedings held *in camera* without prior judicial authority. The *in camera* rule applies to proceedings where there is a statutory requirement such proceedings are held in private or otherwise than in public. It applies to certain proceedings including certain family law proceedings and certain proceedings involving minors.

3.3.2 In many cases the requester seeking access to the records may have been a party to the *in camera* proceedings. The identity of the requester is not relevant to the issue of whether disclosure would constitute contempt of court under section 31(1)(b).

Example: In Case 000137 certain records had been introduced before the courts in family law proceedings. The Commissioner addressed the argument that, because the applicant and his family were amongst the parties involved in the proceedings, release to him of records under the FOI Act could not be deemed to be a breach of the *in camera* rule. However, the Commissioner found that neither the identity of the person seeking the records nor whether the information contained in the records

is already known to the requester were relevant considerations in the application of section 31(1)(b)*

3.3.3 In *L. K. v The Information Commissioner* [2013] IEHC 373 the appellant had sought access to a report which had been prepared for District Court proceedings held *in camera*. The District Judge had also made an order in relation to the report. In the High Court, Ms J O'Malley, in considering the *in camera* rule and the order by the District Court judge, stated:

"The Information Commissioner has no authority to disregard either the statutory provisions relating to the *in camera* nature of the child care proceedings or the court order made in the case. It is no part of his powers to decide that the order was wrong, or that the appellant's right to a copy of the report under s.27 of the Child Care Act should prevail over such an order. Neither the status of the appellant as a party to the District Court proceedings nor the purpose for which she wishes to use the report are relevant to his powers in this respect."

The Sub Judice Rule

3.4.1 Breach of the *sub judice* rule amounts to a contempt of court. *Sub judice* may arise where a matter is before the courts and has not yet been decided. In the High Court case of *Desmond v Glackin* (No. 1) [1993] 3 IR 1, O'Hanlon J. referred to the definition of contempt by way of publication interfering with particular legal proceedings in the New South Wales case of *Attorney General for New South Wales v John Fairfax & Sons* which read: "[C]ontempt will be established if a publication has a tendency to interfere with the due administration in the particular proceedings."

3.4.2 In *Desmond v Glackin* O'Hanlon J. stated:

"It has been stated in other decided cases that there is a need to show a real risk as opposed to a merely remote possibility of prejudice."

3.4.3 The mere fact that proceedings have been issued is not sufficient, of itself, to make out the case that breach of the *sub judice* rule would arise by release of the records or that their disclosure would constitute a contempt of court (Case 99001).

3.4.4 Where exemption is claimed pursuant to section 31(1)(b) on the basis of a breach of the *sub judice* rule, an explanation as to how release of the records would be a breach of the *sub judice* rule should be provided to the Commissioner.

Other Provisions of the FOI Act

3.5.1 In considering the applicability of section 31(1)(b) to any record, it is useful to bear in mind that other exemptions may also be relevant, for example:

- section 32(1)(a)(iv) which provides that access to a record may be refused where such access could reasonably be expected to prejudice or impair the fairness of criminal proceedings in a court or of civil proceedings in a court or other tribunal and

- section 42(a) of the Act which provides that, amongst other records, the Act does not apply to certain records held by the courts and relating to, or to proceedings in, a court.

In many cases where the records might be connected with *in camera* proceedings, section 37 (personal information) may be relevant.

4.0 Section 31(1)(c): Private Papers and Certain Parliamentary Records

What the Act states:

31 (1) A head shall refuse to grant an FOI request if the record concerned –

....

(c) consists of -

(i) the private papers of a member of the European Parliament or a member of a local authority, or

(ii) opinions, advice, recommendations, or the results of consultations, considered by -

(I) either House of the Oireachtas or the Chairman or Deputy Chairman or any other member of either such House or a member of the staff of the Houses of the Oireachtas Service for the purposes of the proceedings at a sitting of either such House, or

(II) a committee appointed by either such House or jointly by both such Houses and consisting of members of either or both of such Houses or a member of such a committee or a member of the staff of the Houses of the Oireachtas Service for the purposes of the proceedings at a meeting of such a committee.

Section 31(1)(c)(i)

4.1.1 Section 31(1)(c)(i) applies to the private papers of MEP's and Councillors

Private Papers

4.1.2 In deciding whether the records comprise 'private papers' relevant matters for consideration include the subject matter of the records and whether, for example, they relate to communications between members of the public or constituents and the MEP or member of the local authority in his/her capacity as elected representative. Also, relevant is who created the records and where/how they are held.

