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Replying to requests for information and evidence

Fiona Scolding QC

The response not to make

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What powers does the inquiry have?

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- Assuming a statutory inquiry, it has powers to compel the production of evidence under s21 of the Inquiries Act 2005.
- This power is rarely used unless a body asks that it be used.
- The Inquiry will send a “rule 9” request which will either ask for (a) documents or (b) witness evidence or both.
- Multiple requests can be sent over a period of time: don’t assume the first will be the last.
- Some inquiries ask for “bits” of evidence about particular subjects at different times on a “rolling basis”.

Voluntarily providing them with information

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- The inquiry will ask for information under “Rule 9”: this is Rule 9 of the Inquiry Rules.
- There is nothing to stop a party from voluntarily providing the Inquiry with information (subject of course to issues of confidence, privilege etc.) at any time prior to such a Rule 9 being served.
- Examples may be:

  (a) When you want to bring a particular piece of information to the attention of the inquiry whilst they are formulating the “scope” of their investigation (eg look at this – this may help you)

  (b) When you want to make it clear the extent of your involvement.

When would you want s21 to be used?

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- When GDPR may be engaged and so as an organisation you want to be able to demonstrate that it is “necessary”
- To avoid debates about the scope of the request internally.

What should be your response?

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- If acting on behalf of a public body – candour: and by candour, I mean the whole truth.
- The inquiry is there to try and make recommendations for the future: having a partial or limited account does not help them and is unlikely to help you.
- Be reflective: what have you learnt? What could have been done differently?
- Be as transparent as possible.
- Collate relevant material (including that literal or metaphorical cupboard)
- If you don't consider you have to provide material, provide a list of what you are not providing and why (e.g. privileged, not relevant)
- Remember your continuing duty to disclose (the cupboard again)
- Be creative with "keyword searches".

When can you refuse?

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(a) Cannot comply (do not have it: not available in the jurisdiction?)

(b) Statutorily unable to provide it (different to confidence/privilege – there are various statutory provisions which prevent disclosure of information (eg security/intelligence information/census information)

(c) Confidential material: but most confidence is "qualified" and subject to the overriding public interest – so medical records etc., private conversations can be disclosed

(d) Unreasonable to comply either because of (a) scope or quality of what is requested or the timescales within which it is requested or (b) the evidence is not of "material assistance" – i.e. not relevant.

(e) Privileged information: where one can claim privilege in civil proceedings

(f) Public interest immunity.

Privilege

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Section 22 of the Inquiries Act 2005 :

- Cannot be required to produce document or evidence if it were not able to be provided in civil proceedings
- Incompatible with an obligation under retained EU law
- PII rules as they do to civil proceedings.

Legal Professional privilege

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- Is this document actually privileged: just referring to ongoing legal proceedings or advice does not make the document privileged (if you are not disclosing the contents of that advice)
- Can you redact out the information in the document to give them the “non-privileged bit”
- Is it relevant to see this document for (a) the terms of reference or (b) to understand the narrative – or are the actions which come out of any privileged information easy enough to divine.

Litigation privilege

- Documents which were created for the purposes of litigation.
- Usually easy to identify and spot.
- Proceedings are either pending or contemplated.
- Can apply to communications between the client and their lawyer, the client and a third party and the lawyer and a third party

Legal advice privilege

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- Applies to confidential communications (the fact something has appeared in public at some time does not necessarily mean that confidence has been lost: depends on the facts and context).
- Can be “waived” or lost, but survives, for example, the dissolution of the company (*Addlesee v Dentons* [2019] EWCA Civ 1600).
- Can include both the advice but also material which “evidences” the substance of the communication – not enough for there to be something which makes someone think: have they got legal advice and what does that say but which creates a real inference about what advice is given (*Edwardian Group v Singh* [2017] EWHC 2805).

Legal advice privilege -

- Need to be communicated between lawyer and client: not third parties; and needs to be about “legal advice” not “business”.
- If the lawyer puts on paper during the course of retainer things they know only because of their professional relationship with the client, those papers are privileged even if not sent to the client (e.g. drafts of documents).
- But there will need to be communication documents going for a client to a lawyer for advice – which can be expressed or implied but is not privileged just because it is sent to a lawyer.
- The client is currently narrowly defined (but the CA has identified that this rule is ripe to be changed). Currently, it only applies to those who have the authorization to seek or obtain legal advice from in house or external lawyers.

Legal advice privilege (2)

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- Client/client discussions about the merits of a case is not subject to legal advice privilege.
- Documents which existed before the need to seek legal advice are not privileged – even if sent attached to a privileged e-mail.
- Example – *Glaxo v Sandoz* [2018] EWHC 2747. Two internal e-mails were sent in which an in house lawyer asked an employee for information to send to external lawyers. The employee replied with information. As the internal e-mails were not sent for the purpose of the in house lawyer giving the employee legal advice. Not subject to legal advice privilege.

