



The Law Society

Adjudication in a matter raised by Mr Andrew Kerr

Law Society Freedom of Information Code

August 2008

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1 The issue

Whether the Society acted appropriately and in accordance with its Freedom of Information Code ('the Code') in declining to release to Mr Andrew Kerr information concerning an investigation conducted by the Solicitors Regulation Authority (SRA)

2 The background

This adjudication concerns requests made by Mr Kerr, of solicitors England Kerr Hands & Co, to the SRA and to the Law Society concerning an investigation carried out by the SRA into a complaint about his firm.

On 21 April Mr Kerr wrote to Mr W. O'Meara at the SRA apparently expressing his dissatisfaction at how the investigation had been handled. He went on to ask whether 'a copy of the information you hold on this matter can be released to me under the Freedom of Information Act'. In addition he expressed his concern that the officer who had conducted the investigation might have been inexperienced, and he asked to be told of the officer's qualifications and experience.

On 21 May the Law Society's then Information Compliance Manager, Ms Fariha Ayyub, wrote to Mr Kerr acknowledging his request. She pointed out that the Society was not governed by the Act but by its own voluntary Code which aimed to apply the same principles. On 21 May she wrote again with a substantive reply, saying that she was unable to supply the information Mr Kerr had requested because it fell within the exception in section 14.5 of the Code (which allows the Society to withhold information 'if it is about specific investigations, disciplinary cases or applications arising from our regulatory role'). Ms Ayyub said that in applying s.14.5 the Society evaluated whether the public interest favoured disclosing the information, but that the Society's view was that publication would be 'detrimental to that investigation'. She added that 'assuring the confidentiality of the information collected as part of an investigation was a factor in the success of this investigation'.

Ms Ayyub went on to say that she was also unable to provide Mr Kerr with the qualifications of the person who had carried out the investigation, because this constituted personal data falling under the exception in section 16 of the Code. Finally, she added that she was making enquiries as to whether there were minimum criteria or qualifications required of investigating officers, and she promised to get back to Mr Kerr with an answer.

Ms Ayyub wrote to him again on 29 May to say that any firm carrying out investigations for the SRA had to confirm its size and the composition of its staff, including 'a breakdown of partners and varying levels of fee earners, together with a list of the fee earners who will deal with the work'. She said that a partner of the firm would 'also deal with investigations and manage/supervise the team'.

On 6 June, apparently having not received her letter of 21 May, Mr Kerr wrote in response to that of 29 May repeating his request to be told the qualifications of the actual investigating officer. He then went on to say: 'I did make a request for all documentation to be released in accordance with (the Act), but am still awaiting some documents. In particular, I would be grateful for any documents relating to qualifications required by the investigation officers'.

On 9 June the Society's new Information Compliance Manager, Mr Bob Stanley, replied, enclosing a copy of Ms Ayyub's letter of 21 May, reiterating that the Society was unable to release details of the individual who had carried out the investigation, and referring Mr Kerr to Ms Ayyub's letter of 29 May for general information regarding the minimum criteria or qualifications for investigating officers.

On 10 June Mr Kerr wrote back, saying that it was in the public interest that information be released 'about the qualifications of the investigation officers'. He asked Mr Stanley to refer the matter for adjudication.

Mr Stanley wrote to me on 12 June, saying that the dispute centred on Mr Kerr's request for the qualifications and experience of the investigating officer, and pointing out that the Society had relied upon s.16 of the Code in refusing to disclose the information.

Having read the exchanges of correspondence it appeared to me that there were two separate issues. The first was Mr Kerr's request for information about a specific investigating officer. The second was his request of 6 June 'for any documents relating to the qualifications required by the investigation officers'. It seemed to me that the Society had perhaps not considered that request fully, so I contacted Mr Stanley to ask if the Society would treat it as a separate request under the Code. On 16 June Mr Stanley confirmed that the Society would do so, and said he would write to Mr Kerr accordingly.

On 17 June I wrote to Mr Kerr to inform him that Mr Stanley would be writing to him in answer to his request of 6 June 'for any documents relating to the qualifications required by the investigation officers' and that if, after receiving Mr Stanley's reply, he still felt the Society had failed to meet its obligations under the Code he was welcome to contact me again. In respect of his request for adjudication about the Society's application of s.16 to his request for information about the qualifications of a specific investigating officer, I told Mr Kerr that I was unable to adjudicate because, unlike the other provisions of the Code, s. 16 reflected a statutory requirement on the Society to comply with the provisions of the Data Protection Act (DPA), and it was for the Society, not the Adjudicator, to determine its compliance with Statute. I pointed out to Mr Kerr that matters to do with the application of the DPA were the province of the Information Commissioner, to whom he might wish to appeal.

On 18 June Mr Kerr wrote to me to confirm that he would do so. He then added 'in respect of documents relating to the investigation, it is indeed a request for all

documents relating to that investigation which I have not yet been supplied with, and accordingly would be grateful if you could proceed further’.

On 20 June I informed Mr Kerr and the Society that I would adjudicate upon the Society’s decision to deny Mr Kerr the information he had requested relating to the SRA investigation of his firm.

On 23 June I asked the Society to make a submission in defence of its refusal to disclose information concerning the investigation itself. On 26 June I invited Mr Kerr to make a submission if he wished to do so.

3 Submission by the Law Society

In its submission on 14 July the Society said that having examined the papers contained in the file mentioned by Mr Kerr in his request it had concluded that he was requesting information about a specific investigation into the firm of England Kerr Hands & Co and that section 14.5 of the Code therefore applied.

