



The Law Society

**Adjudication in a matter raised by EJ, GJ & HB**  
Law Society Freedom of Information Code  
October 2012



## **1. The issue**

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it refused to provide applicants (known here simply as EJ, GJ & HB) with a copy of the professional legal advice taken by the Solicitors Regulation Authority in connection with its investigation of complaints lodged by them against a firm of solicitors.

## **2. The background**

On 6 July 2012 EJ & GJ wrote separately to the Solicitors Regulation Authority (SRA) concerning its investigation of complaints they had made against a firm of solicitors. They asked from whom the SRA had taken legal, financial and any other advice as part of its investigation and the professional qualifications of those advisers. They also asked for a copy of the advice the SRA had received. On 10 July HB wrote with an identical request.

The Law Society's Information Compliance Manager, Mr Bob Stanley, replied. He gave each of them the name of the firm from whom the SRA had sought advice but said that the Society was withholding a copy of the advice itself under section 14.8 of the Society's Freedom of Information Code ("the Code"). This allowed the Society not to release information if it consisted of advice from the Society's legal advisers relating to Court action the Society might be involved in or other legal issues affecting the Society, and its release might harm the Society's legal interests.

Mr Stanley told the applicants that, under the Code, they had the right to have the Society's decision referred to the independent adjudicator. In response they asked for the matter to be referred.

On 3 September I wrote to EJ, GJ and HB to outline the adjudication procedure and to invite each of them, if he wished, to make a written submission as to why he believed the Society had acted contrary to the Code in withholding some of the information he had asked for.

## **3. Submission by the Applicants**

Each of the applicants made a short submission.

EJ said he considered he was entitled to a copy of the legal advice, which he said the SRA had relied upon in clearing the legal practice he had complained about of any wrongdoing. He simply wanted to know why the SRA had reached that decision, because he believed that there had been serious breaches of the Regulations, including conflicts of interest.

He believed that the purpose of the SRA was to protect the users of legal services and it should not protect its own interests or the interests of solicitors by withholding information for fear of potential legal action.

GJ said that the purpose of the SRA was to protect the users of services provided by solicitors, but that it had used legal professional privilege to deny him a copy of the legal report it had obtained as part of its investigation into the complaint he had made. He said that the SRA had relied on the report to clear the firm of solicitors of any wrongdoing, and he required sight of it to understand why the SRA had reached its conclusion, because his complaint remained unanswered.

He said that the Law Society had failed to provide him with details of the legal action the SRA was, or thought it might be, involved in, which might be jeopardised by release of the

legal advice. He believed that that contradicted the Society's purpose of protecting the users of legal services. As what he called "a client" of the SRA, GJ believed he was entitled to a copy of the report.

HB said that the SRA had obtained the disputed professional advice as part of its investigation of his complaint. He questioned who was the SRA's "client" in this respect and said he would have expected that he himself was the client and therefore entitled to receive a copy of the legal advice.

#### **4. Submission by The Law Society**

On 4 October, after a delay caused by staff illness, the Society made its submission. The Society said it had told the applicants the name of the firm from which the SRA had taken legal advice in connection with its investigation of their complaints, and it had confirmed that that firm was a recognised body regulated by the SRA.

The Society said that the professional qualifications of the solicitor who had provided the legal advice to the SRA constituted personal data and was therefore withheld under section 16 of the Code. The Society apologised for not having made this clear in its response to the Applicants, but wished to make it clear in its submission. In reference to the specific wording of the applicants' requests, the Society also clarified that the SRA had not received any financial or other advice as part of the investigation; the advice received had been legal advice only.

The Society said it was quite common for the SRA to seek external legal advice in pursuit of its investigations as it did in this case. The Society had reviewed the advice and believed it was clear that it should not be made public. To publish the advice would have the effect of waiving privilege and there would be no public interest in doing this. If the legal advice were to be provided to the requestors under the Code it would also have to be provided to the firm of solicitors which had been under investigation, and to the individual solicitor against whom the complaint had been made, and the Society believed it would be contrary to the public interest to do so in that it would be prejudicial to the SRA's investigations.

