



The Law Society

Adjudication in a matter raised by AD
Law Society Freedom of Information Code
August 2012



1. The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it refused to provide an applicant (referred to here simply as AD) with a copy of all the information held in a file of the Solicitors Regulation Authority concerning a complaint he had lodged against a solicitor who, he said, had failed to pay him his full entitlement from the Estate of AD's late father.

2. The background

On 4 July 2012, having been advised to do so by the Solicitors Regulation Authority (SRA), AD wrote the the Law Society's Information Compliance Manager, Mr Bob Stanley, asking for "any reports, papers, documents or internal correspondence" dealing with the investigation of the complaint.

On 13 July the Society told AD that it would not release the file. Some of the information requested was being withheld under section 14.10 of the Society's Freedom of Information Code ("the Code"). This section allows the Law Society not to release information if it was received in confidence and releasing it would put the Society at risk of legal action either for breaking a confidence or for breaking a contract. The Society said that much of the information on the file had indeed been provided in confidence and the Law Society would be in breach of those confidences if it were to disclose it.

The Society said that the rest of the file was being withheld under section 14.5 of the Code which stated that the Law Society did not have to release information about specific investigations, disciplinary cases or applications arising from its regulatory role. In applying this exception, the Law Society said, it was required to carry out a 'public interest test' in relation to the regulatory information requested. In this case it was the Law Society's view that it would not be in the public interest to disclose the file. The Society said that in reaching this decision it had taken into consideration the fact that information disclosed in response to Freedom of Information (Fol) requests was deemed to have been placed into the public domain, and not just disclosed to the person making the request. The Society told AD that it would clearly not be appropriate for the details of this matter to be placed in the public domain in response to an Fol request.

The Society added that, under sections 17 and 18 of the Code, AD had the right to have this matter referred to the Law Society's independent Fol Adjudicator.

In response, AD asked for the matter to be referred.

3. Submission by AD

On 30 July AD made a submission which gave details of the ways in which he believed his former solicitor had wrongly withheld some of AD's portion of his late father's Estate. He also specified which of the rules of the SRA Code of Conduct he believed the solicitor had breached.

AD said he had lodged a complaint with the SRA in January 2012 but that an investigation had led the SRA to conclude that there had been no such breach. AD said that when he was informed in May that the case had been closed he was advised by the SRA that he could request a full copy of the case file.

AD said that a considerable amount of information about Wills and Estate Administration was available by law as a matter of public record and he cited sections of the Supreme Court Act 1981 to that effect. AD thought that some of the information the Law Society was withholding from him might be in this category.

He then referred to the two sections of the Law Society's Freedom of Information Code which the Society had relied upon in withholding the information from him.

Section 14.10 of the Code allowed the Society not to release information if it had been given to it in confidence and releasing it would risk legal action either for breaking a confidence or for breaking a contract. AD said that although it was possible that some of the information on the file had been provided in confidence and the Law Society could be in breach of those confidences if it were to disclose the information, it would not necessarily be at risk of any legal action if some of the documents were released. He said that several members of the SRA had personally confirmed to him that there was no outstanding regulatory action pending against the solicitor concerned as it was deemed that he had not breached any Code of Conduct. It therefore seemed to AD implausible that the Society would be at legal risk, because the documents would show that the solicitor was not guilty of any wrongdoing. If the solicitor and his firm had done nothing wrong and the SRA investigation merely reinforced that, AD could see no reason for any legal action to be taken against the Society.

AD believed that, if the SRA had taken all his points into account and concluded that both the solicitor and his firm did not breach any code of conduct, there could be no objection to his seeing the SRA's analysis. If, on the other hand, the SRA had concluded that the solicitor had fallen below the standards required, it seemed to AD unusual, in the context of freedom of information, for the solicitor and his firm's position to be protected at the cost of keeping the complainant and the public in ignorance of the findings. AD believed that if the decision rested on the solicitor claiming simply that he had acted on instructions there would seem to be no reason why this information should not be available in the public domain. Restricting the public's access to information obtained by the SRA in the course of its inquiry under section 14.10 of the Code was therefore an incorrect application of its provisions by the Law Society.

