



The Law Society

Adjudication in a matter raised by Mr John Whitehouse

Law Society Freedom of Information Code

December 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 Mr John Whitehouse some of the information he had requested about applications, decisions, and appeals against decisions, made under Regulation 44 of the Training Regulations 1990.

2 The background

On 29 October 2008 Mr John Whitehouse wrote to the Society, citing its Freedom of Information Code ('the Code'), to ask for eight categories of information which he said was held by the Solicitors Regulation Authority ('SRA'). He itemised the information he was looking for as follows:

1. The number of applications received by the SRA/Law Society to date under Regulation 44 of the Training Regulations 1990.
2. The number of decisions made to date under Regulation 44 of the Training Regulations 1990.
3. The number of appeals made to date against decisions made under Regulation 44 of the Training Regulations 1990.
4. The names of the applicants and appellants, together with their practising addresses (if practising solicitors) in respect of the applications, decisions and appeals referred to in paragraphs 1 – 3 above.
5. The dates on which each application, decision and appeal referred to in paragraphs 1 – 3 above were made.
6. A copy of the applications, decisions and appeals referred to in paragraphs 1 – 3 above. It is my understanding that successful applications made under Regulation 44 are public information.
7. The names of the Adjudicators and members of the judiciary who heard the applications, made the decisions, and considered the appeals referred to in paragraphs 1 - 3 above.
8. The names of the Adjudicators, together with their dates of appointment, who are currently listed with the SRA for making decisions in respect of Regulation 44 of the Training Regulations 1990.

Mr Whitehouse said that he was aware that decisions relating to waivers of the Solicitors' Practice Rules 1990 and The Solicitors' Code of Conduct 2007 were available, on request, to members of the public, but that the type of waivers he was seeking information about related to the Training Regulations. Mr Whitehouse said that he understood the information to be held by, or accessible by, the Education and Training Policy department of the SRA.

Mr Whitehouse said he recognised that the Society might wish to provide copies of documentation without revealing personal data and he said his request should be read as being for the exclusion of any personal data and the redaction of any names from decisions where the Society considered that they did not constitute what he called 'public information'. However, he asked that, where the Society thought that the names did constitute public information, for example the names of solicitors admitted to the Roll of Solicitors or members of the judiciary, then they should be disclosed.

On 26 November the Law Society's Information Compliance Manager, Mr Bob Stanley, gave the Society's substantive response. He said he had discussed Mr Whitehouse's request with the Education and Training Unit of the SRA and that they had informed him they did not hold the information requested.

On 3 December Mr Whitehouse replied, asking for the matter to be referred for adjudication. He said that the SRA did in fact make decisions under Regulation 44 of the Training Regulations 1990 and did keep records relating to such applications. He said that to say the information was not held was simply not true.

On 4 December Mr Stanley said that in the light of Mr Whitehouse's email he had made further enquiries of the SRA and had 'managed to locate' some information. He confirmed that since 1 January 2008 the Caseworking and Operations Policy Team (part of the Education and Training Unit of the SRA) had received eleven Regulation 44 applications, of which three had been upheld and the remaining eight not upheld. There had been six Regulation 44 Review applications, of which one was upheld, two were not upheld, and the remaining three were awaiting adjudication. Mr Stanley expressed sincere apologies that the information had not been provided in response to Mr Whitehouse's original request

Mr Stanley added that the information requested in categories 4 to 8 of Mr Whitehouse's request could not be disclosed because they constituted personal data. He said that Section 16 of the Code stated that the Society must not release personal data in response to Freedom of Information requests, and he was sorry that this had not been pointed out in his email of 26 November.

Mr Whitehouse replied on 8 December, restating his willingness to receive copies of decisions from which personal details of the applicants had been redacted. He added that when a decision was made the name of the Adjudicator could not be withheld, because the SRA exercised its powers under Statute through a quasi-judicial process and it therefore must disclose the name of the decision-maker.

