



The Law Society

Adjudication in a matter raised by Dr Helen Bright

Law Society Freedom of Information Code

September 2011

1. The issue.....	2
2. The background	2
3. Submission by The Law Society.....	2
4. Submission by Dr Bright.....	3
5. Further enquiries	4
6. Adjudication.....	4

1. The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it refused to provide Dr Helen Bright with copies of some of the Exhibits which had been provided as part of a Witness Statement to a hearing of the Solicitors Disciplinary Tribunal.

2. The background

On 18 July 2011, continuing earlier correspondence with the Solicitors Regulation Authority, Dr Helen Bright asked for a copy of a Witness Statement made by a doctor (referred to here as Dr P) when he was an expert witness at an oral hearing of the Solicitors Disciplinary Tribunal. On 5 August the Law Society's Information Compliance Manager, Mr Bob Stanley, provided her with a copy of the Witness Statement, which consisted of nine brief paragraphs, referring to six attachments which Dr P had provided as Exhibits for the Tribunal. Dr Bright then asked for copies of the six Exhibits.

On 12 August Mr Stanley provided her with two of them, but he said that the Society was withholding the remaining four under section 16 of the Society's Freedom of Information Code ('the Code'). He said that this was because they contained 'sensitive personal data' relating to third parties and that to publish these exhibits would be a breach of the Data Protection Act. In response, Dr Bright asked him to provide redacted versions.

On 19 August Mr Stanley said he could not do so, because the exhibits contained nothing other than sensitive personal data relating to third parties. Dr Bright replied, saying that Mr Stanley had erred in law. She said that redacted Expert Reports could be provided to journalists, in the public interest. She asked why personal information would be a problem because she would have no idea [given the redactions] which person it referred to.

Three days later Dr Bright emailed Mr Stanley again, asking if he was going to provide a redacted copy. She said she would like to appeal against the Society's decision and she sent him a link to what she called the case law. Dr Bright said that, essentially, the Society could not withhold the documents on the grounds that they contained personal information, because there had to be transparency of the disciplinary process. She added that she was also a journalist and had written about the case which had come before the SDT. Dr Bright sent Mr Stanley a copy of an article she had written about Dr P whose expert witness testimony to the SDT she had asked for.

On 23 August Mr Stanley referred the matter to me for adjudication, together with the relevant correspondence between Dr Bright and the Society. On 24 August I asked the Society to provide a submission in support of its decision to refuse her some of the information she had requested, and I invited Dr Bright, if she wished, to make a submission as to why she believed the Society had not acted in accordance with the Code.

3. Submission by The Law Society

On 8 September the Society made its submission. It said that the four withheld exhibits contained Dr P's professional opinions on the health of a number of residents of a Home for elderly people in June 2003. Specifically, the witness had been instructed to prepare a report in relation to the mental capacity of those residents and the likely effect on their mental and physical health of a possible move from the Home. The Society said that this was in the context of the possible closure of the Home by Bristol City Council.

The Society said that the withheld exhibits contained medical reports prepared by Dr P on residents, and this was clearly sensitive personal data as set out in section 2 of the Data Protection Act [‘the DPA’].

The Society said that the content of the withheld exhibits was such that redaction of the sensitive personal data would leave no meaningful information to disclose.

4. Submission by Dr Bright

On 8 September Dr Bright provided a copy of the article she had referred to as ‘case law’ and said she hoped it would be sufficient to support her request for adjudication. In reply, I reminded Dr Bright that any submission she might choose to make should address specifically the question of why, in refusing her some of the information she had asked for, she felt that the Society had not acted in accordance with its Code.

On 17 September Dr Bright submitted more than eight hundred pages of documentation, including appendices of statutes and Court judgements. In summary, Dr Bright explained that she leads an organisation called Doctors4Justice and that she has extensive experience in psychiatric medicine, having herself acted as an Expert Witness on many occasions. Dr Bright said that, following disclosures she had made in 1999 in what she said was the public interest, she had been victimised by Dr P over twelve years through his work with the General Medical Council. As a result she had lost her medical career, the pension she would have accrued, and her property, and her health had suffered.

In essence, Dr Bright’s challenge to the Law Society’s decision centred on what she believed to be the Society’s over-zealous interpretation of the requirements of the DPA. She quoted the section of the Code under which the Society had refused her the information she wanted: ‘if you ask for details of a personal nature about someone else, the Data Protection Act 1998 says we cannot let you have it’. But Dr Bright pointed that the DPA defined personal data as being data related to ‘a living individual who can be identified’. She said that the Society had not indicated whether any of the elderly individuals referred to in Dr P’s Exhibits in 2003 were still living. She also pointed out that, in connection with the Freedom of Information Act [‘the FoIA’] the Information Commissioner had given guidance that requests for third party data could be refused (by public authorities) only if disclosure would breach any of the data protection principles defined in the DPA.

Dr Bright went on to outline some of those principles and to argue that release of the exhibits would not breach them. She further cited guidance from the Information Commissioner that public authorities should ask themselves whether disclosure would cause unnecessary or unjustified distress or damage to the person the information was about: Dr Bright suggested that release of suitably redacted versions would not do so. In response to a further question from the Information Commissioner’s guidance – ‘would the third party expect that his or her information would be disclosed to others?’ – Dr Bright argued that, if they had mental capacity, their answer would be ‘yes’.