Turning to section 14.5 of the Code, which stated that the Law Society did not have to release information about specific investigations arising from its regulatory role, AD said it was critical to note that although the Society was *allowed* not to release such information this was discretionary, not mandatory.

Referring to the fact that the Society was required to carry out a "public interest test" before relying upon this section of the Code, AD said it had been incorrect in its assessment of where the balance of public interest lay. In this case the balance of interest lay in the information not being withheld from the public. AD could see no reason why the Society should refuse to supply the information, because he had asked for it solely to enable him to ascertain that in reaching its decision the SRA had taken full account of all the points made in his original complaint, and that it had taken a reasoned decision. If the SRA had found that the solicitor and his firm's conduct had met acceptable standards, then there seemed no reason why AD could not be told why. If, on the other hand, the solicitor and his firm had failed to meet acceptable standards, both AD and the wider public were entitled to know this information.

AD noted that he had never been asked by the SRA for any additional information beyond what was contained in his original complaint, so he assumed that the SRA had accepted that his submission had been accurate. He said that if, however, the SRA did have any doubts about the information he had submitted he would certainly have no objection to this information entering the public domain.

AD believed there was clearly a public interest in knowing how regulatory complaints were assessed by the SRA, and the specific criteria used to evaluate the validity of a complaint, which would also further reinforce public confidence in both the regulation and the SRA.

AD listed again some of the information concerning his late father's Will which was already in the public domain. He believed that releasing some of the information about the SRA's investigation of his complaint could help other members of the public who were facing similar issues with Will, Estate administration or Probate matters, and so restricting the public's access to information obtained by the SRA in the course of its inquiry was an incorrect application of the Code. He added that he would be happy for any information and correspondence concerned to be put into the public domain in order to strengthen public confidence and regulatory credibility.

Finally, AD went on to list a number of previous Adjudications which he believed to have set precedents which were relevant in this case. He cited extracts of the adjudications in the cases of "JA", Nicholas Gould, and "AZ" – all of which are published on the Society's website.

Referring to the case of "JA" (May 2012), AD drew attention to the adjudicator's expressed view that "there was a public interest in knowing that regulatory complaints are assessed in ways, and according to criteria, which would command public confidence in the regulation" and that "there must be a public interest in seeing how the regulator approaches that task". AD observed that in that case the adjudication had been in favour of the Society releasing a completed RAP form.

Referring to the case of Nicholas Gould (January 2012) AD noted that the Society had belatedly taken the view that an SRA caseworker's notes should be released because it would be in the public interest "to demonstrate the rigour of the process pursued by the SRA caseworker in arriving at her conclusion". AD noted that the adjudicator had welcomed this development.

Finally, referring to the case of "AZ" (October 2011), AD noted that the adjudicator had said that "there might well be a strong public interest in both solicitors and potential complainants having the information" regarding criteria applied by the SRA in assessing complaints. The adjudication had also acknowledged that "the complaints history of a firm might be a legitimate matter of public interest".

AD concluded by saying that he wished to receive, as a minimum, the summary of the findings from the SRA Investigation, a copy of any internal SRA document analysing the arguments and reaching a conclusion regarding his complaint, or any final letter to the solicitor and/or law firm concerned summarising out the outcome of the investigation, in addition to the Risk Assessment Profile (RAP) for the case.

4. Further developments

On 1 August, after AD had made his submission, the Law Society said that it had reconsidered its position and had sent AD a redacted copy of the SRA's Risk Assessment Profile (RAP) which had been used to evaluate his complaint, along with copies of all the documentation that AD himself had provided to the SRA in connection with his complaint. The Society said that the information it had redacted from the RAP consisted of the name of the SRA supervisor involved and the names and identifying numbers of the solicitor and the firm for which he had worked, all of these being withheld under section 16 of the Code. In addition, the Society said it had withheld "some of the comments at the bottom of the RAP form" and some further information under section 14.10 of the Code.

Having received this information, AD asked a number of other questions of the Society about sections of the RAP form. They are not relevant to the matter under adjudication. AD also indicated that he wished the adjudication process to continue in respect of the redacted information.

