

SAR Exemptions: Legal Professional Privilege and Self-Incrimination

Two exemptions in Schedule 2 sit apart from the rest of this series. Legal professional privilege and self-incrimination do not use the familiar prejudice test that runs through most of Schedule 2. Instead, they borrow directly from established common law and criminal law doctrine, so applying them correctly means applying the same test a court would apply, not a data protection specific one.

1. Two doctrines borrowed from the courtroom

Legal professional privilege protects the confidentiality of communications between a person and their lawyer, and in some cases between a person and a third party, where those communications relate to the seeking or giving of legal advice, or to actual or contemplated litigation. Self-incrimination protects a person from being forced to hand over evidence of their own criminal offending through a data protection right. Both exemptions exist because Parliament decided the wider legal system should not be undermined by a subject access request, and both require you to reason like a lawyer assessing disclosure in litigation, not like a data protection officer assessing prejudice.

The two limbs of legal professional privilege

Legal professional privilege actually covers two distinct privileges. Legal advice privilege protects confidential communications between a client and their lawyer made for the purpose of giving or receiving legal advice, whether or not litigation is contemplated. Litigation privilege is wider in one sense and narrower in another: it can extend to communications with third parties, such as expert reports or witness statements, but only where litigation is in reasonable contemplation or already under way, and only where the communication was created for the dominant purpose of that litigation.

WHY THE DPA 2018 DEFERS TO THE COMMON LAW

Paragraph 19 does not create a new, data protection specific test. It exempts information to the extent a claim to privilege could be maintained in legal proceedings, which means the exemption rises and falls with the underlying common law doctrine of privilege, not with any separate statutory wording.

2. Litigation privilege and the reasonable contemplation test

Litigation privilege only applies where three conditions are met: the litigation must be adversarial in nature, rather than a purely investigative or inquisitorial process; the communication must have been made for the sole or dominant purpose of that litigation; and the litigation must be in progress or in reasonable contemplation at the time the communication was made.

What reasonable contemplation actually requires

Reasonable contemplation is a higher bar than a general worry that a dispute might arise one day. The courts have consistently held that a mere possibility of litigation is not enough; there needs to be a real prospect of proceedings, viewed objectively at the time the communication was made. An internal note written because litigation is conceivable in the abstract will not attract privilege. A note written because a specific claim has been threatened, or because a specific regulatory investigation is expected to lead to enforcement action, is more likely to.

This distinction matters most in a regulatory or criminal context. The Court of Appeal's decision in *Serious Fraud Office v Eurasian Natural Resources Corporation* confirmed that a criminal investigation does not, on its own, mean prosecution is in reasonable contemplation, but that contemplation can arise well before a formal charge if the organisation under investigation has good reason to expect the investigation will lead to adversarial proceedings against it. The test is applied at the time each document was created, not with the benefit of hindsight.

WHY THIS TRIPS UP INTERNAL INVESTIGATIONS

Notes, interview records and internal reports created during an early stage internal investigation, before any regulator is involved and before litigation is a real prospect, will usually not attract litigation privilege, however sensitive they feel. Reassess the position as an investigation develops, since the point at which contemplation becomes reasonable can shift.

3. Four limbs, one deference to the common law

Each limb below is exempt for a different reason, but all four rest on the same idea: the exemption applies only to the extent an equivalent claim could be made outside a data protection context.

SCHEDULE 2, PART 4, PARA 19(A)

Legal advice privilege

Confidential communications between a client and their lawyer, made for the purpose of giving or receiving legal advice, are exempt from the listed GDPR provisions, including the right of access. Litigation does not need to be contemplated or under way for this limb to apply; the protection covers the ordinary course of seeking and receiving advice.

In practice: identify the specific communication and confirm it was made to a professional legal adviser acting in that capacity, for the purpose of giving or receiving advice, not simply copied to a lawyer for information.

SCHEDULE 2, PART 4, PARA 19(A)

Litigation privilege

Where litigation is in reasonable contemplation or already under way, communications created for the dominant purpose of that litigation are exempt, even if they involve a third party such as an expert witness or an investigator rather than the lawyer directly. Apply the three part test set out in section 2 of this guide before relying on this limb.

In practice: record the date litigation became reasonably in contemplation and the dominant purpose of each communication, since both will need to be defended if the exemption is challenged.

SCHEDULE 2, PART 4, PARA 19(B)

Duty of confidentiality owed by a legal adviser

A separate, narrower limb exempts information a professional legal adviser holds under a duty of confidentiality owed to their client, even where a claim to privilege in the strict sense could not be maintained. This is most relevant to legal advisers and law firms responding to a subject access request made by, or about, a client.

In practice: this limb is aimed at legal advisers themselves; most organisations outside the legal profession will rely on the legal advice or litigation limbs instead.

Self-incrimination

A controller need not comply with the listed GDPR provisions to the extent that compliance would reveal evidence of an offence and expose the controller to proceedings for that offence. This does not apply to offences under the DPA 2018 itself, or to perjury type offences of making a false statement otherwise than on oath, so it cannot be used to avoid data protection enforcement or to justify dishonesty. Information disclosed in response to a subject access request is not admissible against the discloser in proceedings for a DPA 2018 offence.

In practice: this exemption protects against exposure to other criminal offences, not against DPA 2018 enforcement; do not rely on it as a reason to withhold information from the ICO or to justify non-compliance with the Act itself.



KEY TAKEAWAY

Both exemptions in this guide follow the underlying legal test exactly, rather than adjusting it for data protection purposes. If a court would uphold a claim to privilege, or would accept a self-incrimination objection, in equivalent litigation, the exemption applies. If a court would reject the claim, so should you.

4. The pitfall to avoid

The most common error is treating litigation privilege as available from the moment a subject matter becomes sensitive, rather than from the moment litigation was actually a real, objectively assessed prospect.

THE PITFALL

Asserting litigation privilege over material created before litigation was a real, objectively assessed prospect, simply because the subject matter later became contentious.

THE REMEDY

Fix the date contemplation became reasonable, and test every document created before that date against the ordinary prejudice or advice based exemptions instead, not litigation privilege.

Conclusion: prioritise the underlying legal test, precise timing and honest disclosure

Legal professional privilege and self-incrimination are two of the few exemptions in Schedule 2 that ask you to apply an external legal test rather than a data protection specific one. Identify which limb of privilege you are relying on, fix the point at which litigation became reasonably in contemplation where litigation privilege is in play, and remember that self-incrimination protects against other offences, not against the Data Protection Act itself.

A few checks worth running before you rely on any exemption in this group:

- **Name the limb:** confirm whether you are relying on legal advice privilege, litigation privilege, the adviser's duty of confidentiality, or self-incrimination.
- **Test contemplation objectively:** for litigation privilege, fix the date a real prospect of adversarial proceedings arose, not the date a dispute became conceivable.
- **Confirm dominant purpose:** a document created for several reasons must have litigation as its dominant purpose to attract litigation privilege.
- **Do not stretch self-incrimination:** it does not cover DPA 2018 offences or excuse a false statement.

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