Again, she cited the Information Commissioner as inviting the question ‘had the person been led to believe that his or her information would be kept secret?’ Her belief was that this was unlikely, and certainly the Society had not claimed it to be the case.

Dr Bright emphasised that she wanted to see the exhibits because she questioned whether Dr P’s Expert Report had been justified in the light of available scientific evidence at that time. She wanted to be able to take the evidence to the High Court to seek Judicial Review of the GMC’s decision not to investigate her claims.

Turning to the Information Commissioner’s Guidance that information ‘about the home or family life of an individual...is likely to deserve protection’ Dr Bright said that even this was not an absolute exemption from disclosure. She was content that places, names, and the age of individuals could be redacted, and other personal information about their family lives.

She believed that their mental states were unlikely to be so exceptionally unusual as to enable an individual to be identified from any reference to them.

Dr Bright gave many reasons why there was a strong public interest in the information about Dr P's Expert Reports being made available. In summary, she said that in refusing her request the Society had applied an absolute exemption where only a qualified one applied.

5. Further enquiries

I attended the Law Society's offices on 13 September to inspect the material which had been withheld. The first Exhibit consisted of Dr P's assessment of the physical and mental health of a number of named residents of the care Home. The second contained his assessment as to whether, and if so how, the residents could be safely and effectively transferred to a new Home. The third contained his more detailed assessment of the prognosis under various different circumstances for three named residents. The fourth contained Dr P's answers to four supplementary questions, again concerning the degree of jeopardy to each patient under a variety of different scenarios involved in moving them to a new Home.

6. Adjudication

In many previous adjudications where the Law Society has relied upon section 16 of the Code I have asked that appeals under this section should be removed from the Adjudicator's remit. The reason is that, unlike the other provisions of the Code (which are adhered to by the Society on a voluntary basis as a matter of policy) section 16 reflects the fact that the Society has statutory duties under the DPA in respect of its handling of personal data. It must be for the Law Society itself, not for an independent Adjudicator, to determine how to fulfil its legal obligations, because the Law Society rather than the Adjudicator would be open to prosecution if it were found to be in breach of the law. I cannot, therefore, by way of an Adjudication, instruct the Society to do anything which it believes to be contrary to the DPA.

Turning to the contents of the Exhibits themselves, it is hard to imagine categories of personal data more sensitive than the medical and mental histories of, and the prognoses for, named individuals, including in several cases an estimate of their likely life expectancy under various scenarios. The Exhibits run to a total of forty-four pages and, in my judgement, clearly fall into the category of sensitive personal data defined by Section 2 of the DPA.

Releasing this information to Dr Bright in an unredacted form would certainly breach section 16 of the Code as it is currently worded, and **the Society is therefore within its rights under the Code in withholding the information.**

That begs the question whether section 16 of the Code is too widely drawn. By condensing the entire contents of a sophisticated Act of Parliament like the DPA into a single sentence, section 16 of the Code may not be worded in a way which is consistent with the principles of the FoIA which the Law Society espouses.

It is for the Courts, not for an Adjudicator, to settle questions of interpretation of the duties imposed by the DPA, but at the very least it seems to me that, when relying upon section 16 of the Code, **the Society should state clearly and precisely to an applicant why it believes that releasing the requested information would breach the DPA**, and in reaching its decision the Society should give due weight to the Information Commissioner's Guidance.

I do not believe that Dr Bright's motives in seeking Dr P's Expert Report are relevant to this Adjudication, and certainly I can take no view as to the rights and wrongs of her claims against him. However, she makes a very good case that there is a strong *prime facie* public interest in Expert evidence presented to a Court or Tribunal being made publicly available,

as part of the transparency that justice requires. Again at the very least I think that, if the Society continues to believe it must withhold the information, Dr Bright deserves to be given a precise explanation, grounded in the terms of the DPA, as to why.

The remaining question on which I can advise is whether redaction could be effective in eliminating any possibility that the individual patients referred to by Dr P might be identifiable. The Society believes that redaction 'would leave no meaningful information to disclose'. However, I am clear that, even if every possible item of sensitive personal data were redacted, some of the remaining text in each exhibit would be comprehensible. Whether it would satisfy Dr Bright's needs seems to me not to be a matter for the Society to determine. It would be a dangerous precedent for the Society to decide, in effect, what information is *worth* releasing in response to a request.

My own opinion is that careful redaction, removing not only the names and ages of all the patients concerned but also all references to their relatives, and to any previous care homes in which they had been resident, would render the data no longer sensitive or even personal. I recognise that releasing information under Fol is tantamount to publishing it, and makes it available to anyone else who may ask for it. Redaction must therefore be sufficient to ensure not only that Dr Bright cannot identify individuals, but that no-one else can do so either, irrespective of how much information they might already know about those individuals.

I therefore find that, although the Society acted in this case in accordance with its Code, in the interests of Freedom of Information it should revisit the possibility of redaction, though a final decision on how to comply with the law must be for the Society itself and not for me. In the event that the Society remains of the view that it is unable to release the documents in any form it should provide Dr Bright with a clear indication of precisely why, under the terms of the Data Protection Act, it feels it cannot do so.

I also recommend that the Society should reconsider, in a future re-drafting of its Fol Code, the best way to reflect the requirements of the Data Protection Act.

Richard Ayre
Freedom of Information Adjudicator
27 September 2011