5. Submission by the Law Society

On 2 August the Law Society made its submission in relation to the redacted information. It said that the names and identifying information concerning individuals had been withheld under section 16 because the Society was not allowed to publish personal data in response to requests under the Code. The Society said that although the redacted information was already known to AD, all information disclosed in response to Freedom of Information requests was deemed to have been placed into the public domain, and not just disclosed to the person making the request. It was the Society's view that it would not be appropriate for the redacted information to be made public in the context of the SRA Risk Assessment Profile form. The Society added that although the name and ID of the firm was not in itself personal data, if published it could easily lead to the identification of the solicitor concerned.

As for the other information withheld, including comments at the bottom of the RAP form, the Society said they had been redacted under section 14.10 of the Code. It said that it had set out the reasons for this in a confidential annex which it provided for the adjudicator, along with the withheld material. The Society said that s.14.10 allowed it not to release information which had been given in confidence, where releasing the information would put the Society at risk of legal action either for breaking a confidence or for breaking a contract.

6. Further submission by AD

In the light of the Society's release to him of the RAP form, but containing specific redactions, AD made a lengthy second submission, of which this is a short summary.

AD first offered a detailed analysis of the SRA's scoring system as shown on the redacted RAP form. [Since the information still being withheld by the Law Society is withheld only under sections 14.10 and 16 of the Code -and therefore the matter I have to resolve is whether the information is covered by a duty of confidence or consists of personal data - I do not consider AD's arguments in this respect relevant to this adjudication.

AD pointed out that the Society had initially relied only upon sections 14.15 and 14.10 of the Code in withholding the information he had requested, and had made no mention of section 16 until after it had decided it could no longer rely upon section 14.5. He argued that sections 14.15 and 14.10 should therefore be the "primary basis" for an adjudication.

Turning to section 16, AD said he appreciated the limits of the adjudicator's authority with respect to section 16, based on previous adjudications, but he said it was clear that the adjudicator was still able to assess whether the information which had been withheld was truly subject to s.16. He noted previous cases where the information in question had been released with appropriate redactions and he hoped that this would also be considered in the current case. He expressed concern lest the Society had mentioned section 16 at this late date solely as a mechanism to protect the solicitor concerned.

AD said that the Data Protection Act recognised that, where certain personal data was otherwise required to be made public, publication should not be prevented by the data protection principles. He cited section 3.1.3 of the Act as saying that personal data could be disclosed where there was a "substantial public interest" if the information was in connection

with any unlawful act, whether alleged or established. He believed that, on these criteria, the Society had misapplied section 16 in withholding the information.

AD said that the Society had repeatedly told him that information released in response to a Freedom of Information request was deemed to have been put into the public domain, not merely provided to the person requesting it. However, he pointed out that on 1 August, when the Society decided to release the redacted RAP form to him, it provided him with copies of documents he had originally lodged with the SRA as part of his complaint and that these contained sensitive personal data about both himself and others, including the solicitor concerned. He believed this was an example of the Society's inconsistency in applying section 16. He said the Society needed to demonstrate its consistent interpretation of the Code by not redacting information relating to the solicitor and his firm on information it released, since it had already released this information to the public in response to AD's request. He said he was particularly concerned that his own personal data had been made available to the public, while the Society still refused to make the solicitor's professional data available, which would be in the public interest.

AD went on to say that the SRA's Handbook and the Solicitors Act 1974 both require certain data about individual solicitors to be made available for inspection to any member of the public as it is in the public interest. He said it would be an incorrect interpretation of the Code if the Society could withhold this exact same information in response to a FoI request. He then listed some of the personal information he had retrieved from the SRA register, including the name and SRA ID number of the solicitor concerned, and the firm he had worked for. AD said it seemed unnecessary, therefore, for the Society to withhold or redact this information.

Turning to the Law Society's reliance upon section 14.10 in withholding some information on the basis that it had been given in confidence, AD said that there was no basis upon which a solicitor providing information to an SRA investigation into his conduct could have a legitimate expectation that this information would automatically be kept confidential. He pointed out that this issue had been discussed in a previous adjudication [Pickerill, *September 2010*] and that the Society had previously confirmed that it did not apply such a blanket exemption to information it received. AD said that restricting the public's access to information obtained by the SRA in the course of its inquiry into his complaint under the section 14.10 was therefore an incorrect application of the Code.

