



The Law Society

**Adjudication in a matter raised by Mr Neil Webb-
Johnson**

Law Society Freedom of Information Code

April 2009

supporting
solicitors

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1 The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it denied Mr Neil Webb-Johnson the copies he had requested of all communications between the Solicitors Regulation Authority (SRA) and a solicitor against whom he had complained.

2 The background

This case arises from a complaint originally made in 2007 by Mr Webb-Johnson to the SRA about the conduct of a solicitor who had submitted evidence to a Bar Standards Board (BSB) investigation of an earlier complaint Mr Webb-Johnson had made against a barrister. In writing to the BSB the solicitor said things about him which Mr Webb-Johnson claimed were untrue, exaggerated or misleading.

The SRA rejected Mr Webb-Johnson's complaint without ever having put it to the solicitor concerned and, when Mr Webb-Johnson appealed to the Legal Services Ombudsman (LSO), she was not satisfied that the SRA had reached a reasonable conclusion. In April 2008 she asked the SRA to reconsider the matter, and to put the complaint to the solicitor for his response.

In July 2008, after putting Mr Webb-Johnson's complaint to the solicitor, the SRA again rejected it, but without having first shown the solicitor's responses to Mr Webb-Johnson for his comment. Mr Webb-Johnson again appealed to the LSO, who recommended that the SRA reconsider the complaint a second time, saying that she would have thought it necessary for the SRA to have obtained Mr Webb-Johnson's views on the solicitor's responses before reaching a final decision.

It appears that, having reconsidered the complaint for a second time, the SRA decided that no further action was necessary. On 11 February 2009 Mr Webb-Johnson wrote to the SRA asking them to release to him copies of all communications, to include both emails and correspondence, between the SRA and the solicitor. Mr Webb-Johnson pointed out to them that the LSO had twice sent his case back for reconsideration, recommending that they should provide him with a copy of the solicitor's response to his complaint.

On 9 March the Law Society's Information Compliance Manager, Mr Bob Stanley, wrote to Mr Webb-Johnson to say that the Society had decided not to give him copies of correspondence between the SRA and the solicitor. He said this was because the information fell within the exception in section 14.5 of the Freedom of Information Code ('the Code'). This section allows the Society to withhold information if it is 'about specific investigations, disciplinary cases or applications arising from our regulatory role'. Mr Stanley said that, when relying upon s.14.5, the Law Society evaluated whether the public interest favoured disclosing the information requested, but that 'in this case the public interest in disclosing the information requested is outweighed by the public interest in not disclosing (it).' Mr Stanley told Mr Webb-Johnson that, in arriving at this decision, the Society had taken into consideration the

importance of assuring the confidentiality of the information collected as part of an investigation. He said that an expectation that information provided to assist an investigation could later be disclosed in response to a freedom of information request could have the effect of dissuading people from providing information to the Society in the furtherance of future investigations.

On 10 March Mr Webb-Johnson wrote to Mr Stanley to say he wanted to appeal against this decision. On 11 March Mr Stanley forwarded this request to the Adjudicator, providing copies of the email exchanges between himself and Mr Webb-Johnson. On the same day I asked the Society to let me have its submission in support of its decision. I also wrote to Mr Webb-Johnson to explain that, while it was for the Society to satisfy me that it had properly applied the Code, he was welcome to let me have his own submission as to why the information should have been released.

3 Submission by Mr Webb-Johnson

Mr Webb-Johnson wrote to the Adjudicator on 25 March and also provided a number of documents in support of his request, including copies of both decision letters he had received from the LSO. He pointed out that there is a presumption under the Code that an applicant should be given information unless the Law Society can show why it should not be released. He said the Code gave the Law Society the *discretion* not to disclose information; that did not mean that it was *mandatory* not to disclose it.

He said that the LSO had recommended that the SRA should give him a copy of the solicitor's response to his complaint for him to comment upon. Mr Webb-Johnson said that the LSO had no doubt made that recommendation because she considered that a fair and transparent complaints process required a complainant to be given the opportunity to comment upon the response to their complaint. He said this was a practice which had been adopted by the Bar Standards Board when carrying out its own regulatory role.

He said that, in rejecting his request, the Law Society had merely stated that it was not in the public interest to provide the information due to its supposed confidentiality. He said that the Society had not, however, tried to rely upon s.14.10 of the Code (the section which deals with matters of confidence). Mr Webb-Johnson said that the Society had ignored the fact that the LSO, in her letter of 7 October 2008, had stated that it appeared that the SRA had complied with the solicitor's pleas not to send Mr Webb-Johnson a copy of his response, even though the solicitor had stated that he did not claim that any of the document he had submitted to the SRA was privileged or otherwise confidential.

Mr Webb-Johnson enclosed a letter he had written to the SRA on 6 November 2008 in which he had pointed out that no legal reason existed for not disclosing a copy of the solicitor's response. He said that at no time had that been disputed by the SRA. Mr Webb-Johnson said that, since the issue of confidentiality had not even been raised by the solicitor, and since the solicitor had been fully aware from the LSO's recommendations that a copy of his response should be copied to Mr Webb-Johnson

for his comments prior to his complaint being determined by the SRA, the raising of the issue of confidentiality now by the Law Society was just a red herring.

Mr Webb-Johnson also enclosed a recent letter to him from the LSO saying that she believed that 'having regard to fairness and transparency, and having regard to the spirit of the Freedom of Information Act 2000, it is in the public interest that information should be disclosed unless there are good and justifiable reasons why specific information should not be disclosed.'