#### **5. Further enquiries**

On 15 October I visited the Law Society's offices in London and examined a substantial file on its investigation of the complaints by the three applicants. I read the contents of that part of the file containing its exchanges with the firm of solicitors from whom it had obtained legal advice. A number of the documents were clearly marked "Professional Privilege", though the vast majority were not.

Having read the documents I asked further questions of the Law Society. I asked, since the legal advice did not appear to relate to "court action we are or may be involved in" (the wording of section 14.8 of the Code), whether I was right in assuming that the Society was relying upon the remaining wording of that section, namely "other legal issues affecting us"? If so, I asked what those other legal issues were and how might they have affected the Society? Also, in what ways could the release of the advice harm the Society's interests?

In reply, on 23 October the Society referred to specific correspondence between the SRA and the firm. The Society said that this showed that the advice obtained from the firm was obtained largely to assist in the preparation of a Rule 5 Statement (the statement which accompanies an application to the Solicitors Disciplinary Tribunal (SDT)). One letter from the SRA had also instructed the firm to advise on who should be referred to the SDT. The Society said that the Rule 5 statement was a crucial document in the regulatory process and

was the foundation of any legal proceedings that might follow in the SDT. The Society believed that the advice it had received did therefore fall within the first part of the Section 14.8 exemption as legal advice relating to potential court action.

The Society added that it was in the very nature of the context in which such advice was sought and given that it was confidential. Disclosure of what it believed was privileged material would be harmful to the Society's legal interests in that it could impede the full and frank exchange of information and advice which was so essential to the Society in the exercise of its regulatory functions.

In light of the fact that the requesters' original complaints against a firm of solicitors had apparently been dismissed by the SRA, on 23 October I asked the Society to elaborate upon its statement that disclosure of the legal advice it had obtained could be prejudicial to the SRA's investigations. In response the Society supplied details of current SRA investigations into the same firm.

## 6. Adjudication

This has been a very difficult issue to resolve. Not for the first time, an appeal for adjudication arises from the fact that complainants about a solicitor feel that they have not been given sufficient information by the SRA as to why their complaint has been dismissed. In those circumstances it is entirely natural that they should wish to establish more about the reasoning behind the SRA's decision.

Against that, the principle of legal professional privilege is an important one, and one that is recognised and relied upon day and daily in law. Without it, solicitors would feel inhibited in giving free and frank legal advice to their clients. I am clear that in this case the client was the SRA, not the individuals who had lodged the complaints.

The Society's refusal to disclose the professional qualifications of the solicitor from whom advice was sought was based upon section 16 of the Code, which in turn reflects the requirements of the Data Protection Act to maintain and process personal data fairly. I have made clear in numerous adjudications that, because this section of the Code is the only one which reflects a legal duty upon the Society, I would not feel able to overrule its judgement even if I were to disagree with it. However, in this case that does not arise, because I accept that the individual's qualifications constitute personal data the release of which might well be a breach of the Act.

The question of release of the legal advice obtained by the Law Society in this case is much more finely balanced. Having examined it, I am satisfied that it is legal advice the release of which could prejudice the Society's legal position and – because release would constitute general publication – might prejudice the SRA's continuing investigations into other aspects of the firm.

On the other hand, I am not convinced by the Society's argument that the information contained in the advice relates to "court action", which is the part of section 14.8 of the Code which the Society seeks to rely upon. It does relate to possible proceedings before the Solicitors Disciplinary Tribunal, but that is not the same thing.

There is a conflict here between the wording of the Code, which appears to me to be looser than the usual definition of "legal privilege", and the wider public interest in maximising the chances of successful investigations by the SRA. With some misgivings, I must follow my instincts about what is in the wider public interest and I am clear that release of the legal advice could be prejudicial. **I therefore find for the Society.**

However, as I hope I have made clear, there seems to me to be a strong case for the SRA to give complainants more detail that it apparently does about the reasons when it feels it inappropriate to proceed with complaints. There is also a need for the Law Society to revisit the wording of the Code in relation to legal professional privilege.

**Richard Ayre**

*Freedom of Information Adjudicator*

*24 October 2012*