

First published in the Law Society Gazette (January 2008)

Freedom of Information Update

References to sado-masochism and the Freedom of Information Act 2000 (“the Act”) are not normally made in the same serious legal article. But a recent decision under the Act requires me to do just that.

Section 42 of the Act contains an exemption (legal professional privilege) which is often relied upon by public authorities when refusing to disclose legal advice. However the exemption is wider. Section 42(2) states that the duty to confirm or deny the existence of the information does not arise if it would involve the disclosure of any information which in itself attracts privilege.

In a decision involving the Ministry of Justice (MoJ) (5 December 2007), the complainant requested a copy of any legal advice which confirms that the possession of images of consensual sado-masochistic violent sex can successfully be prosecuted and that Article 8 of the European Convention on Human Rights does not apply. The background to the request was a consultation exercise on proposed legislation making possession of such images illegal.

The MoJ refused to confirm or deny that any such legal advice was held applying the section 42 exemption. The Commissioner agreed with the MoJ. He noted that legal professional privilege does not, in usual circumstances, attach to the fact that legal advice has been sought. However in this case the Commissioner noted that the phrasing of the request was for “any legal advice which confirms...”. The Commissioner found that the either confirming or denying that legal advice is held, in the circumstances of this case, does in itself attract privilege as to do so would reveal the basic contents of the advice if held. The Commissioner considered the arguments put forward by the public authority and felt those reasons demonstrated a strong public interest argument for maintaining the exemption. He noted that the proposed legislation had undergone a public consultation and the responses had also been published.

What is the difference between Michael Parkinson, Gary Lineker and the former temporary finance officer at Corby Borough Council? The answer is that only the first two have a right to privacy when it comes to disclosure of the contents of their pay packets. So says the Information Commissioner in two recent decisions under the Freedom of Information Act 2000.

The first (8 October 2007) involves the BBC’s refusal to provide details of its financial agreement with Michael Parkinson (“Parky” to his fans), including his gross remuneration, for the past three years. The Commissioner agreed with the BBC who argued that the information was exempt under section 40, being personal data disclosure of which would be unfair to Mr Parkinson.

The Commissioner commenced his decision by stating that senior officials in public authorities should expect details of their salary bands to be disclosed because they are paid out of public funds commensurate with their level of responsibility. Interestingly the Commissioner talked about salary bands whereas previously he has ordered disclosure of the precise salary (see the decision involving the disclosure of the salary of the former temporary finance officer at Corby

Borough Council (25 August 2005). However Parkinson is considered to be different to a senior BBC executive. The BBC calls him (and the Commissioner accepts him as) “talent”. Those who have sat through Davina McCall’s attempts to host a chat show may agree.

The Commissioner accepted the BBC’s arguments that payments made to talent are not analogous to the salaries paid to senior employees in public sector organisations. This is because the sums paid by the BBC to talent do not relate to the performance of a public function, but rather to individuals who are contracted to provide services to the BBC in an entirely private capacity.

The Commissioner was satisfied that Mr Parkinson had a reasonable expectation of privacy and consequently to disclose details of his financial agreement would be unfair. The same conclusion was reached by the Commissioner with regard to a request for the same information from the BBC about Gary Lineker (8 October 2007).

I find these decisions difficult to reconcile with the ethos of the Act which is openness and transparency. Of course Parkinson and Lineker don’t spend public money or make public decisions unlike senior public sector employees. But they do get paid large sums out of the public purse. Surely the public has a right to know what they get paid to enable them decide for themselves whether they are worth it.

Can the reasoning in this decision be applied to requests for information about individuals, who are not celebrities, providing services to public authorities? Does it mean that if I provide training services to a local authority I can ask them to keep the contents of my invoice secret? After all whilst I am not as famous (yet) I too like Parkinson am often contracted to provide training services in a private capacity. Where does this leave public scrutiny? Or was the decision based on the subject being famous? In which case what about us mere mortals? This decision raises more questions than it answers.

When it comes to information about policy formulation central government has a whole exemption for its exclusive use in section 35. This was invoked in a recent decision involving the Department for Culture, Media and Sport (DCMS) (3 December 2007) which will be of interest to football fans. The DCMS must release documents relating to the takeover of Manchester United Football Club by Malcolm Glazier's company, Red Football Ltd.

The ruling followed a complaint by a member of the public who wrote to the DCMS requesting copies of all documents, minutes and emails relating to the takeover. The department stated that to disclose the documents would compromise the ongoing formulation of government policy around the issue of competition in football club takeovers and that the documents contained information relating to advice given to government officials. It argued that the release of such advice could result in future recommendations given by civil servants being less candid.

In his decision, the Commissioner took the view that the timing of the request was important. It was made after the policy formulation and development process had effectively ended. In addition, the Commissioner noted that the disclosure of advice given by government officials in this case would not inhibit government officials from giving frank advice. Weighing up the arguments, the Commissioner found that the public interest favoured disclosure of the

information.

The Government recently published a consultation document to consider whether additional organisations discharging a public function, including in some instances private sector companies running services for the public sector, should be brought within the scope of the Act. If the proposals go ahead the Information Commissioner and the Tribunal are going to have a busy 2008.

Ibrahim Hasan is a director of Act Now Training and a consultant with IBA Solicitors.

Email: ih@informationlaw.org.uk

FOI Courses from Act Now Training

<p><u>Freedom of Information: An A-Z Guide</u> <i>with Paul Simpkins and Ibrahim Hasan</i></p> <p>Manchester - 25th Feb, 11th Nov London - 7th Feb, 1st July Belfast - 2nd April Edinburgh - 28th Feb, 25th Sep</p> <p>A complete guide to the Freedom of Information Act. Ideal for those who have little or no knowledge. Key issues including fees, exemptions and how to recognise, and practically deal with, an FOI request will be discussed. We will also examine the latest guidance from the Information Commissioner.</p>	<p><u>Freedom of Information Update: Latest Decisions and the PI Test</u> <i>with Ibrahim Hasan and Tim Turner</i></p> <p>Manchester - 1st April, 4th Dec Belfast - 3rd July London - 6th March, 2nd Dec Edinburgh - 8th May, 20th Nov</p> <p>An advanced workshop examining the latest decisions of the Information Commissioner and Tribunal. Packed full of exercises, case studies and discussions, this workshop will also examine the factors to be considered when applying the Public Interest Test. Essential for all those wishing to keep up to date with FOI/FOISA.</p>	<p><u>The FOI/FOISA Records Management Code of Practice</u> <i>with Philip Jones</i></p> <p>London - 13th May, 19th Nov Belfast - 17th June Manchester - 18th March Edinburgh - 22nd Oct</p> <p>This workshop examines the FOI S.46/ FOISA S.61 Records Management Code of Practice. It focuses on how to identify and interpret the relevant requirements, implementing a section 46 compliance regime within a public sector organisation and understanding the resource implications.</p>
--	---	--

Full details at www.actnow.org.uk