



The Law Society

Adjudication in a matter raised by Mr Michael Sandler

Law Society Freedom of Information Code

August 2011

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supporting
solicitors

1. The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it refused to provide Mr Michael Sandler, a solicitor, with some information held by the Solicitors Regulation Authority about a complaint against his firm.

2. The background

On 8 March 2011 Mr Sandler wrote to the Solicitors Regulation Authority (SRA) requesting a copy of one of its regulatory files. He said he wanted to see what information had been given to the SRA by a Housing Association which had complained about his firm, so that he could consider what, if any, action to take against them.

On 4 April the Law Society's Information Compliance Manager, Mr Bob Stanley, replied that under section 14.5 of the Society's Freedom of Information Code ('the Code') the Society could withhold information concerning specific investigations, disciplinary cases or applications arising from its regulatory role. Mr Stanley said that, in deciding to do so, the Society had conducted a public interest test and had determined that it would not be in the public interest to release communications between the SRA and the Housing Association in connection with the SRA investigation into the Association's complaints. In reaching this decision, Mr Stanley said, the Society had taken into consideration the fact that information disclosed in response to Freedom of Information (Fol) requests was deemed to be put into the public domain. The Society's view was that to publish the information Mr Sandler had requested would be likely to prejudice the legitimate regulatory activity of the SRA and would clearly, therefore, not be in the public interest. Mr Stanley said that Mr Sandler had the right to seek adjudication.

On 15 April Mr Sandler responded, disputing the Society's right to withhold the information. He said he could see no possible public interest in the Society doing so. Mr Sandler said that the matter of what information the Housing Association had disclosed to the Society regarding his firm was not a matter of public interest, but a matter of considerable interest to Mr Sandler himself, given what he described as defamatory comments the Association had made regarding his firm and two of his employees. He added that he was not seeking disclosure of information as to how the Society carried out its legitimate regulatory activity, simply of what the Association had said to the SRA.

On 20 April Mr Stanley replied, repeating Mr Sandler's assertion that the matter of what information the Association had disclosed to the Society was not a matter of public interest. Mr Stanley said that the key point was that information disclosed under the Code was deemed to be released to the public at large and not merely to the person making the request. He said that it was the Society's view that it clearly would not be in the public interest to disclose the information requested.

On 13 May Mr Sandler asked for a copy of the Code, and Mr Stanley sent him a link to it on the Society's website. On 27 June Mr Sandler wrote to Mr Stanley to ask for the same information under the Data Protection Act, adding that if the Society chose not to provide it he would raise the matter with the information commissioner. As regards his request under Fol, Mr Sandler pointed out that the information he had requested was not about a third party but about his own firm, in which connection he referred to a previous adjudication dated September 2010 in a matter raised by Mr Michael Jones. Mr Sandler said that exception 14.5 in the Code did not apply in his own case, because there had been no investigation. He said the Association had written to the SRA but without providing any evidence, and accordingly there was no investigation or disciplinary case or application

arising from the complaint, and the SRA had not been called upon to exercise its regulatory powers or duties. Mr Sandler concluded by saying he would like the matter referred for adjudication.

On 28 June Mr Stanley sent me copies of the correspondence between the Society and Mr Sandler.

On 30 June I asked the Law Society to make a submission in support of its decision, and I invited Mr Sandler to make a submission, if he wished, as to why he believed the Society had acted inappropriately under the Code. In the event, owing to Mr Sandler's indisposition, another partner in his firm, Mr John Gorner, represented his interests. Mr Gorner said he was content to make no separate submission beyond the arguments already put by Mr Sandler.

3. Submission by The Law Society

On 14 July Mr Stanley made a submission in defence of the Law Society's decision. He said that all of the information contained in the file Mr Sandler had requested clearly related to a specific regulatory investigation (and was therefore covered by s.14.5 of the Code). But, that being only a *qualified* exception to the principal of FoI, the Society had also to decide whether or not it would be in the public interest to disclose the information. Mr Stanley said that the issue to be decided was whether releasing otherwise exempt information would serve the public interest to the extent that it outweighed the exemption: was it better for the public to release or to withhold the information?

He said the Society had given consideration to the fact that once information had been disclosed in response to an FoI request it was deemed to have been put into the public domain and not just disclosed to the person who had made the request. Mr Stanley said that the file concerned the SRA investigation into allegations by the Housing Association into the conduct of Mr Sandler's firm in filing a number of actions against the Association on behalf of its clients who were Association tenants.