Pointing out the claim on the SRA's website that "Our purpose is to protect the public", AD said it would be in the public interest to disclose information from the investigation, as the public would benefit from understanding the analysis and the final outcome, particularly in light of the scores which the redacted RAP form had disclosed.

AD then turned to the Guidance issued to public bodies by the Information Commissioner's Office (ICO) that even "where the complainant does not have a legal right to the information you may still choose to release it in certain circumstances". In the interest of maintaining confidence in the SRA's regulatory credibility, AD thought that additional information must be released from the file as a key function of a regulatory body such as the SRA was to safeguard public confidence in its investigations by providing open and transparent access to the means by which it reached its regulatory decisions. The Law Society had currently shown a lack of balance in using its powers under the Code to withhold information from the file when there was a definite public interest in maintaining public confidence in the regulatory credibility of the SRA by making further disclosures.

AD said that several members of the SRA had personally confirmed to him that, based on the investigation conducted by the SRA Investigations Team, the solicitor had not breached any Code of Conduct. He thought it therefore implausible that the Society would be at risk of any possible legal action if it disclosed the documents that showed that the solicitor and his

firm were not guilty of any wrongdoing. If, on the other hand, the SRA had concluded that the solicitor had fallen below the standards required, it seemed to AD unusual, in the context of freedom of information, for the solicitor and his firm's positions to be protected at the cost of keeping AD himself and the public in ignorance of the findings. Similarly, he thought that, if the decision rested on the solicitor claiming simply that he had acted on instructions, there seemed to be no reason why this information should not be in the public domain. Restricting the public's access to information obtained by the SRA in the course of their inquiry under the section 14.10 was therefore an incorrect application or breach of the Code by the Law Society.

In addition, AD argued that his request deserved special consideration because there was a considerable amount of information pertaining to Wills, Grants of Probate, Estate Administration and Death Certificates already available to the public by law and therefore deemed to be in the public interest. Specifically, any Will, Certificate of probate and oath signed by the estate administrator was available to anyone at anytime once probate had been granted. He thought it followed that some of the information the Law Society was withholding might already be accessible by request procedures available to the public.

AD then turned to a series of previous adjudications in cases where the Society had sought to rely upon sections 14.10 and 16. He cited the adjudication in the case of Webb-Johnson (*April 2009*) as ruling that the SRA could not offer a blanket assurance to a regulated solicitor that contributions to an investigation would remain confidential, and the Society's acceptance of that principle in the case of Pickerill (*September 2010*).

Referring to the case of Mahmoud (*November 2010*) AD cited the adjudication as saying that, although a file had contained the name and address of the solicitors concerned, that seemed more likely to be regarded as professional rather than personal data, and the adjudicator had decided that the information was not exempt from disclosure under the Code. In that case the Society had belatedly decided that the information was not exempt from disclosure under the Code.

Referring to the case of Pickerill (*June 2010*) AD observed that the Law Society had said that although the information requested contained personal information relating to a solicitor, this was largely in the public domain as a result of the publication of an Adjudicator's findings, and this meant that the information was no longer 'personal data'.

Finally, AD cited the case of Gould (*January 2010*) in which the Society had decided to release the handwritten notes of an SRA caseworker "in order to demonstrate the rigour of the process pursued by the SRA caseworker in arriving at her conclusion". He noted the adjudicator's comment at the time that this was a welcome development which might impact on future requests under the Code

Based upon all these arguments, AD then said he would like to revise his original request for information, and listed specific documents he wanted the Law Society to provide. [This request has been lodged direct with the Law Society].

In a further submission, on 10 August, AD said that the Society had been inconsistent over its assessment of the public interest. He recalled the recommendation in an adjudication in 2008 that the Society should adopt and publish a clear set of criteria to apply when considering the balance of public interest. He thought it extraordinary that the Society should rely upon the Data Protection Act in withholding information without defining "personal data" as narrowly as he believed the law allowed. He again cited provisions of the Act where, he said, personal data must be made available in the public domain and where this was in "the substantial public interest". He thought it was wrong to use the DPA as a reason for non-disclosure if, within the same Act, reasons existed which actually supported disclosure.