On 9 December Mr Stanley told Mr Whitehouse that although the Society did publish some decisions it did not do so in respect of Regulation 44 applications. He cited the SRA website as clarifying that the decisions they published included:

- decisions to prosecute at the SDT
- decisions to control how a solicitor practises
- decisions to close a practice
- agreed outcomes with solicitors.

Expressing the hope that this would clarify the situation, Mr Stanley nonetheless confirmed that he would immediately refer the matter for adjudication, as Mr Whitehouse had requested.

The matter was referred to me on 9 December, together with copies of the exchanges summarised above. On 11 December I asked the Law Society to let me have its submission in defence of its decision to withhold some of the information Mr Whitehouse had requested, and I invited Mr Whitehouse to make a submission if he wanted to.

3 Submission by the Law Society

On 19 December the Law Society's submission began by saying that, having reconsidered Mr Whitehouse's request, it had decided to provide him with the information sought in categories 7 and 8 of his request. This was because information relating to appointed adjudicators performing a regulatory function constituted general regulatory information, and in accepting an appointment an adjudicator was accepting a publicly accountable function, so such information should be made available to the public.

The Society said that, having already provided Mr Whitehouse with the information in response to categories 1 to 3 of his request, its submission would address only categories 4, 5 and 6.

The Society considered that to provide any of the information requested would be to provide personal data in breach of paragraph 16 of the Code.

It believed that, even where Mr Whitehouse was not directly requesting the names of individuals, if the information were to be provided it would be likely to be sufficient, when combined with other data released in response to his request, to identify a living individual. The Society said that this would place those data within the definition of personal data in the Data Protection Act. Citing, as an example, category 5 of Mr Whitehouse's request, the Society argued that if that information were to be disclosed along with the information requested in category 6 there would be sufficient data in the public domain to constitute personal data relating to identifiable, living individuals. The Society said that the information requested in category 4 was clearly personal data in its own right.

The Society said it also wanted to address Mr Whitehouse's contention that the Training Regulation waivers were comparable to decisions relating to waivers of the Solicitors' Practice Rules 1990 and The Solicitors' Code of Conduct 2007. The Society said that waivers were granted by the SRA in order to ensure that it could always exercise its regulatory powers fairly and in the public interest, even where there were exceptional circumstances. Where a general regulatory requirement would adversely affect a regulated party because of exceptional individual circumstances, and the public interest would not be adversely affected by waiving the requirement, a waiver allowed the SRA the flexibility to maintain this balance between fairness to regulated parties and the public interest.

The Society said that professional conduct requirements, such as those in the Solicitors' Code of Conduct 2007, bore directly on the services solicitors provided, and on their relations with the general public. For instance, the Society said that when a client instructed a solicitor, he or she had a right to know the extent of the professional conduct duties regulating the standard of service he or she would receive. Therefore, where the extent of those professional conduct duties was altered by means of a waiver, details of the waiver should be publicly available in order that the client, or any other interested party, might know the extent to which he or she was protected.

The Society said that the SRA also acted as what it called a 'gatekeeper' controlling the solicitors' qualification process and preventing unsuitable individuals entering the profession. The Training Regulations 1990 provided a regulatory framework which enabled the SRA to secure standards of competence and entry to the profession. Waivers could be granted where a general regulatory requirement under the Training Regulations would adversely affect an individual because of exceptional individual circumstances, but the standards of competence and entry to the profession would not be adversely affected. Therefore, such a waiver related to the process of qualification but not to a lowering of the standard of competence. The Society said that the waiver did not, therefore, bear directly on the services solicitors provided nor on their relations with the general public.

The Society said that it therefore believed that personal data held by the SRA relating to a Training Regulations waiver could not be disclosed in response to a Freedom of Information Code request.

4 Submission by John Whitehouse

Mr Whitehouse made a submission on 17 December. He said that the eight elements of his request had not been individually considered. Initially, he had been told that the information did not exist, then he had been given a broad reason for withholding it, namely that the Data Protection Act (DPA) applied. He did not accept this reason.

