



The Law Society

## **Adjudication in a matter raised by Mr Nicholas Gould**

Law Society Freedom of Information Code

January 2012

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## 1. The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it refused to provide Mr Nicholas Gould with a complete copy of a case file held by the Solicitors Regulation Authority.

## 2. The background

On 16 February 2011 Mr Gould wrote to the Solicitors Regulation Authority (SRA) to ask for a copy of the case file held by them in connection with an investigation into a named firm of solicitors against whom he had complained. He specified that he wanted to be given copies of all correspondence he had sent to the SRA, together with any notes made on that correspondence; correspondence between the SRA and the firm of solicitors, together with any notes; the SRA's analysis of the evidence; and a record of any actions taken on the case by the SRA, together with any other documentation in the file. He said that he understood from the office of the Legal Ombudsman that documentation pertaining to cases was made available to clients on request.

Mr Gould said he thought it would be an injustice to label his request as being made under the Freedom of Information Act, and he trusted that that would not be necessary. [In fact, the Law Society is not covered by the Freedom of Information Act but by its own Freedom of Information Code ("the Code") which aims voluntarily to apply the same principles as the Act.]

On 11 March the Society's Information Compliance Manager, Mr Bob Stanley, replied. He enclosed some of the documents Mr Gould had requested, but said he was withholding a small number of others in accordance with sections 14.5 and 14.10 of the Society's Freedom of Information Code ("the Code").

Mr Stanley said that s.14.5 allowed the Society not to release information if it was about specific investigations, disciplinary cases or applications arising from the Society's regulatory role. He said that all of the information requested fell within that definition, but before withholding it the Society was required to carry out a 'public interest test' to assess whether it should nonetheless be released. The Society's view was that it would not be in the public interest to release some of the information on the file. Mr Stanley said that, in reaching this decision, the Society had taken into consideration the fact that information disclosed in response to Freedom of Information requests was deemed to have been put into the public domain. The Society's view was that to publish the information it had withheld under this section would be likely to prejudice the legitimate regulatory activity of the SRA and would clearly, therefore, not be in the public interest.

Mr Stanley went on to say that s.14.10 allowed the Law Society to withhold information if it had been given in confidence and releasing the information would put the Society at risk of legal action either for breaking a confidence or for breaking a contract. He said that some of the information provided to the SRA in relation to this matter fell into this category and had therefore been withheld. He pointed out that, under the Code, this decision did not require a public interest test. Finally, he informed Mr Gould of his right to seek adjudication of the Society's decision.

On 14 March Mr Gould replied to Mr Stanley, pointing out that he had specifically not made his request under Freedom of Information and that its characterisation as such might have led to some confusion. In addition, Mr Gould said that the information supplied by Mr Stanley was incomplete: it did not include copies of the emails he had sent the SRA, and nor did it contain any notes or annotations made on those emails or on other correspondence he had sent. He proposed various ways in which the Society might satisfy his requests, one of

which was that some of the missing information constituted his personal data which he thought he was entitled to under the Data Protection Act 1998 (DPA).

On 21 March Mr Stanley replied, maintaining the Society's position that certain documents could be withheld under sections 14.5 and 14.10 of the Code, and reminding Mr Gould of his right to ask for adjudication. Mr Stanley explained the Society's view as to why none of the withheld information constituted personal data under the DPA. [This adjudication will omit further exchanges between the Society and Mr Gould on the subject of his entitlement to his personal data, because these are matters governed by the Data Protection Act, not by the Code, and are therefore outside the remit of the Adjudicator.]

Mr Gould replied on 29 March contesting the Society's response, and Mr Stanley answered him on 21 April, maintaining his previous position. On 23 May Mr Gould asked various questions about the status of the Adjudicator, how cases were referred to him, and what his track record was in finding in favour of the Society. On 12 May Mr Stanley told Mr Gould that the Information Commissioner had no locus in connection with Freedom of Information at the Law Society but that the Adjudicator played that role instead. Mr Stanley said there had been nineteen referrals to the Adjudicator since September 2008 and he provided Mr Gould with a link to the pages on the Society's website where each adjudication could be read.

On 20 May Mr Gould asked Mr Stanley for specific answers to issues he had raised earlier about whether or not some of the withheld information constituted personal data under the DPA. On 25 May Mr Stanley maintained the Society's position, explaining again why, in its view, the DPA did not apply.