Mr Stanley cited the letter of 8 March to the SRA in which Mr Sandler had said he wanted the information in order to consider what, if any, action to take. Mr Stanley said that although the reasons for the request were not a required consideration under the Code, the purpose of the request might be useful when considering the public interest test.

It was the Society's view that it would not be in the public interest to publish the contents of the file. Mr Stanley said that the SRA investigated allegations of misconduct against solicitors in the public interest and, in carrying out this responsibility, it needed to have access to as much relevant information as possible.

He said that the SRA had made Mr Sandler's firm aware of the Association's allegations against it. The matter had been closed by the SRA on the basis that the Association had failed sufficiently to evidence its allegations. But Mr Stanley said that to publish the information the Association had supplied to the SRA would send a message to those considering reporting alleged misconduct in future that such information was likely to be published in response to FoI requests to the Law Society. The Society's view was that it would clearly be against the public interest if those wishing to make allegations of misconduct against solicitors were deterred from doing so for fear that their allegations could subsequently be published.

Mr Stanley quoted what Mr Sandler had told the Society in his letter of 15 April, namely that information about what the Association had said to the SRA was 'not a matter of public interest (but)...a matter of considerable interest to me given the defamatory comments the Association made regarding my firm...' Mr Stanley repeated what he called his key point, that

information disclosed under the Code was deemed to have been released to the public at large.

Mr Stanley said that the Society had also considered one of the criteria it used when applying the public interest test: would releasing the information promote an individual's right to fairness and natural justice or other human rights so as to outweigh the exemption? Mr Stanley said that this factor was of particular relevance to the Society as the body that represents and regulates an entire profession. He said that decisions taken about an individual's career or right to practise could impact dramatically on the individual concerned. Releasing the information could allow individuals to understand decisions made that affect their lives or could assist them in challenging a decision.

However, Mr Stanley said that on this occasion the SRA had closed its file without taking any disciplinary action against Mr Sandler or his firm, so the Society believed that no such questions of fairness, natural justice or other human rights arose in this case.

In conclusion Mr Stanley said that, taking account of all of these considerations, the Society had decided that it would not be in the public interest to disclose the information requested by Mr Sandler. He pointed out that Mr Sandler had made a separate application under section 7 of the Data Protection Act for copies of his personal data on the file and that this was being considered separately by the Society.

4. Submission on behalf of Mr Sandler

On 17 July I provided Mr Gorner with a summary of the Law Society's submission to give him an opportunity to respond to any points which the Society had not previously raised in correspondence with Mr Sandler.

On 26 July Mr Gorner replied, saying that the first question to be decided was not, as Mr Stanley had put it, whether releasing 'otherwise exempt' information should be disclosed. The question was whether the information was exempt from disclosure. Mr Sandler's argument was that it was not exempt. Mr Gorner said that the Law Society's submission did not explain or expand upon why exemption was claimed. He said he had nothing to add to the points made in this regard by Mr Sandler in his letter to the Society dated 27 June.

Mr Gorner said that the Society's submission did not appear to deal with Mr Sandler's argument that the request was for information about himself and his firm and not about a third party. In this regard he had already drawn the Society's attention to matters raised by Michael Jones in an Adjudication dated September 2010.

Mr Gorner said that the Law Society appeared to be basing its public interest argument on a misunderstanding, namely that Mr Sandler required to see 'the contents of the file.' Mr Gorner said that he did not. Mr Sandler required to see details of the allegations made against him and his firm by the Association. Mr Gorner said that Mr Stanley was incorrect in saying that the SRA had made Mr Sandler's firm aware of the Association's allegations. Mr Gorner said that this was one of the fundamental points: Mr Sandler had never been told, in terms, what the original allegations were.

Mr Gorner said that Mr Sandler wished to rebut Mr Stanley's argument that publication of allegations could well deter members of the public from making complaints. He said that solicitors, as well as members of the public, had rights, both under the Human Rights Act and generally. In particular, solicitors had a right to defend themselves against what Mr Gorner said he suspected were spurious, unfounded and defamatory allegations in this case made by a vexatious complainant. He noted that Mr Stanley had referred to a test of an individual's right to fairness and natural justice or other human rights. Mr Gorner believed that Mr Sandler and/or other solicitors within the firm about whom spurious and unjustified

complaints had been made had an equal right to fairness, natural justice and to the protection of their human rights.