Mr Whitehouse said that the Society's response did not take account of two different types of decision made under Regulation 44, Training Regulations 1990: first, those decisions arising from individual applications (where the DPA could apply), and second, those decisions arising from corporate applications by organisations (including the SRA itself and the Institute of Legal Executives (ILEX)).

He said that waivers existed and were a matter of public record, citing the website of an established legal trainer as saying : 'ILEX and Magistrates' Court Clerks are exempt from the Electives.' But Mr Whitehouse said he wanted to see a copy of the actual decision that had been made.

Mr Whitehouse said that the SRA had previously made public its own Regulation 44 decision and he quoted it verbatim. Mr Whitehouse said it was difficult to accept that this decision was covered by the DPA when it appeared on the Law Society website.

He also argued that appeals made from internal decisions covering the Training Regulations 1990 of the Law Society/SRA were dealt with by the Master of the Rolls and were also publicly available.

In respect of decisions made by individuals, Mr Whitehouse said he would accept that the decisions should be redacted to remove personal data (as he had proposed in his initial request). He simply wished to understand the reasons which had been given for decisions previously, not to access any personal information.

Finally, Mr Whitehouse said that the names of Adjudicators and Judges should be public. As a matter of principle he thought it must be correct that the names of Adjudicators were not covered by the DPA as they were exercising a statutory function under the Solicitors Act 1974.

5 Further information from both parties

On 23 December Mr Whitehouse sent the Adjudicator a copy of correspondence between himself and the Judicial Communications Office, together with the internet URLs they had sent him in order to direct him to published information identifying serving members of the Judiciary. Mr Whitehouse asked if he could make a further submission before the end of December.

In response, I told him that although I was prepared to accept a further submission by the start of January he did not need to address further the issue of identifying Adjudicators, since the Society had already decided to provide him with that information.

On 27 December I asked the Society for clarification of certain aspects of its submission. I suggested that the Society appeared to be arguing against disclosure of the outstanding information on two separate and independent grounds:

(i) that the material in categories 5 and 6 of Mr Whitehouse's request constituted personal data, and that even if information such as names was redacted (as he himself had proposed) the remaining information would be sufficient, when read together, to enable individuals to be identified. I asked to be provided with one or more specific examples to see how this redacted information could 'identify a living individual', as the Society's submission had suggested.

(ii) that Training Regulation Waivers were different from waivers of the Solicitors' Practice Rules 1990 and of The Solicitors' Code of Conduct 2007.

I asked the Society to clarify to which section of the Code it believed this argument to be relevant.

On 2 January 2009 Mr Whitehouse added further to his earlier submission.

He pointed out that, in response to category 1 of his request, the Society had provided him with the number of applications for the year 2008, but that he had not received detail of the number of applications made for previous years. He believed he was entitled to this information. He also said he had not received information about the number of appeals (as requested in category 3).

He said he wanted to stress that it was inappropriate to refer to the Data Protection Act 1998 in respect of waivers given to organisations, especially when the existence of the waivers were referred to openly on the internet (as detailed in his first submission).

Mr Whitehouse noted that the Code states that 'in the case of regulatory information, the Adjudicator will consider whether the public interest requires us to give you the information, which is the test the Act uses.' In addressing the public interest, Mr Whitehouse said that one of the key steps to qualifying as a solicitor (although not in all cases) was completion of a two year training contract, either within an organisation carrying out legal work or at a solicitor's firm. He said that in certain cases this two year training contract had been waived by the Law Society/SRA, and he believed that they should be open about how those decisions had been made. Mr Whitehouse said that solicitors were Officers of the Court and the process by which an individual could attain this status must be clear, including cases where it was considered appropriate to make waivers of the Training Regulations. This transparency was important to monitor compliance with discrimination legislation and so that the public could be confident that where an exception had been made there were good reasons. He was therefore seeking to establish the reasons why waivers had been given in the past. Mr Whitehouse emphasised that he was not interested in personal data and that he would accept a redacted copy of the information.