Example: In Case 120027 the Commissioner found that certain records constituted the private papers of members of a local authority and that the Council was justified in refusing their release. The records comprised private email correspondence of elected members of a local authority which were contained in individual Councillor email accounts which were hosted by the Council on one of its servers. The Commissioner was satisfied that the records related to communications made by members of the public to elected members of the local authority acting in their roles as elected representatives.

Section 31(1)(c)(ii)

4.2.1 Section 31(1)(c)(ii) applies to opinions, advice, recommendations, or the results of consultations, considered by :

- either House of the Oireachtas or the Chairman or Deputy Chairman or any other member of either House or a member of the staff of the Houses of the Oireachtas Service (clause I) or
- a committee appointed by either House of the Oireachtas (or jointly by both Houses) and consisting of members of either or both Houses or a member of such a committee or a member of the staff of the Houses of the Oireachtas Service (clause II).

4.2.2 In order to fall within the scope of section 31(1)(c)(ii), the record must fulfil three conditions:

- It must constitute opinions, advice, recommendations or results of consultations.
- It must be considered by a House of the Oireachtas, person or committee specified in clauses (I) or (II)
- Such consideration must have been for the purposes of the proceedings at a sitting of either House, or at a meeting of such a committee, as the case may be.

4.2.3 It is important to note that there is no public interest balancing test applicable to this exemption; if a record meets the three conditions above it is automatically exempt from release.

Example: In Case 150142 the Commissioner found that certain records were exempt from release under section 31(1)(c)(ii). The records included a record containing the results of consultations considered by members of the Dáil for the purposes of proceedings of that House; a record containing the results of consultations considered by members of staff of the Service for the purposes of proceedings of the Dáil; and records containing recommendations considered by members of staff of the Service for the purposes of proceedings of the Dáil.

Opinions, Advice, Recommendations or the Results of Consultations

4.2.4 The nature or subject matter of the record should be considered in order to see whether it consists of 'opinions, advice, recommendations or the results of consultations'.

Example: In Case 99279 the Commissioner found that two records were factual in nature and did not consist of "opinions, advice, recommendations, or the results of consultations". One record had been faxed to the Ceann Comhairle's Office for the purposes of a Dáil debate and the other had been considered by the Joint Committee on Foreign Affairs. The Commissioner found that they were not exempt under section 31(1)(c)(ii)*.

For the purposes of proceedings

4.2.5 In order to meet the requirements of section 31(1)(c)(ii)(I) or (II), the relevant opinions, advice etc must be considered for the purposes of the proceedings of a sitting

of either House of the Oireachtas or the purposes of the proceedings at a meeting of the relevant committee.

Example: In Case 98040 the Commissioner found that part of a record did not constitute advice or recommendations for the Clerk of the Seanad *for the purposes of the proceedings at a sitting of either such House*. The record comprised an email regarding the (then) proposed visit by the President of the EU Commission during which he might address the Seanad. It included a reference to advice from the Department of Foreign Affairs to the Clerk of the Senate. The Commissioner found that the portion of the record concerned consisted of a report of advice given to a member of staff of the Seanad concerning a possible date for the sitting of the House. It was not for the purpose of the proceedings at a sitting of the House. The Commissioner found that the relevant part of the record did not fall within section 31(1)(c)(ii)(l)*.

Other Relevant Provisions of the Act

4.3.1 In considering section 31(1)(c) , it is useful to be aware of some of the provisions of section 42. Section 42 provides that the Act does not apply to particular records including –

- records given by an FOI body to a member of the Government or a Minister of State for the purposes of any proceedings in either House of the Oireachtas or any committee or subcommittee of either or both Houses (paragraph (j))
- certain records relating to the private papers of a member of either House of the Oireachtas or certain official documents of either or both Houses of the Oireachtas (paragraph (k))** and
- records relating to certain private papers or confidential communications or official documents within the meaning of provisions of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 (paragraph (l))**.

**It should be noted, however, that the term ‘private papers’ as it appears in these paragraphs is qualified by the relevant provision and takes its meaning from the Constitutional provision or legislation referred to in the particular paragraph. Section 42(k) refers to private papers within the meaning of Article 15.10 of the Constitution and section 42(l) refers to private papers within the meaning of Part 10 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. Caution should therefore be exercised in this regard.

