



The Law Society

Adjudication in a matter raised by Jonathan Johns Law Society

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 when it refused Mr Jonathan Johns two items of information concerning an investigation by the Solicitors Regulation Authority into his complaint about a firm of solicitors.

2 The Background

On 10 August Mr Johns emailed the Law Society to request three items of information concerning an investigation by the Solicitors Regulation Authority (SRA) into a conflict of interest complaint he had made about a firm of solicitors, referred to here simply as M LLP. Mr Johns asked for a copy of correspondence from M LLP to the SRA making comments relating to his complaint. He also asked for a note made by the SRA investigator, Mr Jonathan Hattersley, of a telephone conversation he and Mr Johns had had. Finally, he asked for a copy of the note of another conversation between the SRA and another solicitor.

On 25 August the Law Society's Information Compliance Manager, Mr Bob Stanley, replied, withholding the first two items of information under section 14.5 of the Society's Freedom of Information Code ("the Code"). This permits information to be withheld if it is "about specific investigations, disciplinary cases or applications arising from (the Society's) regulatory role". In respect of the third item of information requested by Mr Johns, Mr Stanley said that no such information was held by the Society. Mr Stanley informed Mr Johns of his right, under the Code, to appeal to the adjudicator if he disagreed with these decisions.

On 26 August, after an exchange of emails between Mr Stanley and Mr Johns clarifying the role of the adjudicator, Mr Johns asked the matter to be referred for adjudication. Mr Stanley provided me with copies of their email exchanges and copies of the relevant information held by the Society.

On 27 August I invited both the Society and Mr Johns, if he wished to, to make a submission as to why, under the Code, the Society had been right or wrong to withhold the information. I sent Mr Johns a reminder on 1 October.

3 Submission by the Law Society

On 30 September the Law Society made a submission. It reiterated that the first two items of information requested by Mr Johns had been withheld under s.14.5 of the Code, and that the third item was not held by the Law Society. It said that it now wanted to rely also upon section 16 of the Code for withholding the second item of information (the note made by Mr Hattersley of his telephone conversation with Mr Johns). Section 16 says that the Society must not release details of a personal nature about someone else.

The Society said it had reviewed the first item Mr Johns had requested, a letter from M LLP to Mr Hattersley dated 9 April 2010, and it did not believe it would be in the public interest to put it into the public domain. The letter was a response from a solicitor who was subject to an ongoing SRA investigation into his conduct. If that solicitor had had reason to believe that the letter would subsequently be made public, the Society argued, it was possible that he would not have provided the information contained in the letter. The Society believed it could not be in the public interest for possible disclosure under the Code to inhibit a solicitor from providing the information required by the SRA to carry out its investigation into the alleged misconduct of that solicitor.

The Society said it had also reviewed the second item Mr Johns had requested, the telephone attendance note of a conversation between him and Mr Hattersley which took place on 30 March 2010. The Society said that this note contained personal data about Mr Johns as well as other individuals and it would be a potential breach of the Data Protection Act (DPA) to disclose the note. The Society was therefore relying on section 16 of the Code in withholding it. The Society pointed out that on 26 August it had invited Mr Johns to make a subject access request under the DPA for any information the Society held about him personally, but he had not yet submitted such a request.

The Society said it was also withholding the telephone attendance note under s.14.5 of the Code. It believed it would not be in the public interest to publish a note containing specific information relating to what it called “an open SRA investigation” into a solicitor’s conduct. The fact that the request was from one of the parties to the conversation was irrelevant in terms of Freedom of Information. The Society said it would not have released the note to anyone requesting it, regardless of their identity.

4 Submission by Jonathan Johns

On 1 October Mr Johns made a submission. He said that it was in the public interest for the SRA to have available to it records of any enquiries made by solicitors seeking clearance to act in cases of conflict of interest so that it could assess whether all the facts had been properly disclosed at the time. Otherwise, he argued, the SRA would be able to rely on a statement from a law firm which might be incorrect.

Mr Johns believed that, if the SRA was to quote from its notes made during telephone conversations with a complainant, those notes should be made available to the complainant for checking to ensure that they were a correct reflection of the conversation and did not misstate any facts or require clarification. Mr Johns said that Mr Hattersley had relied on notes of a conversation with him which he believed were either incorrect or grossly misinterpreted. This had caused Mr Johns considerable distress. He believed it was inappropriate for such notes not to be made available to a complainant for checking as to factual accuracy, because otherwise the conduct of the case by the SRA could be seen to be biased against the complainant, with no opportunity given to the complainant to remedy any errors by the SRA. He found it difficult to see how the SRA could properly exercise its role if it did not give complainants the opportunity to correct any factual misapprehensions.

Mr Johns concluded that it was inappropriate for the SRA to withhold information of this nature as a means of avoiding its responsibilities in investigating a complaint. He believed it was in the public interest for complainants to be dealt with properly and in an open and transparent manner and for reasonable requests for information to be dealt with appropriately.