On 6 June Mr Gould said that he was bringing the correspondence to "a (temporary?) close". He thanked Mr Stanley for the serious consideration he had given to the questions raised but said that, with regret, he would take the matter to the Information Commissioner if he could not resolve them with the SRA. On 13 October Mr Gould wrote again to Mr Stanley to say that he was preparing a document to put to the Adjudicator. He also asked a series of questions about the way the Society filed documents – questions which pertain to whether or not information would be regarded as personal data under the DPA. On 22 November Mr Stanley answered these questions, but neither the questions nor the answers are directly relevant to the FoI matters under adjudication here.

On 22 December Mr Gould provided a substantial document he had written for the attention of the Adjudicator. Mr Stanley forwarded it to me, along with all the previously noted correspondence between them.

On 12 January 2012 Mr Stanley wrote to Mr Gould to say that, as part of the Society's review of its handling of his request, it had been decided to release two previously-withheld hand-written notes made by the SRA caseworker investigating his complaint. Mr Stanley added that, as a gesture of goodwill, the Society was also providing Mr Gould with all the correspondence which had been added to the SRA file after the date of Mr Gould's request.

### **3. Submission by Nicholas Gould**

Much of Mr Gould's submission concerned ways in which he believed that the Law Society had failed to fulfil its obligations under the DPA. These are matters not directly relevant to the question under adjudication here – whether or not the Society acted appropriately in accordance with its FoI Code.] However he also highlighted a number of pertinent issues.

Mr Gould said that the Society had been confused as to whether to treat his request for information under the DPA or under the FoI Code and that, in releasing to him under the Code certain documents which contained his own personal data, the Society had breached its obligations under the DPA. He also highlighted what he believed to be an inconsistency in that the Society had released to him copies of five out of nineteen attachments which he had originally sent to the SRA caseworker, though there was no substantive difference

between those five and the remaining fourteen. Similarly, he wondered why the Society had given him copies of only some but not all of the emails he had sent to the caseworker. If the remaining documents had not been disclosed to him because they were not in the case file he was concerned that this showed sloppy administrative practice by the SRA.

Mr Gould cited the guidance issued to public bodies by the Information Commissioner's Office (ICO) that even "where the complainant does not have a legal right to the information you may still choose to release it in certain circumstances". Mr Gould argued that, in the interests of maintaining confidence in the SRA's regulatory credibility, his request should have been met more fully. He argued that it was a function of a regulatory body like the SRA to safeguard public confidence in its investigations by providing open and transparent access to the means by which it reached its regulatory decisions.

#### **4. Submission by The Law Society**

In its submission the Law Society listed the specific documents which remained withheld from Mr Gould. The documents originally withheld under s.14.5 of the Code were:

- Letter from the SRA to the firm of solicitors dated 15 December 2010.
- SRA file note dated 10 December 2010
- The SRA caseworker's handwritten notes

The documents withheld under s.14.10 were:

- Letter from the firm of solicitors to the SRA dated 7 January 2011.
- Letter from the firm of solicitors to the SRA dated 26 November 2010.
- Letter from the firm of solicitors to Mr Gould's Union dated 25 July 2009 and Undertaking.
- Emails between the firm of solicitors and the Union dated 4 December 2009.
- Employment Tribunal Referral Form.
- Screenprint from database.
- Employment Tribunals Service Receipt.

The Society said that it would not be in the public interest to publish the documents withheld under section 14.5 with the exception of the SRA caseworker's notes (which it had provided to Mr Gould on 12 January).

The letter from the SRA to the firm of solicitors dated 15 December 2010 was a request for a copy of the firm's instructions from the Union to which Mr Gould had then belonged. It explained that the firm's client was the Union and not Mr Gould and included an assurance that the information requested by the SRA would not be disclosed to Mr Gould. The Society believed that publication of this letter in response to a request under the Code would be "inappropriate at the very least and certainly not in the public interest".

The Society said that the file note dated 10 December 2010 outlined the possible options open to the SRA in proceeding with any investigation against the firm of solicitors. The Society's view was that it would not be in the public interest to publish this file note. In particular there was mention of Mr Gould's concern that the firm had tried to cover for a mistake by reassuring Mr Gould that his case was 'not a runner'. The Society believed that the fact that this concern proved to be unfounded would make its publication unfair to the firm.

