



The Law Society

Adjudication in a matter raised by AK
Law Society Freedom of Information Code
June 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 (known here as AK) with some of the information he had requested concerning the performance of ethnic minority candidates in legal qualifications at certain universities.

2. The background

On 22 May AK emailed the Law Society to ask the percentage of ethnic minority solicitors practicing in the immigration sector in 2011 and 2012. Later that day he also asked what measures the Law Society or SRA took to ensure that there was no discriminatory conduct by course providers in marking students in professional examinations such as the Legal Practice Course (LPC). He also asked for specific information about four course providers - City University, University of Westminster, College of Law and BPP: how many students had failed in the years 2009 and 2010 in the LPC and their breakdown in terms of ethnicity; and how many students had received commendation and distinction in 2009 and 2010 in the LPC course and their breakdown in terms of ethnicity.

On 7 June the Society provided AK with a spreadsheet of the information he had requested, but with substantial sections redacted. The Society said that this was because the redacted information was sensitive personal data relating to individuals and, under section 16 of the Society's Freedom of Information Code ("the Code") could not be released.

In reply, AK observed that the statistics provided had not been disclosed for City University and the University of Westminster, and he asked for the data relating to those two institutions too. The Society answered that the data sets for both City University and University of Westminster were small enough to potentially lead to the identification of individuals, and that was why they had been withheld.

On 7 June AK asked the matter to be referred for adjudication, and the Society provided me with the email exchanges between the two parties. I wrote to AK and to the Society inviting their written submission, and I invited AK to look at previous adjudications relating to the Society's reliance upon section 16 of the Code. I explained that, unlike all the other sections of the Code (which the Society says it will abide by on a voluntary basis, because it is not subject to the Freedom of Information Act), section 16 reflects the statutory duty that the Society has under the Data Protection Act not to disclose certain personal data. I explained that, although I was prepared to express a judgement as to whether the Society had properly applied the Data Protection Act provisions, I had consistently declined to adjudicate in relation to section 16 cases because, if I were to do so, I might require the Society to release material publication of which it felt would constitute an offence under the Act.

3. Submission by the Law Society

On 15 June the Law Society made its submission. The Society also provided the adjudicator with a spreadsheet of the full information AK had requested, together with a redacted copy of the same information as it had been supplied to AK.

The Society explained that it redacted any row of information on the spreadsheet where any of the percentages in that row would produce a number of 10 or fewer students in that category. It had done this to avoid the possibility of the publication of sensitive personal data in breach of the Data Protection Act.

The Society also provided the adjudicator with a Decision Notice dated 25 October 2010 (reference: FS50269949) from the Office of the Information Commissioner, outlining the Commissioner's reasoning for supporting a decision by the Royal Berkshire NHS Foundation Trust to withhold certain information relating to the ethnicity of doctors working for the Trust. The Society believed that this case was analogous to the request made by AK.

In addition, the Society provided the adjudicator with a copy of its response to a request for information AK had made on 21 July 2011. It said that AK had argued that he could not see why his current request had been handled differently from that one. However, the Law Society pointed out that in the 2011 case the information he had asked for had already been published by the universities concerned, and that it had not included a breakdown by ethnicity.

The Society said that in its view it must not disclose statistics in relation to ethnicity that, if published, could lead to the identification of individual students in breach of the Data Protection Act.

4. Submission by AK

On 27 June AK made a lengthy submission, which is summarised here. He said he thought the Society's reasoning was unjustified. The Society had not clarified on what basis it had decided that the data sets concerned had been small enough to risk identifying individuals. The Society had not cited any authority (statute or case law or guidance) to support its decision.

AK said he did not think it was possible to identify individuals from any such disclosure, since the information requested was statistical in nature and would be anonymous. He cited a legal case (*Durant v Financial Services Authority 2003*) in which, he said, the Court of Appeal had defined personal data and had said that not all information retrieved from a computer search against an individual's name was personal data within the Act. He said the Court had also held that data gathered during the course of an investigation which referred to a data subject was data about that investigation, not the personal data of the subject (unless it affected his privacy). AK said this suggested that mere incidental reference to an individual with no further information about him or her did not constitute information which "relates to" the individual. He believed that the statistical information requested at best could be described as an incidental reference and was anonymous in nature. Identification of the individuals by cross referencing the requested anonymous statistical data alone was not possible.

AK cited a further case (*Ferguson v IC and The Electoral Commission (EA/2010/0085)*) in which the Court had held that "to constitute personal data the information should have the data subject as its focus and affect the subject's personal privacy. Identification that a person was involved in some matter which has no personal connotations will not amount to personal data".

AK said that, in any event, the disclosure of the information would be fair and lawful. He cited a further case (*Department of Health v IC [2011] EWHC 1430 (Admin)*), where the issue was concerned with the disclosure of statistical information for abortions which was alleged to be sensitive personal data. He said the High Court had held that the information did not amount to personal data as it was anonymised data which would not, if disclosed, lead to the identification of a living individual and that, in any event, the extremely remote risk of identification meant that disclosure of the data would have been compatible with the fair and lawful processing principle contained in §1 of schedule 1 to the DPA and was proportionate and justified when balanced against important legitimate public interests in disclosure.

