The devil's in the detail: the LPP exemption to the Right of Access

Olivia Whitcroft, Principle of OBEP, examines the nuances in the application of the legal professional privilege exemption to the right to access

The legal professional privilege ('LPP') exemption to the right of access feels like it should be a quick and easy one to apply. Compared to others in the same Schedule under the UK Data Protection Act 2018 ('DPA 2018'), it has a lot of things going for it. At only four lines long, it's concise and easy to understand, unlike, say, the wordy 'corporate finance' exemption. Any organisation can use it, so they don't need to check if they are one of the listed entities (as with the 'regulatory functions' exemptions) or have a specified function (as with the 'functions designed to protect the public' exemption).

In contrast to the public functions exemption, the LPP exemption does not require conditions to be met (see the conditions matrix in that exemption) or a tricky balancing assessment (as for the 'protection of the rights of others' exemption). Nor does it have tests to apply which may change over time, such as considering whether disclosure would be 'likely to prejudice' the organisation's activities (as under the 'crime and taxation', 'management forecasts' and 'negotiations' exemptions), or 'seriously impair' their purposes (like the 'research and statistics' exemption). And LPP is a well-established legal concept, unlike, for example, the 'manifestly unfounded or excessive' exemption under Article 12(5) UK GDPR, where there are limited cases from which to draw its interpretation.

However, this latter point leads to a problem. Yes, LPP is a well-established legal concept, but it is also a very complex concept, completely separate from data protection law. It is based on common law, which is neither concise nor easy to understand, and there are conditions to be met. Privilege may also be lost or waived, so protection may change over time. Applying the LPP exemption does not just require interpretation of the DPA 2018, but also interpretation of over 400 years of common law.

So, rather than this being a very short article where I inform you about the LPP exemption and you go away happy and confident to apply it, I find myself with plenty more to say.

What is the LPP exemption?

The LPP exemption can be found in Schedule 2, paragraph 19 of the DPA 2018. It provides that the right of access (along with other transparency obligations) does not apply to personal data that consist of:

a) information in respect of which a claim to legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings; or

b) information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser.

This means that, if certain personal data are protected by LPP, they do not need to be provided to a data subject in response to a subject access request ('SAR'). Although part (b) is clear to read, it is less easy to understand what it intends to capture. Potentially it envisages extending the exemption to confidential communications with lawyers which are not covered by privilege. Though in practice, this is likely to cover similar information to legal advice privilege (discussed more below).

What is legal professional privilege?

LPP is a right for clients to seek legal advice in confidence, to ensure the proper administration of justice, and to protect the right to a fair trial in legal proceedings. It is a well-established right under the laws of England and Wales, Scotland, and Northern Ireland (which need to be considered separately).

In Scotland, LPP derives from the concept of 'confidentiality of communications', which is why this is referenced in the exemption. Records protected by LPP are confidential

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and can be withheld from disclosure, including to courts and parties in legal proceedings, and to other legal or regulatory authorities.

So it makes sense for there to be an exemption to SARs — the right of access does not provide an alternative route to get access to these data.

There are two limbs to LPP: legal advice privilege ('LAP') and litigation privilege ('LP'). LAP protects confidential communications between a lawyer and client made for the sole or dominant purpose of giving or receiving legal advice. This captures advice given by a professional lawyer to a client, where that advice may, for example, include reference to an individual (who may make a SAR). Lawyers include solicitors and barristers (or advocates in Scotland), and the scope has been expanded in more recent years to cover other professional legal advisers, such as chartered legal executives, licensed conveyancers and patent attorneys.

LAP protects advice from in-house lawyers as well as external lawyers, but advice on legal issues provided by non-lawyers is not protected (see the Supreme Court decision, *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1).

LP protects confidential communications between a lawyer and a client, or with a third party, made for the sole or dominant purpose of obtaining information or advice relating to existing or reasonably contemplated litigation. Litigation may include, for example, a legal claim against the company by a customer or former employee (who may make a SAR). LP protects communications with non-lawyers as well as lawyers, but is limited to circumstances where there is litigation. The litigation must have started or be 'reasonably contemplated', and not a mere possibility.

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For both limbs of LPP, the communication must be for the purpose of legal advice or litigation. There can be a tendency to think that, by copying in lawyers to every email, all of them will be protected by privilege, but this may not work for emails which have a different objective. In-house lawyers often have a commercial role which is wider than solely providing legal advice, so some communications with them may not be subject to LPP. The 'sole or dominant' (primary) purpose must be the relevant legal advice or litigation.

Protected records may include background papers and records, as well as actual communications between the parties, provided they are confidential. An email of advice circulated around an organisation, including to staff which are not authorised to receive legal advice on behalf of the business, may not meet the required standard of confidentiality.