5.0 Section 31(2) and (3) – Records relating to the Appointment or Business of a Tribunal

What the Act states:

31 (2) A head may refuse to grant an FOI request if the record concerned relates to the appointment or proposed appointment, or the business or proceedings, of—

- (a) a tribunal to which the Tribunals of Inquiry (Evidence) Act 1921 applies,
- (b) any other tribunal or other body or individual appointed by the Government or a Minister of the Government to inquire into specified matters at least one member, or the sole member, of which holds or has held judicial office or is a barrister or a solicitor, or
- (c) any tribunal or other body or individual appointed by either or both of the Houses of the Oireachtas to inquire into specified matters,

and the request is made at a time when it is proposed to appoint the tribunal, body or individual or at a time when the performance of the functions of the tribunal, body or individual has not been completed.

(3) *Subsection (2)* does not apply to a record in so far as it relates to the general administration of, or of any offices of, a tribunal or other body or an individual specified in that subsection.

General Background

5.1.1 The exemption provided for at section 31(2) is a discretionary exemption. It is also a class based exemption. It applies where :

- the record relates to the appointment, proposed appointment, business or proceedings of a tribunal, body or individual specified in paragraphs (a), (b) or (c) of subsection (2)
- the request is made at a time when it is proposed to appoint the tribunal, body or individual or at a time when the performance of the functions of the tribunal, body or individual has not been completed and
- the record does not relate to the general administration of the tribunal, body or individual or of any of their offices (subsection (3)).

5.1.2 This exemption does not require the consideration of whether a harm is likely to occur upon release of the record in question. Furthermore, it does not provide for the setting aside of the exemption where to do so would serve the public interest.

5.1.3 The time at which the request is made is relevant.

Example : In Case 030830 the Commissioner found that the relevant Inquiry had concluded. The records concerned were records of correspondence with and

relating to the Post Mortem (Dunne) Inquiry. The Commissioner found that section 31(2)* was potentially relevant only in circumstances where the performance of the functions of the tribunal, body or individual had not been completed. She was satisfied that the “Dunne” Inquiry had concluded and that no other tribunal or other body or individual had been appointed to enquire into the matters the subject of the records.

On appeal the High Court (*The National Maternity Hospital v The Information Commissioner* [2007] 3 I.R. 643) Quirke J found that there was ample evidence before the Commissioner upon which she could reasonably have concluded that on the date on which she made her decision the documents sought no longer related to the business or proceedings of a tribunal within the meaning ascribed to the word by section 22(1A) of the FOI Act, 1997. (Note: section 22(1A) of the 1997 Act is equivalent to section 31(2) of the 2014 Act).

Other Relevant Provisions

5.2.1 In considering section 31(2), it is useful to bear section 42 of the Act in mind.

- section 42(a) provides that it does not apply to certain records held by the courts or a service tribunal within the meaning of section 161 of the Defence Act 1954 and
- section 42(e) provides that the Act does not apply to certain records relating to an inquiry by a tribunal or an investigation by a commission of investigation.

5.2.2 The provisions of section 32(1)(a)(iv) should also be borne in mind. Section 32(1)(a)(iv) provides that access to a record may be refused where such access could reasonably be expected to prejudice or impair the fairness of criminal proceedings in a court or of civil proceedings in a court or other tribunal.

6.0 Section 31(4) – Neither Confirm nor Deny

What the Act states:

31(4) Where an FOI request relates to a record to which *subsection (1)(a)* applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would be contrary to the public interest, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

6.1.1 This is called a 'neither confirm nor deny' provision. It provides for the refusal of a request for access to a record and for the refusal to disclose whether or not such a record exists, provided the requirements of the subsection are met.

6.1.2 It may be relied on only where section 31(1)(a) applies to the record or would apply to the record if the record existed. Thus it may be relied on only where legal professional privilege attaches to the record concerned or would attach to the record if it existed. It may not be invoked where any other provision of section 31 (other than subsection (1)(a)) is being relied on.

6.1.3 The provision applies where it is the disclosure of the existence or non-existence of the record – as opposed to disclosure of the contents of the record – that would be contrary to the public interest.

See separate Guidance Note on 'neither confirm nor deny' provisions.