7. Further developments

Having read both AD's second submission and the material which the Law Society continued to withhold from him, on 8 August I asked two further questions of the Society.

First, I sought the Society's reaction to AD's suggestion that the Society itself had breached section 16 of the Code, and the provisions of the Data Protection Act, by supplying him in response to his FoI request with information which included personal data both about himself and about the solicitor. In reply, the Society said that it "was not providing [AD's] personal data under the Code". The Society said it should have made it clear to him that copies of the information he had sent in to the SRA were being provided to him alone and not being released to the public at large under the Code. The Society added that it certainly had no intention whatsoever to further disclose AD's personal data to anyone else and, as far as personal data relating to the solicitor was concerned, the Society would not be releasing this under the Code for the reasons set out in its submission.

Second, having read the Validation and Quality Assurance Form (which was being withheld from AD under section 14.10 of the Code because the Society believed it had a duty of confidence not to disclose the information it contained) I questioned two sentences within it, namely *"However, whether or not the money belonged to [AD] and whether or not the firm were entitled to retain the sum in this way is a legal issue that is not for us to determine. This is something that I consider [AD] needs to seek legal advice on."* I asked why that sentence, apparently confirming that the SRA felt unable to say whether or not the solicitors had acted lawfully, should have been withheld from AD since it appeared to contain no personal data and no information in respect of which the Society could owe a duty of confidence. In return, the Society promptly provided the information to AD and apologised for having earlier withheld it.

8. Adjudication

This case has highlighted again the frustration experienced by some complainants to the SRA who, having lodged a complaint about a solicitor, find it difficult or impossible to establish the extent to which it has been investigated or what the precise conclusions of any investigation may have been.

The Society's belated decision not to rely upon section 14.5 of the Code in this case is welcome. It is, of course, right that the public interest must be judged on a case-by-case basis, taking full account of the circumstances in each individual case. But there must be a presumption, in the light of recent adjudications and recent decisions by the Law Society, of a public interest in releasing information which will demonstrate that a proper regulatory assessment has been made in respect of complaints made by members of the public against solicitors. It seems to me that the stance formerly taken by the SRA that it would not provide information to complainants about the outcome of their complaints is no longer publicly defensible, if indeed it ever was.

During the course of this adjudication the Law Society shifted its ground on two occasions, releasing further information to AD. This adjudication is therefore confined to whether, in redacting some information from the RAP form before releasing it to AD and in withholding all but two sentences from the Validation and Quality Assurance Form, the Society acted appropriately in accordance with the Code in applying the provisions of sections 14.10 and section 16.

The Society's reliance upon section 16

AD, in one of his submissions, objected to the fact that the Law Society had not originally relied upon section 16, and had chosen to do so only after it had withdrawn its reliance upon

section 14.5. He argued that this adjudication should therefore use only sections 14.5 and 14.10 as its “primary basis”. I have some sympathy with his frustration, but I can see no practical benefit to limiting this adjudication in the way that he suggests, because the Society would doubtless decline to release the information, again citing section 16, and the whole process would merely start again.

It is crucial to recognise the difference between section 16 and the rest of the Code (which the Society observes on a voluntary basis). Section 16 reflects a legal duty upon the Society, under the Data Protection Act, not to release personal data in response to an FOL request. As I have made clear on numerous occasions, I am not in a position to rule on matters of law, and it is for the Information Commissioner and ultimately the Courts to determine matters of interpretation of the DPA. All I can do is to express a personal view. In my view, AD has misunderstood some of the provisions of the DPA, and it does not permit publication of personal data simply on the grounds that there may have been an allegation of an unlawful act. Nor does the fact that certain personal data may be lawfully published elsewhere mean that the same data should be released under an unrelated FOL request. I believe that the Society acted reasonably in accordance with section 16 of the Code in withholding the name of the SRA supervisor in this case, and the names and identifying numbers of the solicitor complained of and of the firm for which he worked. The fact that the latter may be in the public domain elsewhere, as well as being known already to AD, does not mean that they should be published in response to an FOL request.