The Society's view was that publication of the documents withheld under s.14.10 would put the Society at risk of an actionable breach of confidence. The information was given to the Society in confidence by the firm of solicitors and the Society's view was that the firm's expectation of confidentiality in relation to these documents was reasonable and justified. Indeed, in the SRA's letter to the firm dated 15 December 2010 an undertaking had been given that the information requested by the SRA would not be disclosed to Mr Gould.

As regards the SRA caseworker's handwritten notes, the Society said that, upon reconsideration, it felt that it would be in the public interest to release them in order to demonstrate the rigour of the process pursued by the caseworker in arriving at her conclusion in this matter. The Society had also, as a gesture of good will, sent Mr Gould copies of all correspondence placed on the file since the date of Mr Gould's original request (16 February 2011).

Regarding Mr Gould's belief that it had been wrong to release to him his own personal data in response to his FoI request, the Society accepted that it was possible that, under the Code, this information should not have been released, but the Society said it had simply been trying to be helpful to Mr Gould in providing him with the information he himself had originally sent to the SRA.

Finally, in answer to Mr Gould's contention that he could see no distinction between the information disclosed to him and that which had been withheld, the Society said that most of the information disclosed was that which had originally been provided to the SRA by Mr Gould himself and the Society saw no good reason to withhold it. The information that had not been provided to him had been withheld for the reasons set out by the Society.

## **5. Further submission by Mr Gould**

On 16 January Mr Gould added to his original submission. He said he believed that the Society had unreasonably denied him regulatory information about a case in which he was concerned and had shown a lack of balance in using its powers under the Code to withhold information when there was a public interest in maintaining public confidence in the regulatory credibility of the SRA by making further disclosures.

He asked that an adjudication should consider whether certain specific documents should have been provided to him, namely:

1. the assessment of the solicitor who had undertaken a review of Mr Gould's original complaint to the former Legal Complaints Service;
2. the initial analysis of Mr Gould's case by the SRA caseworker conducted shortly before November 5<sup>th</sup> 2010 when she had written to him outlining her intentions;
3. notes recorded by the SRA caseworker to Mr Gould's response on November 10<sup>th</sup> 2010 to that letter;
4. any notes related to, or annotated copies of, the evidence bundle Mr Gould had sent to the caseworker on January 13<sup>th</sup> 2011, made by the caseworker or any other person involved in the process of analysing the evidence;
5. attachments 6 to 19 of that evidence bundle;
6. any analysis conducted by the caseworker or any other person in which the respective merits of evidence submitted by either Mr Gould or the solicitors against whom he had complained were weighed;
7. any draft copies of the caseworker's final report dated '10 February 2011'.

Mr Gould went on to pose further questions which relate to the DPA and are not within the remit of the adjudicator.

Mr Gould emphasised his view that there was a public interest in ensuring that regulatory investigative processes and procedures should be open to scrutiny – as far as appropriate exemptions permitted. He said his experience of the SRA was of institutional resistance to legitimate scrutiny, and that the SRA was not disposed to being called to account for its conduct. The issue of how matters had been investigated was at the very centre of his concerns. Mr Gould then outlined various complaints about the way he believed the SRA had handled his case, but these are not within the remit of the adjudicator. He recognised that he could seek judicial review of the SRA's conduct but, in order to establish the truth of what had happened, he had tried the route of requesting information so that he could see for himself whether the SRA's regulatory processes and procedures had been carried out to an acceptable standard.

Mr Gould said it was a matter of public interest if the Law Society resisted a limited and legitimate request for information designed to substantiate whether a regulatory investigation had been properly conducted. He believed it was in the public interest that regulatory bodies should show how they had weighed evidence in reaching their findings.

Mr Gould said that he accepted that the Law Society had an absolute duty to protect confidentiality, but that duty did not extend to protectionism.

Commenting that, in his dealings with the Law Society's Information Compliance Manager he had found him to be helpful, Mr Gould nonetheless thought the "gesture of goodwill" in releasing to him certain documents placed on the SRA file after the date of his request for information seemed like evidence of a random process at work.

Mr Gould repeated that he recognised the need for the Society not to release private and confidential information, but he believed that the residue of documents should be automatically provided to a requester who is the complainant. He said his request was purely concerned with the processes and procedures of the SRA investigation. It was difficult for him to see how issues of confidentiality arose, but if they did there was always the recourse to redaction.

## **6. Adjudication**

On 11 January I visited the Law Society's offices and inspected the SRA file, including all the documents the Society had withheld from Mr Gould (which, at that time, included the SRA caseworker's handwritten notes). On 23 January, in response to Mr Gould's second submission and in the light of the Society's decision to release to Mr Gould the SRA caseworker's handwritten notes, I inspected the file again.