Mr Whitehouse concluded by asking for an opportunity to see any Law Society submissions before the Adjudication was complete.

On the latter point I replied to Mr Whitehouse that, as part of ensuring a reasonably swift and simple means of resolution, my procedure for Adjudications did not involve submitting one party's submissions to the other party for comment, and that it was my responsibility to interrogate those issues in either party's submission that might require elucidation before an Adjudication could be concluded.

On 4 January, in response to a question from me, Mr Whitehouse said that the information Mr Stanley had sent him on 4 December about the number of Review Applications did not constitute the information about the 'number of appeals' which

he had asked for in category 3 of his original request. He said that Appeals were made to the Master of the Rolls, and it was the number of these that he had wanted.

I therefore wrote to the Law Society on 4 January to ask whether it accepted that the information it had already provided him did not address category 3 of Mr Whitehouse's request. I also asked the Society to indicate whether it would be prepared to release the information which Mr Whitehouse had now specified and, if not, why not. On 9 January the Society confirmed that the information it had provided on 4 December had not been about the number of appeals and that it would write to Mr Whitehouse to provide him with that information, namely that no applications dealt with by the SRA in 2007 or 2008 had been referred to the Master of the Rolls.

The Society also responded to my letter of 27 December. It said it was unable to provide specific examples which would show how the provision of the information requested by Mr Whitehouse in categories 5 and 6, and redacted as he had suggested, could be used to identify a living individual, as the Society had previously suggested would be the case. But it said that there were only a small number of applications, decisions and appeals made each year, often on very individual facts, and that even if personal data were removed it would be possible from the facts set out in them to establish individuals to whom these would relate. The Society argued that there had been cases where the Information Tribunal had held that a small sample of data, even when anonymised, was likely to lead to the identification of living individuals and therefore to fall within the Data Protection Act's definition of personal data.

Finally, in answer to my query as to why the Society had sought to make a clear distinction between Training Regulation waivers and waivers of the Solicitors' Practice Rules 1990 and The Solicitors' Code of Conduct 2007, the Society said that the distinction was relevant to section 14.5 of the Code, which allowed refusal of a request 'if it is about specific investigations, disciplinary cases or applications arising from our regulatory role.' The Society said that waivers were granted by the SRA in order to ensure that it could always exercise its regulatory powers fairly and in the public interest, even where there were exceptional circumstances.

The Society argued that where a general regulatory requirement would adversely affect a regulated party or their client because of exceptional individual circumstances, and the public interest would not be adversely affected by waiving the requirement, a waiver allowed the SRA the flexibility to maintain this balance between fairness to regulated parties and the public interest.

The Society said that professional conduct requirements, such as those in the Solicitors' Code of Conduct 2007, bore directly on the services solicitors provided and on their relations with the general public. For instance, it said that when a client instructed a solicitor, he or she had a right to know the extent of the professional conduct duties regulating the standard of service he or she would receive.

Therefore, said the Society, where the extent of those professional conduct duties was altered by means of a waiver, details of the waiver should be publicly available in order that the client, or any other interested party, could know the extent to which he

or she was protected. In such cases, the Society thought that the public interest in withholding the details of the waiver was outweighed by the public interest in disclosure. However, the Society said that the SRA also acted as a 'gatekeeper' controlling the solicitors' qualification process and preventing unsuitable individuals entering the profession. The Training Regulations 1990 provided a regulatory framework which enabled the SRA to secure standards of competence and entry to the profession. Waivers could be granted where a general regulatory requirement under the Training Regulations would adversely affect an individual because of exceptional individual circumstances, but the standards of competence and entry to the profession would not be adversely affected.

Therefore, said the Society, such a waiver related to the process of qualification but not to a lowering of the standard of competence. The waiver did not, therefore, bear directly on the services solicitors provided or on their relations with the general public. The Society said it therefore argued that the details of the waiver fell into the category of information captured by section 14.5 and that the public interest in disclosing details of such waivers was outweighed by the public interest in withholding them.