On 1 August, when the Law Society sent AD a redacted copy of some of the information it had previously withheld from him, it also provided copies of the documents he himself had originally supplied to the SRA, and they contained personal data, both about AD and about the solicitors who were the subject of his complaint. This led AD to conclude that the Law Society had itself breached the Code and the Data Protection Act in supplying him with personal data in response to his FOL request. I am satisfied that the Society provided this information to him in good faith, intending that he should receive as full a copy of the entire SRA file as it felt able to release, including all the material he himself had originally supplied. I am also satisfied with the Society’s assurance that it would not have released, and will not release, the personal data to any third party. However, the Society should have made it crystal clear to AD that it was supplying him copies of his own material, complete with the personal data it contained, merely as a courtesy to him and not as a response to his FOL request.

The Society’s reliance upon section 14.10

Section 14.10 allows the Society to withhold information it has been given in confidence if releasing it might lead to legal action for breach of confidence or of contract. I do not accept AD’s argument that, even if some of the information withheld by the Society had been received in confidence, there is no real risk of legal action being taken in the event that the Society breaches that confidence. AD is not in a position to make such a judgement, and in this instance it seems to me that such a judgement would be entirely wrong.

The Society has provided the adjudicator, in confidence, with the background to the confidential nature of the information referred to in the redacted notes at the end of the RAP form and referred to in detail throughout the withheld Validation and Quality Assurance Form. Having seen documentation provided to me by AD himself, it appears that some of the information provided in confidence to the SRA by the firm of solicitors is already known to AD, but that one important element of it, however, may not be. But whether or not it is known to AD already, I am satisfied that it was all properly provided in confidence by the solicitors to the SRA, and it seems to me entirely proper that the SRA should feel bound by that duty of confidence. The Law Society has accepted in previous cases that there may be occasions when information received in confidence should nonetheless be released, but I am clear that there is no strong public interest in breaching the solicitor’s confidence in this case.

I therefore find for the Society in the information it continues to withhold under sections 14.10 and 16 of the Code.

9. Postscript

As the adjudication has sought to make clear, I believe that the Society acted appropriately under the terms of the Code in withholding from AD some personal data and some factual information which it had been given in confidence by the solicitor under investigation. But this case seems to me to have raised wider issues.

The Law Society says that AD was told verbally that the conclusion of the SRA's investigation was that he should seek independent legal advice if he wished to recover the money he believes he is owed from his father's Will. The Society accepts that this was not conveyed to him in writing. Crucially, it seems to me improbable that, had AD not taken advantage of the appeal to the adjudicator permitted under the Code, he would ever have received what appears to be the other crucial sentence of the SRA's conclusion, namely *"whether or not the money belonged to [AD] and whether or not the firm [of solicitors] were entitled to retain the sum in this way is a legal issue that is not for us to determine."*

As part of the adjudication process I put it to the Law Society that members of the public who feel they may have been wrongly treated by a solicitor might reasonably assume that the SRA would investigate any allegation of wrongdoing. I asked for a clear public statement of the limits of an SRA investigation. In response they Society provided the following statement, parts of which I have italicised:

The SRA regulates solicitors, the firms in which they operate and all those working within those firms. *Our ability to investigate is generally limited to the professional practice of the solicitors, firms and staff* although in some cases we may also decide to investigate the conduct of a solicitor in their personal capacity, for example if they have been convicted of an offence, or they have discriminated against someone.

Those that we regulate are bound by the SRA Principles 2011 which include obligations such as upholding the rule of law, acting in the best interests of each client and acting with integrity. The Principles form part of the Handbook which set out all the conduct rules and regulatory requirements. *Any investigation undertaken is limited to considering the obligations set out in the Handbook.*

We cannot decide on legal issues, although there may sometimes be an overlap between the law and the obligations in the Handbook. For example, only a Judge can decide if there has been contempt of court. But the SRA can investigate issues which could amount to contempt of court, such as failing to comply with court orders or misleading the court.

Occasionally, there may be circumstances which would limit our ability to investigate, for example, the existence of other civil or criminal proceedings."

Richard Ayre
Freedom of Information Adjudicator
16 August 2012