The Society said that Mr Kerr would already be in possession of many of the documents contained in the file, because they were items of correspondence from him to the SRA or from the SRA to Mr Kerr. The only documents in the file that he would not already have seen were itemised by the Society as:

- standard acknowledgment from the SRA to the informant.
- a telephone attendance note of a telephone conversation between an SRA employee and the informant advising that the matter was being forwarded to a firm of solicitors who undertake work on an outsourced basis on the Law Society’s behalf.
- letter to the informant confirming that the matter was being forwarded to that firm.
- letter to the firm from the SRA enclosing file.
- standard acknowledgement from the firm to the informant.
- letter to the informant from the firm confirming issues/allegations.
- SRA designation sheet
- SRA risk assessment sheet.

Asked to elaborate, the Society confirmed that the file referred to in the fourth bullet point constituted the file which is the subject of Mr Kerr’s Fol request. The Society also said that the designation sheet and risk assessment sheet contained ‘details as to where the matter should be sent i.e. LCS/SRA, the number of complaints open/closed, and risk scores, complaint patterns and Fraud intelligence indicators which are highly confidential, also guidance to caseworkers’.

In its submission the Society said it had considered the public interest test as it was required to do where the information requested related to its regulatory activities. The Society took the view that in this case the public interest in disclosing the information

requested was outweighed by the public interest in withholding it. In arriving at this decision the Society said it had taken into consideration the importance of assuring the confidentiality of the information collected as part of an investigation. It believed that an expectation that information provided to assist an investigation could later be disclosed in response to a freedom of information request could have the effect of dissuading informants from providing information to the Society in the furtherance of future investigations.

The Society said it believed that in this case the disclosure of the documents requested by Mr Kerr would be likely to have the effect of prejudicing future investigations by removing the assurance of confidentiality from those submitting evidence in relation to such investigations.

Finally, the Society referred to two recent adjudications on the application of s.14.5 in which I had contrasted the Society's obligation to apply the public interest test to the circumstances of each request with its repeated assertion that it was essential to maintain the confidentiality of information given to the Society as part of the investigatory process. The Society said it had accepted the recommendation in those adjudications that it should consider and publish criteria for applying the public interest test in such cases, and said it was currently working on developing such criteria. In the meantime, said the Society, it reaffirmed its commitment to looking at each case on its own merits in relation to its application of the public interest test

4 Submission by Andrew Kerr

In his submission Mr Kerr expressed concern at what he called the very draconian powers of the SRA and he addressed arguments why he should be told of the experience of the SRA's investigating officer in his case (which is not the subject of this adjudication). Mr Kerr made no comments specifically on the Society's reliance upon s.14.5 in refusing to release the SRA file.

5 Further submission by the Society

On 1 August I asked the Society to clarify aspects of its original submission. I noted that its argument about the public interest rested on the need to maintain the confidentiality of information provided to the investigation. I asked whether the Society's concern was because some of the information or allegations provided by the informant were not made known to the solicitor under investigation, or whether it was because the release of such information under Freedom of Information constituted general release to the public.

The Society replied that the latter was the case. It said that allegations were usually made known to the subject solicitor, although it was often the case that the original letter of complaint or report was not forwarded but instead summarised in the 'Explanation With Warning' (EWW) letter (the initial letter to the subject solicitor seeking an explanation of the allegations which the Society has decided to put to him or her).

The Society said it did not always make the allegations known in their entirety to the solicitor concerned, for example if the caseworker decided that some of the allegations were irrelevant and obviously outside the Society's remit, or if the Society decided to make an internal referral to the Fraud and Confidential Intelligence Bureau. In such cases the Society would not disclose everything (or perhaps anything) and would continue its investigation in confidence so that the solicitor was not 'tipped off'. The Society said it did not believe that it was obliged to disclose the allegations or their source under the FOI Code but that where, if, and when it was decided to take action against a solicitor or firm they would be advised of the reasons and be given an opportunity to respond.

The Society said it took the view that the FOI Code allows non-disclosure in these circumstances, as to disclose this information would enable solicitors to make an FOI request to find out what information the Society held about them before the Society was ready to take action. Such disclosures could effectively prejudice any investigation the Society was intending to make.

In this case, the Society said, Mr Kerr would have received a copy of the initial complaint. This would have been the Society's initial contact with the subject firm addressed to Senior Partner dated 22 November 2007, advising that the Society had received a complaint and enclosing a copy of it. Also the allegations had been raised with Mr Kerr in the Society's EWW letter dated 5 December 2007.

6 Adjudication

The information requested by Mr Kerr is clearly about a specific regulatory investigation conducted by the SRA, and as such it falls within the exception to publication specified in s.14.5 of the Code. This is a qualified exemption, and is subject to the test of whether the public interest is better served, in the circumstances of this particular case, by publishing or by withholding the information.

The release of information under FOI constitutes general publication. Information is either freely available, to anyone who asks for it, or it is not, and it would be unsustainable to release material to one person under FOI whilst denying it to another in identical circumstances. In several adjudications I have accepted the Society's argument that publishing the contents of a complaints file might undermine the confidence with which both informants and solicitors must feel able to provide information to an investigation. Having declined a number of requests from complainants to see the files about investigations into complaints they have raised it would be perverse, in the current case of a solicitor seeking information about the investigation of his own firm, to take a different view, and I can see no reason in the circumstances of this particular case to believe that the public interest would be better served by general publication of that part of the information which is not already known to Mr Kerr. I therefore uphold the Law Society's decision in this case.

Richard Ayre

Freedom of Information Adjudicator

15 August 2008