



The Law Society

Adjudication in a matter raised by Mr Lawrence Downey

Law Society Freedom of Information Code

September 2008

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1 The issue

Whether the Society acted appropriately and in accordance with its Freedom of Information Code ('the Code') in declining to release to Mr Lawrence Downey a paper presented to the Society's Rules and Ethics Committee.

2 The background

This adjudication arises from a letter written to the Solicitors Regulation Authority (SRA) on 18 December 2007 by Lawrence Downey, of solicitors Mace & Jones, contesting various aspects of an SRA investigation. Mr Downey made a number of requests for information, much of which the Society subsequently disclosed, but on 25 April 2008 Ms Fariha Ayyub, then the Society's Information Compliance Manager, told Mr Downey that one document, Annex 3 to a paper for the Rules and Ethics Committee entitled *The Accident Group (TAG) – Request for Further Guidance*, would not be disclosed. She cited section 14.7 of the Code, which allows the Society to withhold information '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'.

On 13 May Mr Downey wrote to Ms Ayyub to seek clarification of that decision. He referred to the Guidance published by the Information Commissioner, which advises that a public authority, when refusing to release information under the Freedom of Information Act ('the Act'), should state clearly why one of the exemptions to publication applies. Mr Downey said it was inadequate merely to assert that an exemption applied. He referred also to s. 15 of the Code which commits the Society to say 'why we feel unable to give you the information you want'. In the light of this commitment, Mr Downey asked Ms Ayyub to clarify the reasoning behind the Society's decision.

Mr Downey said that the paper he was seeking dealt with 'a response to a request for assistance regarding the *application* of guidance issued by the Society'. He believed that, on the face of it, the paper did not deal with the formulation or development of policy, which had been settled (according to Mr Downey) in the original guidance. Rather it dealt with the detail of how that policy was to be applied.

On 24 July, having apparently received no reply, Mr Downey wrote to Ms Ayyub again asking for the matter to be referred to the Adjudicator.

On 31 July the Society's new Information Compliance Manager, Mr Bob Stanley, wrote to say the Society had reconsidered its decision to rely upon s.14.7 but had concluded that the exemption had been correctly applied and that the document would continue to be withheld. Mr Stanley said it was a draft letter which formed part of the internal development of policy. The Society believed that disclosing the letter would hamper the free and frank exchange of views in relation to subsequent policy development.

Mr Stanley confirmed he had forwarded Mr Downey's request for adjudication.

3 Submission by Lawrence Downey

In his submission to the Adjudicator on 18 August Mr Downey pointed out that s.18 of the Code makes a presumption in favour of publication. He said he found himself hampered in making a submission by the fact that the Society had said nothing to justify withholding the document other than to re-state the terms of the relevant exemption, namely that the information related to work done to develop the Society's policies and that releasing it would hamper the free and fair exchange of views in future. The only thing of substance Mr Stanley had told him was that the document concerned was a draft letter.

Mr Downey said that the Information Commissioner's advice regarding exemptions under the Act was that public authorities should: clearly explain why a particular exemption applied; explain the likely harm that would arise from disclosure; and explain the public interest arguments the authority had addressed in reaching its decision. He said the Society had explained none of these to him.

Mr Downey said he had been able to draw some inferences about the nature of the document. It was an annex to a paper submitted to the Society's Rules and Ethics Committee, and the paper had invited members of the Committee to consider a draft reply to a request for assistance regarding the application of guidance issued by the Society concerning TAG cases. Mr Downey said that by its very terms the disputed document dealt with the application of policy that had already been adopted. It had nothing whatever to do with the formulation or development of policy. Therefore the reason given for its being withheld was incorrect.

Mr Downey conjectured that the document might show the Society to have been in some confusion as to how its policy should be applied; it might show there had been some illogicality in the Society's response; it might be something which the Society would now view with embarrassment. But none of these possibilities diminished the public interest in the document or could justify its being withheld.

4 Submission by the Law Society

The Society, in its submission on 20 August, said that the document in question was a draft letter from Mr Julian Wildsmith, who was then Head of Professional Ethics at the SRA, to Mr A Dennison of Row Cohen Solicitors. The Society enclosed a copy with its submission.

The Society said that the draft letter had set out the views of the Head of Professional Ethics at that time, but that those views did 'not necessarily represent the fixed position of the SRA or the Society at that time'. The Society believed that a dangerous precedent would be set if draft correspondence such as this were to be placed into the public domain. To disclose the document would hamper the free and frank exchange of views in subsequent cases, because authors of such documents

would be likely to be constrained in setting out the entirety of their views if they had an expectation that those views would subsequently be published.

The Society said that the matter to which the document referred was still the subject of SRA investigations and associated legal proceedings. The Society accepted that there might come a time when the exception in the Code upon which it relied in this case would no longer apply to the document, but it did not believe that time would have arrived until SRA investigations and associated legal proceedings had reached a conclusion.

Having read the Society's submission I asked for additional information about the role being played at this time by Mr Dennison, the intended recipient of the draft letter. The Society provided a detailed explanation but, since it does not appear to me to alter the issues to be determined here, I shall not summarise it. I further asked the Society two questions, namely: why had the draft letter been presented to the Rules & Ethics Committee? And who was responsible for development of the policy which the Society claimed that this draft letter had informed?

