



The Law Society

## **Adjudication in a matter raised by Mr Brian Pickerill**

**Freedom of Information Code**

**October 2010**

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## 1 The Issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code (“the Code”) when it refused to give Mr Brian Pickerill a report it holds in connection with a complaint he had lodged against the conduct of a solicitor.

## 2 The Background

A previous adjudication, dated 23 June 2010, gave the background of a request Mr Pickerill had made for a report held by the Law Society. At the time of the adjudication, the Society had decided that it was no longer necessary to withhold the information it believed he had asked for and offered to provide it.

Subsequently Mr Pickerill discovered that the report provided by the Society was not the one he had wanted. During an exchange of correspondence between them the Law Society became aware for the first time of a letter from Mr Pickerill dated 15 March 2010 to the Solicitors Disciplinary Tribunal (SDT). In this he had specifically questioned the existence of a Forensic Investigation Report (“the Report”) dated 14 May 2008 which had been referred to in the SDT’s Findings in a particular case, and he asked for a copy of it, citing Freedom of Information. It is the Law Society’s response to this request which the current adjudication is about.

On 4 August the Law Society’s Information Compliance Manager, Mr Bob Stanley, wrote to Mr Pickerill saying that it had been decided to withhold the Report under section 14.5 of the Code, which allows the Society not to release information if it is “about specific investigations, disciplinary cases or applications arising from our regulatory role”. Mr Stanley said that this was a qualified exemption, and the Law Society was required to decide whether or not it would be in the public interest to release the report. He said that he had concluded that it would not be in the public interest to put it into the public domain. Mr Stanley said it was a confidential document for regulatory use only and had been intended to be seen by the subject solicitors and others involved in the regulatory process. He added that disciplinary sanctions at the SDT were made public and that details of the issues covered in a forensic investigation report were usually summarised in the Findings.

Mr Stanley said that in weighing the public interest he had specifically considered the question: “Will releasing the information promote confidence in the regulation of the legal profession to the extent that the exemption is outweighed?” He had concluded that it would not. Rather, he believed, releasing the report into the public domain would send a signal that such reports were likely to be made public in subsequent cases and that this would be likely to have a detrimental impact on the legitimate regulatory activity of the SRA.

On 6 August Mr Pickerill replied, recognising Mr Stanley’s concern about setting a precedent. But Mr Pickerill said that he would expect the Law Society to act as a transparent organisation by releasing information that would aid the recompense of a client who, through what he called the unprofessional conduct of an errant solicitor, had lost money.

Mr Pickerill repeated what he had told Mr Stanley during his first attempt to secure the document, that he was pursuing a case on behalf of his daughter through the SRA and that he felt there would be information in the Report which would help her

case. Mr Pickerill asked for the Law Society's decision to be referred for adjudication.

On 12 August Mr Stanley provided their exchange of correspondence to the Adjudicator. Both Mr Pickerill and the Law Society were invited to make submissions. Mr Pickerill indicated that he had nothing further to add.

### **3 Submission by The Law Society**

On 27 August the Law Society made its submission to the adjudicator. It said that the Report had been prepared by Mr Mike Calvert, then Head of Forensic Investigation at the SRA. Having reviewed the report the Society had decided to withhold it under section 14.5 of the Code.

The Society said that the information in the report clearly related to a specific investigation, but that s.14.5 was a qualified exception requiring the Law Society to decide whether or not it would be in the public interest to disclose the information concerned.

In applying the public interest test, the Society said it had given consideration to the fact that once information was disclosed in response to an FoI request it was deemed to have been put into the public domain and not simply disclosed to the person who had requested it. There were a number of criteria that the Society said it might consider in applying the public interest test, depending on the type of information requested. In this case it had concluded that it would not be in the public interest to put this Report into the public domain. The Society said it was a confidential document for regulatory use only and was intended to be seen by those involved in the regulatory process. The Society said that disciplinary sanctions at Solicitors Disciplinary Tribunals were made public and details of the issues covered in a Forensic Investigation report was usually summarised in the Findings and Order of the Tribunal.

The Society said that it had considered in particular the following question in weighing up the public interest test: would releasing the information promote confidence in the regulation of the legal profession to the extent that the exemption was outweighed?

It had concluded that releasing the Report would not promote confidence in the regulation of the legal profession such as to outweigh the exemption. Rather, the Society believed that releasing the Report into the public domain would send out a signal that such reports were likely to be made public in subsequent cases and that this would be likely to have a detrimental impact on the legitimate regulatory activity of the SRA in any such subsequent matters.

The Society said that the report contained what it called sensitive information provided to the SRA by the solicitor who was the subject of the investigation and, according to the Society, he would quite rightly have had an expectation that the information would have been kept confidential. The Society said that the information mainly related to the solicitor's firm but that there was also personal data relating to Mr Patel. The Society said that it was not, however, relying on section 16 of the Code (the section which deals with personal data) as it felt that the entire report fell within the s.14.5 exception and that disclosure would not be in the public interest.

## 4 Further enquiries

Having considered the Law Society's submission I wrote to Mr Stanley on 28 August to ask for further information. I said that I had some difficulty with the Society's statement that the Report was "a confidential document for regulatory use only", since the Code made no reference to the existence of a category of "confidential documents" which were to be exempt from publication. I noted that the Society had not sought to rely upon section 14.10 of the Code (which permits information to be withheld if it was given to the Society in confidence and releasing it would put the Society at risk of legal action). I asked therefore for clarification of what the Society meant by the term "confidential document".