In reference to the Law Society's belated reliance upon section 16 of the Code in refusing to give him the second item of information, Mr Johns said it was disingenuous. He believed that any personal information recorded in the note of the telephone conversation would be data relating only to himself. He repeated that he was simply seeking to ensure that the SRA had not maintained erroneous information or information which required clarification but which the SRA might have held to be relevant to its decision.

Mr Johns said that the first item he had requested contained information about a telephone call made by M LLP seeking clearance to act in circumstances of conflict of interest. He said that the SRA had told him it routinely refused to obtain such information knowing that a freedom of information act request was likely to be refused, and he claimed that the SRA had stated in correspondence that the mere fact that a law firm says it had obtained clearance was a reason for them not to enquire further.

Mr Johns said that, where a complainant had reasonable grounds to believe that clearance had been improperly obtained (and in his case, he said, M LLP had subsequently resigned because of a conflict) the Society should make available to the investigating officer the relevant notes so that he might judge whether appropriate disclosure had occurred when that clearance had been sought and whether such clearance had been properly given.

Mr Johns said that if no record of any clearance existed then the complainant should be so informed so that he might request the SRA to examine whether it considered a conflict was in place at the time the alleged clearance took place. He believed that if such a record existed then it was reasonable for the basis on which clearance had been granted to be disclosed, and whether such clearance had been given on qualified grounds .

Finally, Mr Johns said that where personal information about a third party was involved it should be possible for this to be dealt with by way of redaction. He said that where personal information related to a complainant it was in the public interest for such information to be made available to the complainant to comment on its factual accuracy.

5 Adjudication

Information released under a Freedom of Information request is deemed to be published – if it is released to someone who asks for it, it must be released to anyone who does so.

There is no doubt that the two items of information withheld by the Law Society are “about specific investigations....arising from our regulatory role”. Under the Code, they can therefore be withheld, subject to the application of a public interest test: does the balance of public interest favour disclosure or confidentiality?

The Law Society argues that the public interest is against disclosure of the first item of information (the letter from M LLP to the SRA) because the solicitor might not have provided the information he put in the letter if he had thought it might be published. The unstated implication of the Society’s argument is that there is a greater public interest in the SRA being able to gather information to enable its investigation than there is in a complainant having access to that information. Mr Johns says there is also a clear public interest in complainants being dealt with properly and in an open and transparent manner.

Having read the letter concerned I am clear that in it M LLP gave the SRA some information it would not have revealed if it had been intended for publication: indeed the letter is quite explicit on this point. I have previously expressed surprise that the SRA cannot compel solicitors whom it regulates to provide any information necessary for an investigation, but that is not within my remit. I do accept that there must be a strong public interest in the SRA being able to gather the information, even if a high level of confidentiality is necessary to secure it, and although I agree with Mr Johns’ assertion of a public interest in the Society operating in a transparent manner, I judge the greater interest to be in concluding an effective investigation. **In this respect I find for the Society in withholding the first item of information.**

In relation to the second item of information, the note of a telephone conversation between Mr Hattersley and Mr Johns, I have considerable sympathy with Mr Johns’ argument that he should be allowed to see a note purporting to record what he has said, in order that he can correct or comment upon it. However, that is a matter for the SRA’s procedures rather than for a freedom of information request.

The Society argues that it can not be in the public interest to publish information about what it calls “an open SRA investigation”, by which I take it to mean one which is still underway. I am not persuaded that that is necessarily so. If there were clear reasons why publication might impede a current investigation that might be a strong argument against releasing the information, but the mere fact that the investigation is still going on cannot, in my view, be a sufficient reason to withhold all information about it. Each decision should be taken on a case-by-case basis, and in this case the Society has shown no reason why release of this note would damage the investigation. **In relation to the telephone note Mr Johns requested I find that the Society has not satisfied me that the public interest is against publication under s.14.5 of the Code.**

However, the Society also believes it right to withhold it under s.16. Unlike the other provisions of the Code, s.16 reflects a legal obligation on the Law Society under the DPA not to release personal data. **Although s.16 is poorly worded, the legal requirement is that personal data should not be released under a Freedom of Information request, whether it is about the requester himself or about a third party (though people have the right to be given personal information held about themselves, by making a subject access request under the DPA).**

In a succession of adjudications I have declined to rule on the Society's reliance upon s.6, because even if I were to find against the Society I could not require it to release information publication of which it believed to constitute a criminal offence under the DPA. I explained this to Mr Johns when I contacted him to invite a submission.

Having read the note Mr Johns is seeking I can confirm that, in my opinion, it does contain personal data about him and that it contains what may well be regarded as personal data about a number of other individuals. Although, for the reasons stated, I cannot adjudicate on the Law Society's reliance upon s16, I recognise that it feels obliged under the Data Protection Act to withhold the information Mr Johns has requested.

I note that Mr Johns has been invited by the Law Society to make a subject access request under the DPA for personal data held about himself, and he might find it useful to do.

Richard Ayre

Freedom of Information Adjudicator

2 October 2010