Legal advice privilege

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- Must have come into existence for the DOMINANT purpose of giving legal advice.
- So background documents may not count if they existed before the need for legal advice arose (*FRC v Sports Direct* [2018] EWHC 2284 (Ch) – reversed on appeal but not on this point [2020] EWCA Civ 177).
- "Legal advice" includes most work done by lawyers when using legal skills – so internal reviews conducted by lawyers and work with regulators by the lawyers (but not if the discussion between in house staff)
- *Civil Aviation Authority v Jet 2* [2020] EWCA Civ 35 at 61-68 sets out the key principles. Where the legal and non-legal can be severed – the parts covered by legal advice privilege can be redacted and the rest disclosable – but sometimes the "intermingling" is so great that this is not possible.

Public interest immunity

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- The government has not made ”class” PII claims since the mid 1990s.
- Usual claims would be national security, diplomatic relations
- Sources and informants – journalists (subject to s10 of the Contempt of Court Act 1981).
- Informants for the police, but also to other statutory agencies (for example re: staff who had provided information about the possible proceeds of crime – *Shah v HSBC* [2011] EWHC 1713).
- In cases concerning “sensitive government business” it is likely that a public inquiry – which will be set up to look precisely at those things – is unlikely to indicate that such immunity exists save for issues which would cause “*real risk of serious harm to an important public interest (or to a person)*”.

PII (2)

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- Even if there is a “real risk of serious prejudice to an important public interest” then that is not the end. The inquiry will examine:

(a) Can it give adequate protection to the public interest

(b) Can admissions, summaries, gists or “partial documents” be provided?

(c) Closed material proceedings (CPR 82 – with the use of the special advocate).

Self incrimination

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- Where there is a serious possibility that material could be used not only directly for a prosecution but also as a “step” towards the material which the prosecutor may require in deciding whether to prosecute (but not necessarily those which may lead to a “line of inquiry” to other sources), then you should ask the Inquiry to seek an undertaking from the Attorney General.
- This would be not to rely upon evidence which is the product of an investigation commenced as a result of the provision by that person of such evidence and/or even to prevent prosecution at all (but the latter is highly unlikely to be granted save in the most exceptional of cases)
- It does not extend to offences outside the UK (but that may be a discretion as to whether a witness should have to answer a question) or for recovery of a penalty. But it does not extend to disciplinary or administrative proceedings.

Parliamentary privilege

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- Article 9 of the Bill of Rights 1689 :

"The Freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament".

Inquiries frequently look at the things said or done by MPs.

R v Chaytor [2010] UKSC 52 reviews parliamentary privilege.

Fundamentally means that an inquiry cannot bring into question anything said or done by suggesting that actions or words so spoken were inspired by improper motives or were untrue or misleading.

Relevant to querying the contents of ministerial statements given to the house or in select committees.

Risk of damage to the economy

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- S23 of Inquiries Act 2005.
- Bank of England, the Crown (so govt dept), or the FCA
- Can apply to withhold information on the basis that it will cause a “risk of damage to the economy”
- Balancing exercise for the Panel of what is the public interest

Losing privilege

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- Does privilege exist still? Is the document still confidential or has it become "public property and public knowledge".
- Just because it's been published or placed on the internet does not automatically mean that it has lost privilege: it is a question of fact and degree (*Mohammed v MOD* [2013] EWHC 4478 at [19].
- There may also be issues to do with the anonymity of witnesses (if they have had anonymity granted by their role as witnesses or complainants in criminal proceedings – e.g. when youths, or in cases of sexual offences) – the fact that fifteen years ago they may have disclosed their identity does not necessarily lead to the inquiry to conclude that this has been lost forever.

Waiving privilege

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- In most public inquiries the information given to lawyers and subject to privilege are likely to be highly relevant to the terms of reference of the inquiry.
- Serious consideration should be given to waiving privilege in these circumstances.
- Consider:

- Whose privilege is it (is it the client – if several clients, do you have the power to waive it)

Restriction orders

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- Even if you give the information to the Inquiry, you may ask that some matters are “restricted” so evidence not given in public, the witness granted anonymity, or material not disclosed to core participants, or not published even if disclosed to core participants.
- The inquiry has the power to do this under s19 of the 2005 Act read with s20.
- Most powers are obvious (cannot provide under statute or EU law: or required by way of LPP) but also,
- “Where it may be conducive to fulfilling its terms of reference or necessary in the public interest”

Assessment of when a restriction is required?

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- Various criteria (but not exhaustive and only have to have “regard” to them) in s19(4) of the 2005 Act.
- The most important is whether there is “risk of harm or damage”: this has been given a “wide” construction – so as to include psychological harm.
- Relevant when your witness has significant mental health issues or physical health issues and so does not wish to give evidence or wishes to be anonymous.

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Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
Cornwall Buildings
45 Newhall Street
Birmingham, B3 3QR
+44 (0)121 752 0800

Contact
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

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