



The Law Society

Adjudication in a matter raised by IR
Law Society Freedom of Information Code
May 2013



1. The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code in withholding Minutes and Notes of meetings between the Society and Ministers, and meetings with Providers, in connection with Price Competitive tendering.

2. Background

On 11 April 2013 a solicitor, known here simply as IR, under the heading “PCT” asked the President of The Law Society, Lucy Scott-Moncrieff, to provide her with “details of any meetings which have taken place between the MoJ [Ministry of Justice] and 'providers' in respect of the above [i.e. PCT]”, adding “I need the names of the firms and a copy of the Minutes.”

On 15 April Ms Scott-Moncrieff replied, wondering whether IR’s request would be best directed by her to the MoJ under Freedom of Information since it was they, rather than the Society, who would have records of all the private bilateral meetings that they had held with individual firms. However, Ms Scott-Moncrieff told IR that if that approach did not satisfy her she would pass the request on to the Law Society’s Freedom of Information team.

Later that day IR responded, asking “Are you telling me that you do not have, in your diary, the dates of the meetings you had with the MoJ and that they did not give you an agenda and have not sent you a copy of the minutes?”

As a consequence, Ms Scott-Moncrieff referred the matter to the Society’s Information Compliance Manager, Mr Bob Stanley.

On 18 April Mr Stanley wrote to IR, telling her there had been a meeting between the Law Society President and the Lord Chancellor on 27 March 2013 and a telephone call on 4 March 2013. Additionally, there had been a meeting on 11 March 2013 between the Law Society and a Senior Civil Servant. Mr Stanley said that he was withholding copies of the Minutes under sections 14.7 and 14.10 of the Society’s Freedom of Information Code (“the Code”), and he cited each of those sections, under which the Society was entitled to withhold certain information.

14.7 If it is about work we are doing or have done to develop our policies, where we think that giving the information would hamper the free and frank exchange of views or harm the effective conduct of public affairs.

Mr Stanley said that the meetings had been held on a confidential basis, and were alerting the leadership of the Society to the Government’s interim position on a high politically sensitive policy consultation. The free and frank exchange of views between the leadership of the Law Society and the MoJ would be severely hampered if detailed reports of such meetings were to be made publicly available.

14.10 If the information was given to us in confidence and giving you the information would put us at risk of legal action either for breaking a confidence or for breaking a contract.

Mr Stanley said the Society's view was that disclosing private notes of these meetings would clearly break a confidence, and would severely limit the Society's ability to engage in the future with Ministerial and other political stakeholders.

Mr Stanley told IR that, under the Code, she had the right to have this matter referred to the independent Freedom of Information adjudicator. Later that day IR asked for the matter to be referred and the Society forwarded the relevant correspondence to me.

I asked the Society to make a written submission in support of its decision to withhold the information, and I invited IR to do so if she wished.

In a further exchange of emails between Mr Stanley and IR she confirmed that she required both details of meetings between the Society and the MoJ and meetings with, and names of, providers.

3. Submission by IR

In her submission IR said she thought it was necessary to look at the purpose of the Law Society. Its homepage said that it "represents solicitors in England and Wales. From negotiating with and lobbying the profession's regulators, government and others, to offering training and advice, we're here to help, protect and promote solicitors across England and Wales." (IR's added emphasis). She believed that this meant the Society served as an extension of the profession's collective will and that it should at all times understand what it is that its members wished it to say or do.

IR said she was confused as to how her knowing what had been said at one of its meetings with those contracted on its members' behalf could possibly "hamper the free and frank exchange of views or harm the effective conduct of public affairs". She believed the Society should not be exchanging views that did not represent its members' views, and it should not be conducting public affairs that they did not want it to conduct.

IR said she assumed that at all times the Society was making representations to the MOJ that its members would be happy with. As such, telling its members would not be breaking confidence because it would in effect be "us telling ourselves". As far as breaking a contract – she believed that the Society would not, could not, enter into contracts with the government, unsanctioned by its members.

She believed the truth to be that the Society had not been acting in its members' best interest and had not been protecting or promoting them. If she was wrong about that, she said, she would be the first to admit it - once she saw the proof.

Finally, IR said that the Law Society had invoked Chatham House rules, but she believed that they did not stop it telling her what had been said or providing the documents she had requested. She said that Chatham House rules were not legally binding and therefore there was no contract to breach. The Society had

misunderstood the rules, and everything said during the meetings concerned could be disclosed as long as the views expressed were not attributed to individuals.

IR believed that the Law Society was obliged to give her the information she had asked for because “They work for me. I pay the dues”.

4. Submission by The Law Society

In its submission the Society said that it believed section 14.7 of the Code applied because the meeting had been held on a confidential basis, alerting the leadership of the Society to the Government’s interim position on a high politically sensitive policy consultation. The free and frank exchange of views between the leadership of the Law Society and the MoJ would be severely hampered if detailed reports of such meetings were to be made publicly available.

The Society said it strongly believed that to provide the names of the firms and a copy of the Minutes would severely damage its position in future meetings with government. It said this had been referred to as the ‘chilling effect’ of preventing the free and frank exchange of views where there was an expectation that the views expressed would find their way into the public domain. The Society said it was not its view that notes of all such meetings with government should be withheld on this basis, but the issue of Price Competitive Tendering (PCT) for legal aid provision was a live and controversial political issue and, as such, the Society believed it would be severely damaging to the interests of its members, and not in the public interest, to have this information disclosed into the public domain.