4 Submission by the Law Society

In its submission on 25 March the Society said that the information Mr Webb-Johnson was seeking fell within the exception at s.14.5 of the Code. It said that the documents under consideration in response to the applicant's request could be summarised as:

- correspondence between the solicitor against whom the complaint had been made and the SRA
- correspondence between the solicitor and the Legal Services Ombudsman
- telephone attendance notes of conversations between SRA staff and the solicitor
- a Crown Prosecution Service report (the solicitor being a CPS employee)

The Society said it did not dispute the claim by Mr Webb-Johnson that no legal reason existed for the SRA not to disclose a copy of the solicitor's response to the complaint. But the Society believed the public interest in disclosing the information was outweighed by the public interest in not disclosing it. The Society said it wanted to make it clear that it had applied the public interest test with due regard to the specific circumstances of this case.

In arriving at this decision the Society said it had taken into consideration the importance of assuring the confidentiality of the information collected as part of an investigation. It believed that an expectation that information provided to assist an investigation could later be disclosed in response to a freedom of information request could in this case have had the effect of dissuading people from providing information to the Society in the furtherance of future investigations.

The Society said it had also taken into consideration the fact that this information, if disclosed, would be available to the public at large. The Society believed that it could not have been the intention of the Code, or indeed of the FoI Act, to place in the public domain information provided for the purpose of a specific regulatory investigation such as this one where to do so would be likely to have the effect of deterring others from providing equivalent information for the furtherance of subsequent investigations.

The Society said it believed that the circumstances of this case, although relating to an SRA file rather than a Legal Complaints Service (LCS) file, were broadly similar to

previous cases where the Adjudicator had 'accepted the general proposition that release of entire complaints files might undermine the assurance of confidentiality without which complainants (or those complained against) might not be willing to contribute frankly to an LCS investigation' (*'Waters' adjudication - 28 September 2008*).

The Society added that it had already accepted a recommendation from the Adjudicator that it should identify and publish criteria for applying the public interest test to requests for information covered by s 14.5 of the Code. It said that this would take place as part of a review of the Code which would commence shortly.

5 Adjudication

On 9 April, after reading the submissions and the accompanying material supplied by Mr Webb-Johnson, I attended the Law Society and read the files in question.

It is not for me to determine whether natural justice required the SRA to give Mr Webb-Johnson a copy of the solicitor's response to his complaint. Nor is it for me to judge the SRA for its decision not to follow the advice of the LSO. My role is to consider whether the Law Society acted within the terms of its Code and, where the Society has relied on an exemption requiring a public interest test to be applied, it is for me to consider whether the balance of public interest is better served by publishing or by withholding the information.

What the Code says is that anyone should be given access to information the Society holds unless it falls within one or more of the specified categories of exempted material. I have examined what the Law Society says are all the documents covered by Mr Webb-Johnson's request, including the exchanges of letters between the SRA and the solicitor and notes made of telephone conversations between them. I am satisfied that the information requested by Mr Webb-Johnson is '*about specific investigations....arising from (the Society's) regulatory role*'. It is therefore covered by the exemption to publication specified in s.14.5 of the Code.

The Law Society says that before it decided to withhold the information it carried out a public interest test 'with due regard to the specific circumstances of this case', although it does not state what specific circumstances it took into account or what criteria it applied. It concluded that 'an expectation that information provided to assist an investigation could later be disclosed in response to a freedom of information request could in this case have had the effect of dissuading people from providing information to the Society'.

Having read the various communications from the solicitor it appears to me that, for reasons he makes clear, he would have been reluctant or unwilling to provide the information he provided if he had believed that it would become available to Mr Webb-Johnson.

I note that in her decision letter to Mr Webb-Johnson in October 2008 the LSO has already disclosed the principal elements of the solicitor's response to the complaint against him. None of the information contained in that response, nor in the other documents I have seen, suggests to me any wrongdoing, inappropriate behaviour, or regulatory failure – any of which it might be strongly in the public interest to publish.

In addition, the files do contain a deal of personal data relating to Mr Webb-Johnson to which he may be entitled under the Data Protection Act (DPA) but which it would be inappropriate or illegal to release to a third party. I note that the Law Society has already invited Mr Webb-Johnson to make an application under the DPA, but the email correspondence between them suggests that Mr Webb-Johnson has not pursued that course of action.

I do not doubt that Mr Webb-Johnson has a strong *personal* interest in receiving the information he has requested. But the test I must apply is whether the balance of *public* interest is better served by these documents being withheld or being freely available, not just to him but to anyone who asks for them under Fol.

For the reasons stated I do not see a significant public interest which would be served by publishing the information. I do accept a public interest in ensuring that SRA investigations are effective, and though I am surprised if the SRA feels it necessary to offer an assurance of confidentiality in order to secure the cooperation of members of the profession it regulates, I accept that in the circumstances of this particular case the solicitor would have been reluctant or unwilling to give information to the investigation if he had believed it would be made public. I must conclude that the balance of public interest is therefore in favour of withholding the information under Fol, and I find for the Law Society.

6 Recommendation

This case highlights two issues. The first is the need for the Society (and therefore the SRA) to recognise that, under the Code, the withholding of information about regulatory investigations is a qualified exemption requiring a case-by-case consideration of the public interest test. It cannot therefore be the case that the SRA can offer a blanket assurance that contributions to an investigation will remain confidential.

The second issue arises from that fact. It must be in the interests of complainants, solicitors, and the general public to understand what criteria the Law Society might apply in considering the public interest test in relation to such information. Ten months ago the Law Society accepted my recommendation that they develop and publish such a set of criteria, and it is disappointing that it has not yet happened, though I note that the Society's assurance that it will take place as part of a general review of the Code.

I want to give notice that in future cases concerning material covered by s.14.5 I will expect to see the criteria which the Society has applied in determining the balance of public interest in any case referred for adjudication.

Richard Ayre

Freedom of Information Adjudicator

17 April 2009