On 15 January I wrote again to the Society to ask why it had felt 'unable to provide specific examples' of how the release of suitably redacted information sought by Mr Whitehouse in items 5 and 6 of his original request would 'identify a living individual', as the Society had itself maintained. I said that I assumed the Society must have considered Mr Whitehouse's request and must have concluded on some grounds that complying with it even in redacted form would identify an individual. It was therefore hard to understand how the Society could have reached that conclusion and yet felt unable to show how it had done so, and I asked for final clarification.

On 16 January the Society replied offering the following explanation of how the release of the information requested in items 5 and 6 might enable an individual to be identified: 'Suppose dates on which applications, decisions or appeals relating to training contracts were provided along with anonymised details of those applications, decisions and appeals. The legal world is a small community, and an even smaller set of individuals are training at any given time. The facts of each application or appeal will identify traineeship situations which will often be specific to a very small number of firms. (For instance, around 40 per cent of trainees in England and Wales are training with only 5 London firms.) Provision of the dates of those applications, decisions and appeals would then allow a discrete number of trainees to be identified, as those qualifying within a certain time range. It would be possible to put these together and identify individuals.'

6 Adjudication

Mr Whitehouse requested eight categories of information. Though the Society originally said that none of this information was held, on 4 December it provided data for the year 2008 in relation to categories 1 and 2, and supplied what it believed he had requested in category 3. On 9 January the Society accepted that it needed to supply different information to satisfy category 3 and promised to do so.

Having initially said that publication of the information in categories 4, 5, 6, 7, and 8 would constitute release of personal data, the Society accepted in its submission on 19 December that it should release the information in categories 7 and 8, and undertook to do so.

That leaves categories 4, 5, and 6. In respect of categories 5 and 6 the Society put forward on 9 January in its arguments to the Adjudicator a new reason for withholding the information, namely that the information was about 'specific investigations, disciplinary cases or applications' arising from the Society's regulatory role, and that it therefore fell within an exception to publication in s.14.5 of the Code. The Society also advanced an argument that the public interest test favoured withholding the information. I accept the Society's view that the public interest in disclosure may not be very compelling, but I found no convincing argument that there was a strong public interest *against* disclosure, and in the absence of such an argument I do not uphold the Society's judgement of where the balance of public interest lies. I also note that the Society did not cite s.14.5 when it declined to give Mr Whitehouse the information.

The Society has put forward an arguable case that release of the data requested in categories 4, 5 and 6, even if redacted as Mr Whitehouse had proposed, might enable a third party to identify individuals, and that it would therefore itself constitute personal data. It seems clear to me that the information requested in category 4 does indeed constitute personal data. In respect of the information requested in categories 5 and 6 I have not found wholly persuasive the Society's explanation of how release of this material might in theory result in individuals being identified. However, I must follow my own precedent in two previous cases by declining to adjudicate in matters relating to section 16 of the Code. This is because, unlike all the other provisions of the Code, which reflect the Society's voluntary adoption of FoI principles, s. 16 codifies the statutory obligation of the Society to observe the provisions of the Data Protection Act. In my view, no Adjudicator can instruct the Society to act in a way which it judges to be contrary to law. I must therefore decline to adjudicate in relation to the Society's reliance upon s.16 in refusing to release information sought by Mr Whitehouse in categories 4, 5 and 6 of his original request.

Finally, I note that in respect of those categories where the Society has provided or agreed to provide information to Mr Whitehouse it has been information only about 2007 and/or 2008. Mr Whitehouse has made clear in his submissions that he had been expecting information over a longer time period (his original request used the term 'to date') and in the event that he wishes to ask the Society again for the information over a specific period I would expect the Society to apply the same principles when handling that further request, unless it were to rely upon other provisions of the Code.

Richard Ayre

Freedom of Information Adjudicator

17 January 2009