FOI Exemptions: Legal Privilege and Confidence

Two exemptions protect communications that the law treats as confidential. Section 42 of the Freedom of Information Act 2000 covers legal professional privilege and is qualified. Section 41 covers information provided to you in confidence and is absolute. They are often cited together, but they work differently, and treating them the same way is a common mistake.

AT A GLANCE

	Section 42, legal privilege	Section 41, confidence
FOISA equivalent	Section 36(1)	Section 36(2)
Environmental information	Regulation 12(5)(b) and (d) in part	Regulation 12(5)(d) and (f) in part
Type	**Qualified. Public interest test applies**	**Absolute. Section 2(3) lists it**
Main test	Could the information be protected by legal professional privilege in legal proceedings	Did you obtain it from another person, and would disclosure be an actionable breach of confidence
Neither confirm nor deny	Section 42(2)	Section 41(2)

1. What does section 42 protect?

Section 42(1) exempts information that could be protected by legal professional privilege in legal proceedings. There are two main types.

- **Legal advice privilege** covers confidential communications between a client and a lawyer made for the purpose of giving or receiving legal advice.
- **Litigation privilege** covers confidential communications made for the dominant purpose of litigation that is in progress or in contemplation.

Privilege can belong to your authority, or to someone else, and in house lawyers can give privileged advice. The exemption applies to the information, so it can include a record of the advice as well as the advice itself.

Waiver matters. If you have disclosed the advice publicly, or relied on its content in a way that waives privilege, the exemption can be lost. Check whether the advice has been shared outside the privileged group.

2. Why is the public interest test still needed?

Section 42 is qualified, so you must weigh the public interest even where privilege clearly applies. The tribunals have recognised a strong, inherent public interest in protecting the confidentiality of legal advice, because it supports good decision making. That means the case for disclosure needs to be compelling, but it is not impossible. Matters that tend to support disclosure include a large amount of money at stake, a significant number of people affected, a suggestion that advice was ignored or misrepresented, and a lack of transparency about a major decision.

Record both sides. Citing the inherent weight of privilege without engaging with the specific circumstances is a common basis for a successful complaint.

3. What does section 41 protect?

Section 41(1) has two conditions, both of which must be met.

1. You obtained the information from another person. That can include another public authority. Information you created yourself does not qualify, although a document that records what someone told you may.
2. Disclosing it to the public, outside the Act, would be an actionable breach of confidence, either by that person or by someone else.

The test is the common law test. The information must have the necessary quality of confidence, it must have been imparted in circumstances importing an obligation of confidence, and unauthorised disclosure must cause a detriment. An agreement that something is confidential is relevant, but a label alone does not create a duty of confidence.

4. Why is there no public interest test for section 41?

Section 41 is listed as absolute in section 2(3). However, the law of confidence has its own public interest defence, which is part of deciding whether a breach would be actionable. If a court would accept that disclosure was justified in the public interest, there is no actionable breach, and the exemption does not apply. So you must still consider the public interest, but through the confidence test, not the section 2 balance.

WORKED EXAMPLE (ILLUSTRATIVE)

A university receives a request for the legal advice it obtained on a dispute with a contractor, and the contractor's own submissions made in confidence during mediation.

- **The legal advice.** It was given by external solicitors, is confidential and has not been shared more widely. The university applies section 42(1). Weighing the public interest, it recognises that the amount at stake is significant but finds no evidence that the advice was ignored. The inherent weight of privilege prevails, and it withholds.
- **The contractor's submissions.** The university obtained them from another person, in circumstances that imported a duty of confidence, and disclosure would cause the contractor a detriment. It applies section 41(1) and withholds. It considers whether a public interest defence would succeed, concludes that it would not, and records why.

The case record includes each section, each element of the test and the reasoning.

5. Recording these decisions: spreadsheet or structured case workflow

Task	Spreadsheet and email	Structured case workflow
Recording which type of privilege applies	A note in an email	Exemption and reason recorded against the case
Evidence of both sides of the public interest test	Scattered drafts	Public interest delay management and notes held in one case
Handling sensitive documents	Shared by email	Secure disclosure portal for the response and a managed case file
Evidence at internal review	Reconstructed from emails	Audit log and timeline attached to the case

Frequently asked questions

Does a lawyer's involvement make a document privileged?

No. The communication must be confidential and for the purpose of legal advice or litigation.

Can we refuse to confirm whether we hold legal advice?

Yes, under section 42(2), where confirming would reveal privileged material. Use it where even the existence of advice would be sensitive.

Does section 41 apply to our own internal documents?

Not on its own. The information must have been obtained from another person. A report you wrote yourself does not qualify, though parts that quote or record confidential information from someone else might.

What if the person who gave us the information agrees to disclosure?

Then there is no breach of confidence, and section 41 will not apply. Ask, but remember the decision remains yours.

THE PITFALL

Citing the inherent weight of privilege without engaging with the facts of the case.

THE REMEDY

Record the arguments on both sides, including the amount at stake, any waiver and how widely the advice was shared.

KEY TAKEAWAYS

- Section 42 is qualified. Section 41 is absolute.
- Legal advice privilege and litigation privilege are the two types. Check for waiver.
- Privilege carries inherent weight in the public interest test, but it is not a trump card.
- Section 41 needs information obtained from another person and an actionable breach of confidence.
- Consider the public interest defence within the confidence test for section 41.

Conclusion: prioritise the type of privilege, the facts and the public interest reasoning

Ask your legal team which kind of privilege applies and whether it has been waived. For confidence, check where the information came from and whether disclosure would be an actionable breach.

HOW PROVEPRIVACY HELPS

ProvePrivacy DSAR & FOI (Lite) keeps the whole case in one place. Public interest delay management tracks the extended time for qualified exemptions such as section 42, the redaction tool lets you release part of a document where only part is exempt, and the Disclosure tab records the exemption relied on and the reason for it, adding it to the case audit log. Responses are delivered through a secure, time bound download portal rather than as email attachments.

Where this fits in the FOI process

Both exemptions are applied at the decision stage, usually after you have taken advice from your legal team. See our FOI process hub for the whole journey.

SCOTLAND AND ENVIRONMENTAL INFORMATION

In Scotland, section 36 of the Freedom of Information (Scotland) Act 2002 covers both confidentiality of communications in legal proceedings and breach of confidence, in subsections (1) and (2). Under the Environmental Information Regulations 2004, the closest exceptions are regulation 12(5)(b), which covers the course of justice, and 12(5)(d) and (f), which protect confidentiality of proceedings and voluntary suppliers of information. All are subject to the public interest test. See our guides on EIR exceptions and on FOISA and the EIRs in Scotland.

Related guides

- DSAR Exemptions: Legal Professional Privilege
- FOI Exemptions: Personal Information
- FOI Exemptions: Investigations, Crime and Law Enforcement

Sources

- Freedom of Information Act 2000, sections 2, 41 and 42 (legislation.gov.uk)
- Freedom of Information (Scotland) Act 2002, section 36
- Environmental Information Regulations 2004, regulation 12(5)
- ICO guidance: Legal professional privilege (section 42), and Information provided in confidence (section 41)
- Scottish Information Commissioner guidance: Confidentiality (section 36)

Talk to someone who has handled FOI

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