



The Law Society

Adjudication in a matter raised by Mrs E J Lumley

Law Society Freedom of Information Code
June 2008

Contents

Adjudication in a matter raised by Mrs E J Lumley	1
1 The issue	2
2 The background.....	2
3 Submissions by the Law Society	3
4 Adjudication	4

1 The issue

Whether the Society acted appropriately and in accordance with its Freedom of Information Code (“the Code”) in declining to release to Mrs E J Lumley information about the response from a firm of solicitors to the Solicitors Regulation Authority (“SRA”) concerning a complaint she had brought against the firm’s handling of her late mother’s affairs.

2 The background

This case arises from one or more complaints made by Mrs Lumley about the way a firm of solicitors had handled various matters concerning her late mother’s estate. The firm will be referred to here as “P & Co”. It appears that, having investigated Mrs Lumley’s complaint, the SRA decided that no further action was required. At some point thereafter, Mrs Lumley asked to receive a copy of some of the information in P & Co’s response to the SRA, but without success.

On 21 January 2008, Mrs Lumley wrote again, enclosing what she described as “an authority from...the lawful administrator of my mother’s estate, for me to have a copy of that firm’s (P & Co’s) response which persuaded you they had no case to answer”.

On 29 January the Law Society’s then Information Compliance Manager, Joshua McKim, wrote to Mrs Lumley stating that he was unable to supply her with the information because it fell within the exception in s.14.5 of the Code. He went on: *“It is the Law Society’s view that disclosing information about a specific regulatory investigation to the public at large would be detrimental to that investigation. Assuring the confidentiality of the information collected as part of an investigation was a factor in the success of this investigation.”*

Mrs Lumley replied to Mr McKim on 4 February. She said that the Society’s reason for refusing to release the information was different from the reasons previously advanced to her by two officials at the SRA. They had told her the documents were “confidential to your mother” and that the death of their client did not alter a solicitor’s duty of confidence. Mrs Lumley said she believed that the real rationale was “to protect the reputation of one of your members”. She said she understood that the Society had provided P & Co with a copy of her own evidence to the SRA, while denying her the chance to see what P & Co had said in response. She asked why both parties were not treated equally and impartially. Citing Mr McKim’s claim that assuring confidentiality had been a factor in the success of this investigation, Mrs Lumley asked “what success?”, and where had been the assurance of confidentiality for the evidence that she had provided?

On 30 May I wrote to Mrs Lumley to outline the process of adjudication and to invite her to make a submission if she wanted to. No submission was received.

On 1 June I wrote to the Society to ask for its submission in support of its refusal to release the information Mrs Lumley had asked for. I noted that although what I called her “explicit” request of 21 January had been for the release of P & Co’s response to the SRA, her letter of 24 February to Mr McKim could be read as making an additional “implicit” request, in the absence of that material being released, to be told of the date in October 2002 when her late mother had allegedly written to P & Co instructing them to act for her. In her letter seeking adjudication Mrs Lumley noted that the Society’s response of 28 March did not address the question of this “implicit” request.

On 13 June I received the Society’s submission. Having considered it I wrote again to the Society on 18 June inviting a further submission in relation to Mrs Lumley’s claim that the SRA had made her own evidence available to P & Co, casting doubt on the importance the Society attached to the assurance of confidentiality Mr McKim had referred to. On 25 June I received a supplementary submission from the Society addressing these issues, together with copies I had requested of correspondence from the SRA to Mrs Lumley.

3 Submissions by the Law Society

In its first submission the Society repeatedly referred to the LCS (the Legal Complaints Service) rather than to the SRA, though it corrected this in its later submission and in this summary I refer throughout to the SRA.

The Society said it had not previously regarded Mrs Lumley’s letter of 24 February as making an “implicit” request to be told the date when her mother had allegedly instructed P & Co to act for her.

In respect of her request to be given a copy of P & Co’s response to the SRA, the Society said that this was information about a specific investigation arising from its regulatory role and, as such, exemption s.14.5 applied. It was the Society’s view that it was not in the public interest to make available to the general public submissions presented to the SRA relating to specific matters. The Society believed that investigations could be prejudiced if those making submissions had reason to believe that those submissions might find their way into the public domain as a result of requests under the Code. The Society said it was “essential for the proper investigation of complaints that the Society is able to assure the confidentiality of those making submissions”.

In relation to Mrs Lumley’s “implicit” to be told the date of an alleged letter of instruction from her mother, the Society said it did not think it appropriate in its submission to go into the details of the matters considered by the SRA except to say that “the existence or otherwise of the alleged letter referred to... forms part of (P & Co’s) submission to the SRA in this case”, and that s.14.5 therefore applied to this information also.

In support of its position the Society cited an earlier adjudication (*Gomez* – September 2006) in which I said that a request by Mr Gomez to be told the number of complaints the Society had received about a particular solicitor did constitute information about specific investigations and was therefore covered by s.14.5, even though the information he had asked for was “not very detailed or demanding”. The Society also cited another adjudication (*Williams* – January 2008) in which I said: “Mrs Williams’ request...was broad and I am satisfied that to grant it would have undermined the necessary framework of confidentiality with which both informants and solicitors should feel able to contribute to an investigation”. The Society accepted, however, that the Williams case was not entirely analogous to Mrs Lumley’s request (because Mrs Williams had asked for an entire complaints file).

The Society said that though “there may be many incidents (sic) where the public interest is in favour of disclosing certain documents contained in an SRA file”, this was not the case in respect of Mrs Lumley’s request. The Society believed that disclosing the documents she had asked for would have the effect of prejudicing future investigations by removing the assurance of confidentiality from those submitting evidence in relation to an investigation”.