I brought to the attention of the Society the fact that the file included a typed note of 10 December 2010 which appeared to contain similar information to that in the handwritten notes the Society had recently released. The Society agreed to release this too to Mr Gould, and he was sent it later on 23 January. In addition, the Society supplied Mr Gould with the "missing" attachments 6-19 which it had not previously supplied. It should be noted that these attachments had originally been provided to the SRA by Mr Gould himself, and his request to receive them under FoI was apparently to see whether they had been annotated. So far as I could see, they had not, though many of the attachments contained highlighting and some also showed an (ineffective) attempt to redact individuals' names. It was unclear whether this highlighting and redaction had been made by Mr Gould when he supplied the attachments or by someone within the SRA.

It is not part of the adjudicator's role to answer specific questions from an applicant about the contents of a file, but in view of the way in which various documents have been released to Mr Gould at stages over the past few weeks I think it might be helpful in this particular case for me to refer to the seven items he asked about in his second submission:

1. did not appear in the file
2. did not appear in the file
3. all notes in the file made by the caseworker have now been supplied to Mr Gould
4. no notes related to this bundle appeared in the file, apart from the highlighting and redactions referred to above – and all have now been supplied to Mr Gould
5. have been supplied to Mr Gould
6. no documents of this sort appear in the file, apart from those already supplied to Mr Gould
7. no drafts of the sort described appear in the file

When Mr Gould lodged his request for information in February 2011 he specifically stated that he was not doing so under the Freedom of Information Act (by which, I take it, he meant that he was not doing so under the Society's Code) but that is how the Society chose to handle it. In doing so, I think the Society was probably making a genuine attempt to maximise the scope of the information to which Mr Gould was entitled.

I am satisfied that all of the information – both that withheld and that released at various times to Mr Gould – fell within s.14.5 because it was about a specific regulatory investigation (namely the complaint lodged by Mr Gould against a firm of solicitors). Before withholding information under this section of the Code it is necessary to carry out a public interest test as to where the balance of interest in disclosure or retention lies.

Belatedly, the Law Society took the view that the SRA caseworker's handwritten notes should be provided to Mr Gould because the Society concluded it would be in the public interest to release them "in order to demonstrate the rigour of the process pursued by the SRA caseworker in arriving at her conclusion". This is a welcome development which may impact on future requests under the Code. Indeed it is fair to say that the Law Society has now released more of this file than in any similar case I can recall in the last decade.

I agree with the Society that the balance of public interest is against the release of the documents which remain withheld under s.14.5. I do not believe, unless there are exceptional reasons, that it is in the public interest to publish (which is the effect of release under the Code) details of allegations if they have been investigated and found by the regulator to be without foundation.

I can confirm that the documents withheld under s.14.10 of the Code do indeed contain either an explicit or an implicit condition of being held in confidence, and release of them would appear to constitute a breach of those undertakings or understandings.

As I made clear to Mr Gould from the outset, I am unable to adjudicate in respect of the Law Society's compliance with the Data Protect Act, because the Society must be directly accountable to the Courts in the event that it fails to discharge its legal duties under the Act.

**Mr Gould has now received a good part of the contents of the SRA file. In respect of those parts which are still withheld, the Society has acted in accordance with the Code and I therefore find for the Society.**

**Richard Ayre**  
Freedom of Information Adjudicator  
25 January 2012

## 7. Postscript

It may be helpful to Mr Gould for me to add a postscript. An applicant's motives in seeking the information are not a factor that needs to be taken into account under the Code. However, it would appear that Mr Gould's reason for asking to be given copies of documents he had himself provided to the SRA was to see if the Society had annotated them in any way which would throw light on the thoroughness with which it had investigated his complaint.

Having read the entire file I am also able to confirm that I could find only two instances of annotations. The first was on a copy of a letter from the SRA to Mr Gould dated 10 February 2011, which was marked in the margin at the point of an extra line break between paragraphs "*Re\*\*\*\* before sent*" (the first word could have been *Removed* or *Reviewed*). The second was on an email from Mr Gould to the SRA dated 13 January 2011 which bore the annotation "*Received reply from firm – happy there was no conflict but will await Mr Gould's further evidence before proceeding*". The Society was prepared to allow me to disclose this information.