



The Law Society

# **Adjudication in a matter raised by Mr Andrew Bingham**

Law Society Freedom of Information Code

October 2008

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# 1 The issue

Whether the Society acted appropriately and in accordance with its Freedom of Information Code in refusing to release to a solicitor, Mr Andrew Bingham, a copy of a complaint written about him to the Legal Complaints Service ('LCS').

# 2 The background

On 12 August 2008, continuing a correspondence with the LCS about a complaint which had been made against him, Mr Bingham noted that LCS policy was to destroy files after two years. Mr Bingham said he wanted to 'maintain a file indefinitely' so he asked for a copy of a letter written to the LCS by the complainant on 17 July 2008.

On 29 August the Society's Information Compliance Manager, Mr Bob Stanley, wrote to Mr Bingham to say that he was unable to supply the information because it fell within section 14.5 of the Society's Freedom of Information Code ('the Code'), which allows the Society to withhold information if it is 'about specific investigations, disciplinary cases or applications arising from our regulatory role'. Mr Stanley said that information made available under the Code would be available to the public at large, not only to the person who first requested it. The Society considered that the public interest in disclosing the information was outweighed by the public interest in withholding it, and that in arriving at this decision it had taken into consideration the importance of assuring the confidentiality of information collected as part of an investigation. It was the Society's view that to make the complainant's letter available would be likely to prejudice future LCS investigations.

On the same day on which Mr Stanley wrote to him, Mr Bingham wrote to the LCS again to repeat his concern at the thought that its complaint file would not be retained, because he believed that the complainant might resurrect his allegations at a later date. Mr Bingham said that if the complainant had made libellous statements about his firm he felt entitled to see them, and he asked the LCS to set out any legal authority it had for withholding them.

On 1 September, having received Mr Stanley's letter, Mr Bingham asked for adjudication on the Society's decision.

On 12 September I asked the Society to make a submission in support of its decision and I invited Mr Bingham to make a submission if he wished to do so. Mr Bingham indicated that he believed the correspondence that had already been made available was sufficient to inform the adjudication process.

### 3 Submission by the Law Society

In its submission on 26 September the Society said that the letter requested by Mr Bingham clearly fell within the scope of the exception at s.14.5 of the Code in that it was specific to an investigation arising from the Society's regulatory role. Having established this, the Society said, it had gone on to consider the public interest test as the Code requires. It had concluded that the public interest was better served by withholding the information than by disclosing it. The Society felt that it would be inappropriate and against the public interest for the letter to be placed in the public domain, because its release would have the effect of deterring complainants in future cases from fully stating the grounds of their complaint to the Society.

The Society said that Mr Bingham's argument was that if the complainant had made libellous statements against him then Mr Bingham was entitled to see the correspondence. The Society said that, while that might be the case if legal proceedings ensued, the Code (in section 16) did not permit the disclosure of personal data. The Society argued that any potentially libellous statements against Mr Bingham would by definition fall within the category of personal data. It was therefore the Society's view that it would not be in the public interest to put this specific information into the public domain (because of the provisions of s.14.5 of the Code) and that it would be a breach of s.16 to disclose the personal data contained in the letter.

The Society said it accepted that in its letter of 29 August to Mr Bingham it should have explained that to disclose the letter in question would have been a breach of s.16 of the Code. The Society regretted that it had not made its position clear in this respect at that time.

### 4 Further information from the Law Society

Having considered the Society's submission I asked it to elaborate on its belief that 'any potentially libellous statements.....would by definition fall within the category of personal data'. I asked whether it was the Society's intention to apply a 'defamation test', potentially relying upon s.16 of the Code to withhold information within the category covered by s.14.5 publication of which might otherwise satisfy a public interest test. I also pointed out that when the Society relies upon s.16 it expresses its view of its legal obligations under the Data Protection Act (DPA), rather than its voluntary adherence to the principles enshrined in the Freedom of Information Act (FoIA), and it is the latter where the Adjudicator has authority to rule on the Society's interpretation of its obligations.

In response, the Society said that potentially libellous statements against an individual would always fall within the definition of personal data in section 1 (1) of the DPA. The Society said that individuals had a right under the DPA, subject to certain exemptions, to be provided with a copy of personal data relating to them, and it believed that the DPA was the appropriate route through which to obtain one's own personal data. Information released under the Code was released not just to the applicant but to the public at large and it would therefore be a breach of the DPA to

disclose personal data even where those data relate to the individual making the request.

The Society added that the question as to whether the personal data were defamatory was not directly relevant. It argued that 'defamatory personal data' could be said to be a subset of 'personal data' as defined by the DPA and so had to be processed in accordance with the data protection principles and other provisions of the DPA.

The Society said that, when the Code is next revised, it would like s.16 to make clear that no personal data within the scope of the DPA may be disclosed in response to requests for information under FoI where disclosure would breach any of the data protection principles. The Society believed that this would bring the Code into line with section 40 of the FoIA which specifically disallows disclosure of personal data of which the applicant is the data subject.

## 5 Adjudication

What rights of disclosure Mr Bingham might or might not have if he were to institute defamation proceedings against the complainant is not the subject of this adjudication. I am asked whether the Society applied the provisions of the Code appropriately in denying Mr Bingham's request.

I have read the letter from the complainant which Mr Bingham believes he is entitled see. I am satisfied that it is held by the Society as information 'about specific investigations, disciplinary cases, or applications arising from (the Society's) regulatory role' and that the exemption in s.14.5 of the Code therefore applies.

It is important to remember that disclosure under the Code constitutes release not just to Mr Bingham but to anyone who asks for the same information. The Society says that the reason why the public interest is better served by withholding the information than by disclosing it is because its release might deter future complainants from fully stating the grounds of their complaints if they believed they might be made public. In a succession of cases, mostly brought by complainants who wanted access to the responses of the solicitors against whom they had complained, I have accepted the Society's argument that, in the absence of strong arguments to the contrary, publication of the detailed contents of a complaints file might tend to undermine the confidence with which both complainants and respondents should feel able to submit their evidence to the LCS. I can see no argument to take a different view in this case. **I uphold the Society's view of the public interest in this case and therefore its decision to withhold the information under the Freedom of Information Code.**

However, the Society accepts that it should have told Mr Bingham that there was an additional reason why it could not have disclosed the information to him in accordance with Freedom of Information principles. That is because the information contains personal data, release of which is forbidden under s.16 of the Code. The

reason the Code (and s. 40 of the FoIA) forbids the release of personal data in response to a FoI request is that its release would constitute publication to anyone who asked for it, not simply to the data subject.

The Society's submission makes clear that the Data Protection Act gives a data subject the right, subject to certain exceptions, to be provided with a copy of personal data relating to him or her. The Society also states explicitly that the DPA is the appropriate route through which a data subject should seek such information. The implication is that Mr Bingham as the data subject should now make a request to the Society under sections 7 and 8 of the DPA for the information they hold about him. If the Society releases the information to him it will still remain unavailable to members of the public who may ask for it under the Code.

It may therefore be that Mr Bingham will be successful in securing this information when he asks for it citing the DPA. I am bound to observe that, so far as I can see from the correspondence, Mr Bingham never cited the Freedom of Information Code or Act when he made his original request, and it might have been helpful had the Society invited him to make an formal application as data subject under the DPA.

**Richard Ayre**

Freedom of Information Adjudicator

*18 October 2008*