In response to the first question, the Society said that the letter had raised 'policy issues on which Committee agreement was required' and that the Committee was asked 'to endorse, or otherwise, the office's views on these issues.' [Indeed, the final sentence of the draft letter reads 'We have asked the Rules and Ethics Committee to consider our correspondence and they have endorsed our views', which appears to confirm that the letter was drafted specifically with a view to its being considered and endorsed or otherwise by the Committee]. The Society said that the Committee had asked for further information and so the draft letter was put before them and was not sent to Mr Dennison. The Society said that the Committee 'finally agreed its position on the issues' the following month, and that the guidance was subsequently published.

In response to the question about who had been responsible for development of the policy, the Society said the answer was 'the Committee, on the basis that 'policy' is the guidance that was issued in January 2005.' The Society added that 'there was also the 'policy' on enforcement as well which would have taken into account the Committee's views'.

5 Adjudication

In S.3 of the Code the Society declares that 'although the Act does not yet apply to us we are following it as if it did, and this Code should be read on that basis.' I agree with Mr Downey's implicit view that, as a matter of principle, the Society should take heed of the Information Commissioner's Guidance when it applies the provisions of its own Code (as I have tried to do in previous adjudications).

When a public authority is to rely upon one of the exemptions in the Act in order to withhold information, the Guidance says:

'The authority must issue a refusal notice clearly stating upon which exemption it is relying and the reasons why the exemption applies, (if this would not be otherwise apparent). It is insufficient to merely state that a particular exemption applies. The authority must clearly explain why it believes a particular exemption applies, not just which exemption applies, unless to do so would involve the disclosure of exempt information. The extent to which an authority will have to explain its refusal will depend upon the nature of the request and of the exemption upon which it is relying.'

When the Society first refused to release the information to Mr Downey, on 25 April, Ms Ayyub told him simply that 'it has been decided that the document is exempt under paragraph 14.7 of our Code. This is because it relates to policy development and its disclosure will hamper the free and fair exchange of views.' This told Mr Downey nothing beyond the wording of the exemption, and it therefore fell short of the Commissioner's guidance. There are good practical reasons why the Society should explain in as much detail as it can why it feels unable to disclose information: not least, a better explanation of the reasons for withholding information covered by one of the exemptions in the Code might minimise the need for applicants to seek Adjudication. I do therefore recommend that in future cases the Society takes fuller account of the ICO Guidance in explaining to applicants its refusal to disclose information.

However, the question I need to determine is whether the Society acted appropriately and in accordance with the Code in its *decision* not to release the document (rather than in the way it explained its decision to Mr Downey).

It is for the Society to convince me it has done so: it is not for Mr Downey to convince me otherwise. Nonetheless his arguments need addressing. In essence they are twofold: first, that the document gave advice as to how the existing policy might be applied, rather than about the adoption or formulation of policy, and therefore the Society could not rely upon s.14.7; and second, that the public interest is in favour of disclosure, because the document might betray some doubts, confusion or illogicality in the way the Society went about its application of the policy.

In respect of the first point, the Code says that the Society may withhold information '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'. I find Mr Downey's definition of policy too narrow: a policy seems to me to be any plan of action, duly determined. The development of a policy is not necessarily a once-and-for-all process: policies change, and even when they do not change there might need to be robust internal discussion about whether they *should* change. Nor can I accept that there is a clear distinction between policy and guidance: it seems to me that a decision about what guidance to offer about the application of a policy may itself constitute a policy decision.

On the basis of the Society's answers to the specific questions I put to it, detailed above, I am satisfied that the Committee was responsible for developing policy on the guidance to be issued; that the Committee's views would also have played a part

in the determination of enforcement policy; and that Mr Wildsmith's draft letter was presented to the Committee as part of the process of agreeing policy.

I accept the general proposition that there must be scope for free and frank exchange of views within the Society as it formulates policy. Although one might hope that a Head of Professional Ethics would be least susceptible to concerns about his or her advice being published, I do accept that individual staff or post-holders might be likely to feel unduly inhibited in expressing their views in an environment where the Society might unexpectedly disclose them.

There is a strong public interest in seeing how a regulatory authority arrives at its policy decisions, what views were taken into account and what contrary views may have been expressed. In my judgement there is a compelling public interest in public authorities arriving at policy decisions which are well-informed and well tested. A regulator that can achieve both is likely to command a high degree of public confidence, but both the Act and the Code recognise that space may be needed for a frank exchange of views and advice between decision-making bodies and their advisers, unfettered by the threat of publication. There may well be cases where some known or even suspected factor about alleged impropriety or inappropriateness in a decision-making process might shift the balance of public interest in favour of the publication of advice which had been intended to be purely internal, but I do not see such arguments here.

I believe that the Society could, and should, have spelled out its reasoning more clearly to Mr Downey, in line with the ICO Guidance, but I accept that its decision in this case was appropriate and in accordance with the Code, and I therefore find for the Society.

Richard Ayre

Freedom of Information Adjudicator

10 September 2008