The Society concluded its initial submission by accepting that Mr McKim’s statement of 29 January to Mrs Lumley that “assuring the confidentiality of the information collected...was a factor in the success of this investigation” had not been appropriate, because it might have been taken as Mr McKim’s view on the outcome of the investigation.

In its supplementary submission, the Society addressed Mrs Lumley’s concern that the SRA had made her own evidence available to P & Co, which seemed to her to contradict the Society’s claim about the importance of “assurances of confidentiality”. It said that the SRA followed what it termed the Informants Protocol (IP), in accordance with which the SRA may disclose an informant’s complaint to the solicitor against whom it was levelled. The Society said that the SRA tells informants it will not usually send them a copy of the solicitor’s response unless the SRA requires their comments. This is explained to informants at the start of an investigation, according to the Society, and Mrs Lumley had been sent this information at the time the caseworker first raised her complaint with P & Co.

The Society confirmed that it had sent Mrs Lumley’s original letter of complaint to P & Co for their reaction but that “we can’t see that we disclosed any other of her letters”, though for ease of reference they had sent some documents which Mrs Lumley had provided but which P & Co would already have had their own copies of. The Society said that in the course of its second investigation the SRA did not disclose to P & Co any letters from Mrs Lumley.

The Society concluded by saying that Mrs Lumley neither is nor was a client of P & Co. Their client had been her mother, and in responding to allegations of misconduct a solicitor might well need to give the SRA information about instructions from their client which it would be wrong to pass to a third party like Mrs Lumley. It believed that the same consideration did not apply to the information which a third party might send to the SRA when alleging misconduct.

4 Adjudication

It is clear to me that the information Mrs Lumley asked for, namely P & Co’s response to the SRA about her allegations of misconduct, and the date of any letter of instruction her late mother might have sent to P & Co, are both items of

information “about specific investigations, disciplinary cases or applications arising from (the Society’s) regulatory role” and that they are subject to the exemption to disclosure specified in s.14.5 of the Code.

In respect of regulatory information the Code requires the Adjudicator to consider whether the public interest is in favour of publication. The Code does not explicitly require the Society to apply this public interest test in reaching its original decision, but the Act will do so when it eventually applies to the Society’s regulatory functions, and the Code commits the Society to follow the provisions of the Act as if it already applied.

It is therefore necessary for the Society, and then the Adjudicator, to determine where the balance of public interest lies – in disclosing or withholding the information requested. A decision to release information under the Code is a decision to release it to anyone who asks for it: there are no grounds under the Freedom of Information Act (nor therefore under the Code) for releasing information to one requestor while denying it to another.

The Society cites in its submission an extract from an earlier adjudication (Gomez – September 2006) in which I ruled that s.14.5 did apply even though the information Mr Gomez had asked for was neither detailed nor demanding. In the interests of completeness I should note that although I agreed that s.14.5 applied in that case I also held, for reasons explained fully in that adjudication, that the public interest was in favour of disclosure of the information, and I found against the Society.

Mrs Lumley is understandably concerned that the SRA had revealed to P & Co the detail of her complaint, while denying her their response to it on the grounds that both parties needed an assurance of confidence. I think the Society’s supplementary submission addresses this point convincingly. The SRA’s “Informants Protocol” makes clear to complainants that the detail of their complaint may be disclosed to the solicitor against whom it is lodged, and it also makes clear that the complainant should not expect to be shown the solicitor’s response. The Society says this protocol was sent to Mrs Lumley when the investigation began, though it notes that the procedure has now changed so that complainants are given a copy at the time they lodge a complaint.

It is important to distinguish between the release of information under the principles of Freedom of Information (Fol) and other reasons why information might properly be divulged to one party without being made publicly available. It seems to me entirely appropriate, indeed necessary, that the detail of a complaint may be notified to the subject of the complaint in order that he or she may have a proper opportunity to respond to it. That is entirely consistent with the view that releasing information under Fol, and therefore potentially to the general public, risks undermining the framework of confidentiality with which both informants and solicitors should feel able to contribute to an investigation.

In the current case I am persuaded that the public interest in Mrs Lumley seeing P & Co’s response to her complaint is outweighed by the public interest in withholding the information in order to protect that framework of confidentiality. I therefore find for the Society.

Similarly, I am narrowly persuaded for the same reason that the public interest is also against disclosure of information about any alleged letter of instruction from Mrs Lumley’s late mother to P & Co. I take account of the fact that, when the SRA informed Mrs Lumley on 30 January 2007 that they intended to take no further action in regard to one of her complaints, they also told her of her right

to ask the Legal Services Ombudsman to review the file and the way the SRA had conducted its investigation. I therefore find for the Society on this count also.

I remain concerned that, although the Society says “there may be (instances) where the public interest is in favour of disclosing certain documents in an SRA file”, that assurance may seem hard to reconcile with a series of recent cases in which the Society has argued that it is *essential* for the proper investigation of complaints that the Society is able to assure the confidentiality of those making submissions. I therefore recommend that the Society consider, with a view to publication in a revised version of its Code, the sort of factors or circumstances which might lead it, on applying the public interest test in each individual request for information about a regulatory investigation, to conclude that the public interest might be better served by disclosure. A clear and transparent framework for considering the balance of public interest would help ensure consistency of judgement by the Society and would clarify the test for requestors, enabling them better to frame future requests for information.

Richard Ayre

Freedom of Information Adjudicator

29 June 2008