Referring to the Society's statement that the solicitor concerned would "quite rightly have had an expectation that the information would have been kept confidential" I asked the Society to explain the basis upon which a solicitor providing information to an SRA investigation might legitimately have such an expectation.

I also asked to see a copy of the Report so that, having considered any further submission from the Law Society, I might reach a view on where the balance of public interest lay in relation to disclosure.

On 14 September the Society provided a copy of the Report. The Society said it accepted that its reference to "a confidential document for regulatory use only" had been confusing in the context of the Society's reliance on the specific regulatory information exception (s.14.5) in this case. The Society said that there was no basis upon which a solicitor providing information to an SRA investigation into his conduct would have a legitimate expectation that the information would automatically be kept confidential. The Society said it did not apply such a blanket exemption to information provided to the SRA by solicitors and it apologised if its submission had given that impression.

The Society argued that the main thrust of its submission in this case was that it would not be in the public interest to release this Forensic Investigation Report into the public domain. The Society believed that disclosing the Report would be likely to have a detrimental impact on the SRA's ability to gather the information it requires in order to compile such reports in subsequent cases.

## 5 Adjudication

I have taken account of the submission made by Mr Pickerill when he first requested the Report, and detailed in my first adjudication dated 23 June.

I have also read the Report Mr Pickerill is seeking. It contains detailed information about the investigation of the financial affairs of the solicitor against whom Mr Pickerill's daughter has a complaint. It also details his financial dealings with a number of other clients and includes the solicitor's answers to a range of questions put to him by the investigators. It appears to me to contain personal data which, if publication were to be deemed appropriate under the Code, would need to be redacted to satisfy the requirements of the Data Protection Act, though Mr Pickerill indicated at an early stage that he would be happy for such redaction to take place.

There is no doubt that the Report is "about specific investigations, disciplinary cases or applications arising from (the Law Society's) regulatory role" and it therefore falls within the exception to publication specified in s.14.15 of the Code. Before the Law

Society can withhold information under that section it is required to carry out a public interest test.

The Society's assertion, put forward in its submission, that the Report is "a confidential document for regulatory use only" appears to be at odds with the wording of the Code. Under the Code, information can be withheld only if it falls within one of the absolute exemptions to publication or, as in this case, if it falls within a qualified exemption, in which case the public interest will determine whether it is to be withheld or released.

The Society was right to observe, in its submission, that publication under the Code is not restricted to the person who seeks the information: once released it is deemed to be published and is available to anyone who wants it. The public interest test is to be considered in that context. Although there might well be a public interest in a directly affected party having access to the full investigation into his or her former solicitor's conduct, the question to ask under FoI is whether there is a public interest in the Report being made publicly available.

In its submission the Law Society said that it had considered in particular whether releasing the information would promote confidence in the regulation of the legal profession to the extent that the exemption was outweighed? I am troubled by this calculation. If the Society means the confidence of *solicitors* in the profession's regulation, I see no direct correlation between that and the public interest. If the Society means the confidence of the *public* in regulation, that is surely likely to be first and foremost a product of the quality of the regulation itself. I see no public interest in promoting confidence unless it is deserved, and as a matter of principle confidence in regulation seems more likely to be delivered by transparency than by opacity. That seems to me to be a fundamental reason for freedom of information.

I therefore welcome the Society's assurance that it does not seek to apply a blanket exemption to requests for information provided to the SRA by solicitors. Equally, I give credence to the Society's concern that releasing the Report into the public domain might send out a signal that such reports were likely to be made public in subsequent cases, and that this could have a detrimental impact on the legitimate regulatory activity of the SRA in any such subsequent matters.

The question for me is whether, taking account of the facts of this particular case, the public interest is better served by the publication or the withholding of this Report. It is clearly a matter of public interest that the SRA should be effective in carrying out its regulatory investigations, and it does appear to me that routine publication of the detailed responses that solicitors might make to an SRA investigator risks acting as a deterrent to full and frank disclosure by those under investigation. I do not believe the balance of advantage is as clear as the Law Society seems to believe, and I can envisage circumstances under which, on the facts of a particular case, the balance might be in favour of disclosure. But I see no particular *public* interest reasons in this case for publication, and I do accept a general principle that publication could have a detrimental impact on the SRA's regulatory activity, in which there is a clear public interest.

### **I therefore find for the Law Society.**

I am encouraged by the Law Society's belated acceptance, apparently in contradiction of its original submission, that there is no basis upon which a solicitor providing information to an SRA investigation into his conduct would have a legitimate expectation that the information would automatically (*my emphasis*) be kept confidential. This has been a matter of contention in previous cases referred for adjudication, and the Society's statement is helpful. Since it is inevitable that clients

with a complaint against a solicitor will wish to see as much detail as possible of the investigation in their complaints, I recommend the Law Society to consider what steps might be appropriate to share as much information as possible with complainants following completion of an investigation, consistent with its other obligations and with the need, recognised here, to protect the SRA's ability to conduct those investigations effectively.

**Richard Ayre**

Freedom of Information Adjudicator

16 September 2010