AK said that it was fair to interpret from their communications that the Society had received the information from the universities in question (which were public authorities), and that the Law Society had not claimed that revealing this information would be a breach of confidence. The universities had therefore already disclosed this information and the Law Society did not have a direct duty to the data subjects. He also wished to suggest that the individuals concerned had given their consent to publication of the statistical information and he attached a link to the City University's online registration instructions for students. The most relevant part of these instructions told potential students that "we have to collect this information as part of our HESA (Higher Education Statistics Agency) return to Government: the information is held within our statistics and your personal details are not linked to those statistics." AK also cited an identical text from the University of Reading's website, but which had the added sentence "This is also used by other associate offices and may sometimes be referred to as 'race'".

AK said that the information as to the ethnicity of the applicants / students was requested by the Universities at the time of enrolment. He believed that when collecting the information the Universities had made it clear that personal details were not linked to the statistics which would be generated from their ethnicity details. Applicants were also allowed to refuse to reveal such details. He argued that the applicants could not reasonably expect the statistical information as to their race to remain confidential and therefore, those who disclosed the information had given their express explicit consent that statistical data pertaining to that information could be made available. In any event, providing such statistical information to the HESA was for publication purposes.

AK added that, on a personal basis, as he had studied at the City University, he had not expected information as percentage or numbers about ethnicity would be kept confidential. He also pointed out that his request to the Law Society had given it the option of providing the information in percentage terms, therefore without revealing the number of individuals belonging to any ethnicity.

AK said he was involved in equal rights work and had a legitimate interest in receiving such data and he believed that revealing it would help to ensure racial equality and adequate protection for the rights of others. The release of the information was essential to find out if the universities' equal opportunity policies were successful and, if not, to promote equality and to further ensure ethnic minority students were fairly assessed. He could see no harm that could be caused to the interests of the data subjects, and the need for release of the information was overwhelming and for the benefit of ethnic minorities. The disclosure in all circumstances would be fair and lawful.

AK then made some observations about the pass percentages of ethnic minorities in different years in a particular University. He thought it would be unfair and highly questionable to allow these universities to shield behind any unreasonable reliance on the Data Protection Act for the sake of avoiding disclosure of highly relevant information.

AK pointed out that other public authorities such as the Driving Standards Agency made their pass rates public, expressed by ethnicity of the individuals, even in test centres where the attendance rate was less than 10 persons in the year. He cited a Department for Transport website to substantiate this.

Finally, AK referred to the ICO case cited by the Law Society in its submission, concerning The Royal Berkshire NHS Foundation Trust. He said that that matter had been concerned with employees of that organisation, who were public authority employees, and not applicants / students who were widely scattered and therefore could not be identified.

5. Further enquiries

On receipt of AK's submission I invited the Society's comments upon his observation that the Society had not suggested having received this information from the Universities in confidence; that it was the Universities themselves who, by disclosing it to the Society, had published it; and that the Society owed no direct duty to the data subjects.

In response, the Society accepted that it did not owe a direct duty of confidentiality to the students but argued that this did not detract from its obligations under the Data Protection Act (DPA). The Society continued to assert that the redacted information had been withheld because to publish it could lead to the identification of the individuals concerned in breach of their rights under the DPA.

The Society said that the Universities had provided the information only to the Law Society in order for it to carry out its regulatory functions; they had not published the information under the Freedom of Information Act. The significant difference was that if the Society disclosed the information under its Code it would be deemed to be published to the world at large and would therefore put the Society in breach of the DPA. Similarly, the Universities would be in breach of section 40 of the Freedom of Information Act if they published the information in response to a request under that Act.

6. Adjudication

If this were simply a matter of deciding where the balance of public interest in disclosure lay it would be an easy case to deal with. There is a clear public interest in publication of the number of, and pass rates of, ethnic minority candidates in Universities. However, the question is not whether publication is in the public interest, but whether publication of those parts of the statistics which have been withheld by the Society would breach the Data Protection Act because there is a significant risk that it might lead to the identifying of personal information (namely, their ethnicity) about individuals.

As I have repeatedly made clear, decisions made under section 16 of the Code relate to the Society's judgement of its own legal obligations under the Data Protection Act. As such, I feel unable to countermand those judgements, though I am free to offer a view as to their appropriateness. I explained this at the outset to AK.

AK has cited several legal precedents which he believes reinforce his view that the data concerned would not constitute personal data under the Act. But this is not a Court of Law and I am not a judge. By contract, the Society has cited the Information Commissioner's decision in the case of the Royal Berkshire NHS Foundation, in which the Commissioner judged that information about the ethnicity of individuals was clearly sensitive personal data and could not legally be released unless it was truly anonymised. In that case, the Commissioner accepted that the numbers of individuals involved was so small that it was likely that it, if released, it could be tied to identifiable individuals. That case seems to me to be directly analogous to the current matter.

I accept AK's argument that there is no clear definition of how small a data set has to be to present a realistic risk that individuals might become identifiable if it were released. However, I think that the judgement made by the Law Society - to withhold data which might produce a subset of ten or fewer individuals - is a reasonable one and is in line with the expressed view of the Information Commissioner.

As I made clear throughout, even if I were to be persuaded that the Society had misjudged its obligations under the Data Protection Act in this case I would not feel able to require the

publication of information if the Society believed it would constitute an offence to do so. However, I am not so persuaded in this case. I think AK's requests were entirely reasonable, but I also think the Society has acted reasonably in providing him with much, but not all, of the information, consistent with what it believes to be its duties under the Data Protection Act.

Richard Ayre
Freedom of Information Adjudicator
29 June 2012