5. Further enquiries

On 29 July, having read the submission made on Mr Sandler's behalf, I emailed Mr Gorner to ask him to clarify precisely what information Mr Sandler had intended to request: a copy of the SRA file, or all the information given to the SRA by the Association or, more narrowly, the allegations made by the Association against Mr Sandler or his firm. I said that I could not adjudicate on a decision which the Law Society had made in relation to a request which, Mr Gorner had suggested in his submission, was not the one intended by Mr Sandler.

Mr Gorner replied that Mr Sandler did not need to see the entire file, merely the information that had been given to the SRA by the Association about his firm or any of its employees, including (but not limited to) the original complaint. Mr Sandler said it might be that the Association had disclosed no more to the SRA than the original complaint, but only the SRA knew whether that was the case. Mr Sandler's firm did not know for sure whether the SRA had told it precisely what the Association had said about it, and it wanted to know.

Accordingly, I indicated to the Law Society the changed terms of the request by Mr Sandler for disclosure, and I invited the Society to indicate whether that changed in any way its decision on withholding the information. On 2 August the Law Society confirmed that its position remained the same. Mr Stanley said that the arguments put forward in the Society's submission applied to the particular information about Mr Sandler's firm provided to the SRA by the Association as well as to the contents of the file in general.

Mr Stanley added that the firm had been aware of the Association's allegations since 24 February 2010 when a formal complaint was made directly to the firm by the Association, and he provided a copy of that complaint, written by the Association's Director of Resources.

On 4 August I visited the offices of the Law Society and inspected the SRA file concerned.

6. Adjudication

Upon the reading the file it became clear that the allegations made by the Association came to the SRA's attention in April 2010 when Mr Sandler 'self-referred' them to the SRA as Regulator, his firm having received them direct from the Housing Association. Perhaps the most striking thing about the contents of the SRA file is the almost total absence of communications direct from the Association to the SRA. I could find only two, each of them relatively brief emails. Indeed, the Association's failure to respond to requests from the SRA for information – and, when it eventually did respond, its failure to supply any substantive evidence to support its complaints – led the SRA to close the file and take no further action.

6.1 Applicability of section 14.5 of the Code

Section 14.5 says that the Society may withhold information *if it is about specific investigations, disciplinary cases or applications arising from our regulatory role*. Mr Sandler argues that, in this case, s.14.5 does not apply, because there had been no investigation: the Association had failed to provide evidence to substantiate its allegations and therefore the SRA had not been called upon to exercise its regulatory powers or duties. His contention is given some support by a letter from the SRA caseworker to Mr Gorner in September 2010, declining to release one of the documents which are the subject of this adjudication. The

caseworker said that “where the allegations raised do not warrant an investigation (as are the facts on this matter) we do not disclose documents...” And she then added that “the position would have been different if the matter had proceeded to investigation”.

Against that, shortly after Mr Sandler self-referred the Association’s complaints to the SRA, it had written to his firm to say that “a file has been opened in the Conduct Investigation Unit”. It might reasonably be supposed that what that Unit does is to investigate.

It seems to me that, whatever the semantics, an investigation would be generally understood to begin from the moment the SRA asks either the solicitor or the complainant to provide further information relating to a complaint. In this case, having been alerted by Mr Sandler to the existence of the complaint, the SRA invited the Association to substantiate it. A common sense view must be that that marked the start of an SRA investigation. The fact that, in the absence of the Association providing any substantial evidence, it was a short-lived investigation, requiring no formal response from Mr Sandler’s firm, does not mean that no investigation had taken place.

I am satisfied that the information sought by Mr Sandler does fall within s.14.5. The Society is therefore entitled to withhold it, but subject to determining whether the public interest is better served by doing so or by releasing it.

6.2 The public interest test

Each public interest test must be conducted on the merits of the individual case. It is accepted by both parties in this case that the substance of any allegations made by the Association against Mr Sandler’s firm are not a matter of public interest, though they are, of course, a matter of intense interest to Mr Sandler’s firm. [In my view they might have become a matter of public interest had they been substantiated.]

The Law Society argues, and I agree, that information released under the Code, once released, becomes publicly available: it cannot be released to one applicant and then denied to another. It follows that information which is released under Fol becomes available for publication. This is relevant because, if a complainant risked the details of his complaint being made available only to the firm against which the complaint was levelled, that might not be thought a deterrent against making the complaint. But if the risk were general publication of the complaint the potential deterrent effect seems to me significantly more substantial.