The Society said it also relied upon section 14.10 and, by way of background to the issues that would have been discussed at the meeting, provided a link to information on Price Competitive Tendering (PCT):

<http://www.lawsociety.org.uk/news/stories/legal-aid-further-cuts-and-competitive-tendering-plans/>

The Society said that in its view disclosing private notes of these meetings would clearly break a confidence, and would severely limit the Society’s ability to engage in future with Ministerial and other political stakeholders.

The Society said that it had not made reference to Chatham House Rule in justifying its decision to withhold notes of the meeting. Chatham House Rules usually related to the reporting of meetings, where the media could report what was said only in general terms, rather than making for-the-record attributions to any quote.

The Society said that there was simply a general rule of confidentiality in any dialogue between Ministers and Senior Civil Servants. This was an implicit agreement between both parties, and if it did not exist then, whilst no laws would have been broken, the potential for future such dialogue between the Society and a Minister of the Crown would be severely limited. In this case the President had been acting in her proper capacity as a leader of the Solicitors’ profession, and it was vital that if she was to perform this important role she must be able to engage openly and candidly with Ministers and other senior stakeholders within Westminster and Whitehall. Therefore, said the Society, the notes of such meetings, which it stressed were unilateral notes taken by Law Society staff for its own internal purposes, were

not shared even with the Ministers' private office. The note was just for the Society's internal information-sharing purposes, and not for the purpose of keeping an authoritative verbatim note of what had been discussed.

For those reasons it was the Society's firm view that publishing the names of the firms and a copy of the Minutes of the meeting would be a breach of confidence that would put the Society at risk of legal action for breaking a confidence.

5. Further enquiries

On 12 May, in response to a request for clarification, IR said that what she had called the Chatham House Rule was one which organisations hide behind in order to justify secrecy, and that she had therefore assumed when the Law Society spoke of a confidentiality agreement it was the Chatham House Rule to which the Society had referred.

On 29 May I visited the Law Society's London offices to inspect the relevant documents. These consisted of a Note of a telephone call between the President of the Law Society and the Lord Chancellor on 4 March and a Minute of a meeting between the Society's Chief Executive and the Lord Chancellor on 27 March. I was told that no Note could be found of a meeting between Law Society officials and MoJ Civil Servants on 11 March.

The available Note and Minute principally record the Lord Chancellor's views and expressions of the Government's intentions, together with some responses by the Law Society.

6. Adjudication

The subject of Price Competitive Tendering is highly controversial within the legal professions and elsewhere, and members of the Law Society undoubtedly have a strong professional interest in knowing about discussions the Society's officers are having on their behalf with Government. The Society may have its own channels for keeping its members informed, but the issue at stake here is whether the records made by the Society of its discussions with Ministers and civil servants should be released under Freedom of Information, which would amount to publishing them to the world at large.

The Society has withheld those records under two separate provisions of the Code. I will address them here in reverse order.

Section 14.10 of the Code enables information to be withheld by the Society if it was given in confidence and releasing it would risk legal action for breaking that confidence. The Society, in its submission, offered no evidence that there was any explicit or exceptional agreement about confidentiality in advance of this meeting, saying rather that there is simply a general rule of confidentiality in any dialogue with Ministers or senior civil servants. I accept that good manners as well as good tactics generally require discretion in the way the parties treat the content of private conversations between Ministers and stakeholders on policy issues. But to suggest that there is a rule which is generally observed seems to me to fly in the face of

everyday experience in which interested parties – including Ministers themselves – often feel free to quote (and sometimes misquote) from conversations that have taken place behind closed doors. In any case, section 14.10 requires a risk of legal action for breach of confidence, and I have struggled without success to think of a single case of any Government ever having taken legal action as a result of a leak of a “private” discussion with “stakeholders”. I cannot see, therefore, that the Society can rely upon section 14.10 in withholding the information IR requested. **I therefore find for IR in respect of the Law Society's reliance upon s.14.10**

Section 14.7 of the Code allows information to be withheld if it is about work the Society is doing or has done to develop its policies, where it thinks that giving the information would hamper the free and frank exchange of views or harm the effective conduct of public affairs.

I fully accept that publishing details of discussions held behind closed doors with Ministers or their civil servants concerning the implementation of Government policies might well embarrass the Society and impede future discussions and relations with Government. In other words, it would risk hampering the free and frank exchange of views and harm the effective conduct of the Society's public affairs. The only doubt in my mind is whether these particular meetings can properly be described as work the Society is doing or has done to develop its policies.

It seems to me that what the Society learned from the Lord Chancellor is these discussions about the Government's intentions in relation to legal aid and specifically to Price Competitive Tendering would certainly aid the Society in developing its own policies and in making tactical judgements about the implementation of its existing policies. Premature publication which put at risk further engagement with Ministers could well impede the Society's ability to represent its members' interests effectively. **I therefore find for the Law Society in respect of its reliance on section 14.7 in withholding the information IR had requested.**

This adjudication has concerned only the records kept by The Law Society of its discussions with Government, and whether they should or should not be released under Fol. By upholding the Society's right to withhold them under section 14.7 of the Code I by no means suggest that the Society is not free to inform its members in whatever detail it judges appropriate of how its represented its members' views during those discussions.

Richard Ayre
Freedom of Information Adjudicator
30 May 2013