How to maintain privilege

LPP may be lost if the relevant communication is not kept confidential (by the client, lawyer or third party), or it may be waived by the client (who otherwise has the right to assert it).

In order to maintain LPP for a record, steps should therefore be taken to ensure LPP is not lost or waived, including access, security and data sharing controls, and associated training for staff. These may include marking the record as confidential and subject to LPP, and distinguishing it from other (non-confidential or non-privileged) records. It should also be treated as confidential in practice; as well as limiting access, this may include limiting the purpose for which it can be used to the relevant advice or litigation. Anyone who does have access should be made aware that the record is privileged, and subject to confidentiality obligations. The record should also not be voluntarily (or accidently) shared externally, for example in response to a SAR!

How to apply the SAR exemption in practice

Before applying any exemption to the right of access, organisations should take into account that the right of access is a fundamental right to enable individuals to be aware of and verify the lawfulness of the processing of their personal data. So an exemption should only be applied to the extent needed to protect the relevant interest covered by the exemption.

Having said that, LPP is another fundamental right, as discussed above, so before providing personal data protected by privilege and, by doing so, potentially waiving that right, organisations should consider the wider consequences of a loss of privilege. This may include requirements to disclose relevant records in legal proceedings leading to a negative impact in the case. In addition, lawyers may have an obligation to assert privilege on behalf of their client, and therefore may need to apply the exemption.

This leads to a question of where an organisation should strike the balance between:

- going through all files that contain communications protected by LPP, to check it is not withholding any record (or part of a record) that is not clearly protected by LPP. This would potentially favour disclosure to the data subject, and risk losing privilege if it makes the wrong call; and
- taking a more blanket approach to apply LPP to sets of records (such

as communications with lawyers), and not risk disclosing any of it in case it waives privilege and prejudices its legal position down the line.

There have been several cases which have considered the application of the LPP exemption and where to strike this balance, decided under the previous Data Protection Act 1998 ('the DPA 1998'), which had a similar LPP exemption. These include: *Holyoake v (1) Candy (2) CPC Group Limited* [2017] EWHC 52; *Dawson-Damer & Ors v Taylor Wessing LLP & Ors* [2017] EWCA Civ 74 and [2020] EWCA Civ 352; and *Ittihadieh v 5-11 Cheyne Gardens & Ors and Deer v Oxford University* [2017] EWCA Civ 121.

Drawing from these cases, organisations should take reasonable and proportionate steps to search through records to decide which are protected by LPP, and which contain personal data not protected by LPP which could be provided to the data subject. Applying a blanket exemption of LPP to a class of records, without any consideration of whether some personal data are not covered, may not be sufficient.

The courts will not, however (in the context of a SAR), generally automatically inspect records to check that the organisation has applied LPP correctly, unless there is evidence of a misunderstanding; a reason to distrust the organisation; or there is no reasonably practical alternative.

In my view, it also comes back to the overall approach to searching for and providing data in response to a SAR. Organisations need to take reasonable steps, and are not required to take action which would be disproportionate to the purpose of the right of access.

In the context of (1) the particular request and the data subject's needs; and (2) the nature and scope of particular records held, more or less may need to be done, including in considering and applying the LPP exemption to particular records.

International considerations

As well as advice provided by professional lawyers in the UK, LAP protects advice given by foreign professional lawyers. Legal advice from lawyers in another country will therefore be protected.

How about if a record held by an organisation subject to the UK GDPR is protected under the privilege laws of another country. Can the LPP exemption be applied?

This was considered in the *Dawson-Damer* case referred to above (under the DPA 1998). The court determined that the exemption only applies in relation to privilege which may be recognised in legal proceedings within any part of the UK. I would, however, query whether part (b) of the current exemption under the DPA 2018 could now additionally capture records protected by a duty of confidentiality (recognised in the UK).

Another interesting international question is if a UK organisation is also subject to the EU GDPR (or data protection laws of other jurisdictions), can it apply a similar LPP exemption to records protected by LPP (under UK or other laws)?

To answer this, we need to consider the exemptions in the relevant EU Member State, as many exemptions are set at national level. For example, section 162 of the Irish Data Protection Act 2018 provides an exemption to the right of access for personal data in respect of which a claim of privilege could be made, and additionally to personal data processed for the purpose of seeking, receiving or giving legal advice.

A tricky exemption after all

I regularly run PDP's Handling Subject Access Requests training course, and my coverage of the LPP exemption is generally heavily summarised as 'privilege rules under common law'. I feel happier now I've been able to expand on it more for this article! As, sadly, far from being a quick and easy exemption to apply, LPP can be as tricky as its wordier companions in Schedule 2 of the DPA 2018.

Olivia leads PDP's training session, Handling Subject Access Requests, which is available in both Classroom and Virtual-LIVE formats. See the website for further details.

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