Mr Sandler’s statement that the information in this case is not a matter of public interest may mean that he does not believe that anyone other than himself and his firm would be interested in asking for it, and the risk of general publication is therefore slight. By contrast, the Law Society argues that there is a strong public interest in withholding from publication information supplied by complainants, so that those who might want to make a complaint in future are not deterred by fear that anything they say may be made public. I agree in principle with that view, and although there may be reasons in the circumstances of a specific case why there is a stronger public interest in the information being made publicly available I do not see any such circumstances in this case.

In Mr Sandler’s original request he volunteered that he wanted to see what the Association had said about his firm so that he could consider “what, if any, action” to take against them. In later correspondence with the Law Society he referred to “defamatory comments” he believed the Association had made about the firm. In my view, while there can be no public interest in a system that encourages complainants to make wild and unsubstantiated allegations without jeopardy, people employed as professionals in regulated professions, like people in the public service, must expect from time to time that complaints will be made against them which are overstated, ill-informed, and sometimes entirely unfair. It seems to me to be the job of the regulators to take a judicious view about the extent to which those

complaints require serious consideration and when they merit further investigation. Making them public as a matter of routine seems to me to risk both unwarranted reputational damage to the subject of the complaints and a significant risk of legal action, or threats of it, against complainants, and that in turn might act as a deterrent for others with well-founded complaints.

6.3 Human rights & natural justice

In his submission on Mr Sandler's behalf Mr Gorner contested the Law Society's claim that the SRA had made Mr Sandler's firm aware of the Association's allegations. Mr Gorner said that this was one of the fundamental points: Mr Sandler had never been told, in terms, what the original allegations were. Mr Gorner referred to the fact that solicitors, too, have human rights, including the right to defend themselves against spurious, unfounded and defamatory allegations.

On reading the file I could see no evidence that the SRA had ever written to Mr Sandler's firm summarising the allegations: the Law Society's submission was wrong in this respect.

I entirely agree that, before the SRA takes regulatory action against a firm in respect of a complaint, natural justice would require the firm to be given a full opportunity to answer the allegations. Failure to have provided such an opportunity might well amount to a compelling public interest in favour of granting a freedom of information request for the relevant regulatory information. However, in this case the SRA closed its file having concluded that, far from needing to take regulatory action, it had received insufficient evidence from the Association to merit pursuing its complaints. Mr Sandler's firm was not required to defend itself to the SRA, because the SRA had concluded there was no case to answer.

Although Mr Gorner's statement that the firm has never been told by the SRA what the original allegations were is accurate, his firm knew the allegations because it was his firm which had received them and it was the firm which had "self-referred" them on to the SRA. In addition, it was the firm which received a later complaint by email from the Association on 22 November 2010, and again passed it on to the SRA a week later.

I can see no breach of Mr Sandler's human rights or of his entitlement to natural justice in this case which might weight the public interest in favour of publication.

6.4 Personal data

In his response to the Law Society and in the submission made to me on his behalf, Mr Sandler cited a previous Adjudication (*Mr Michael Jones: 20 September 2010*). This was a case in which the Society had relied upon section 16 of the Code in refusing to provide Mr Jones with information from some regulatory files on the grounds that the information contained personal data about a third party. Mr Sandler pointed out that, in his own case, he was not seeking personal data about a third party but information about himself (namely, the allegations made against him and his firm by the Association).

It is important to be clear that the Freedom of Information Act (upon which the Society's Code is based) gives no right of access under Fol principles to **any** personal data, whether about third parties or about an applicant. The Code specifically says (in s.16) that personal data about third parties cannot be released in response to an Fol request. The Act goes further, making it clear that personal data about the applicant himself cannot be released in response to an Fol request either (as distinct from in response to a request under the Data Protection Act (DPA)). The reason for this would appear to be that, if his or her own personal data were released to an applicant under Fol it would become publicly available, thus negating the applicant's rights under the DPA.

I am not clear that the Michael Jones case can be relevant here. The Society has not cited s. 16 in the current case. Further, if Mr Sandler is seeking personal data about himself his route must be through the DPA. I note that he has made such a request to the Law Society, the outcome of which is pending but is also outside the remit of the FoI Adjudicator.

6.5 Finding

In the light of each of the above considerations I find: that the information requested by Mr Sandler does fall within s.14.5 of the Code; that the Society was entitled to conclude that the public interest was better served by withholding than by releasing it; and that the Society's decision has not infringed Mr Sandler's entitlement to natural justice so as to weigh in favour of releasing the information in this case. I therefore find for the Law Society.

Richard Ayre

Freedom of Information Adjudicator

9 August 2011