



The Law Society

# **Adjudication in a matter raised by Mr Paul Schofield**

## **Law Society Freedom of Information Code**

November 2009

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## **1 The issue**

Whether the Society acted appropriately and in accordance with its Freedom of Information Code when it refused to give to a solicitor, Paul Schofield, details of all contacts the Legal Services Commission ('the LSC') and the Solicitors Regulation Authority ('the SRA') had had with another solicitor concerning a regulatory investigation into a former partner in her practice, now Mr Schofield's client.

## **2 The background**

Mr Schofield represents a solicitor (referred to here as Mr R) who is the subject of a regulatory investigation. Mr Schofield claims that the investigation was initiated, and is being perpetuated, as a result of claims of dishonesty made about him by a partner in his former practice (referred to here as Ms S).

At the time of making his request for the information which is the subject of this adjudication, Mr Schofield said that civil proceedings between the partners in Mr R's former firm were underway. Mr Schofield said it would clearly serve Ms S's interests if Mr R were to face disciplinary proceedings.

On 5 June 2009 Mr Schofield wrote to the SRA to ask for 'full details of all contacts between (Ms S), the LSC, and the SRA'. Mr Schofield said that it was clear that there had been 'many letters, telephone discussions, meetings and other contacts' and that Mr R should be entitled to see them before being required to make a full response to the SRA.

On 11 June the Law Society wrote to Mr Schofield to say that the SRA was part of the Law Society and that it would treat his request as being made under the Society's Freedom of Information Code ('the Code'). On 6 July the Society's Information Compliance Manager, Bob Stanley, wrote to Mr Schofield to deny him the information. Mr Stanley said that it had been obtained as part of a specific investigation, which itself was part of the Society's regulatory function. It therefore fell within a provision of the Code (s.14.5) which 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 considering the application of this exemption to publication, the Society evaluated whether the public interest favours releasing the information. He said it was the Society's view that releasing information obtained in the course of an investigation would be detrimental to that investigation. Assuring the confidentiality of the information collected as part of an investigation ensured what he

called 'the ongoing provision of this type of information and cooperation from parties involved'.

Mr Stanley informed Mr Schofield that he was entitled to request an internal review of this decision, and on 14 July Mr Schofield asked for one.

### **3 The Law Society's internal review**

On 11 August the Society's Head of Legal Services, Mr Anthony Brooks, wrote to Mr Schofield to say that he had reviewed all the documents relating to the request. In a general observation about the implications of a freedom of information ('Fol') request, Mr Brooks said that Fol was not about private access to personal information: it was about transparency of information in the public domain.

Referring to Mr Schofield's assertion that Mr R was entitled to receive the information before he could formulate a detailed response to the SRA's investigation of his conduct, Mr Brooks said that he had asked Mr Stanley to check with the SRA whether they had responded to Mr Schofield on what Mr Brooks called 'the regulatory aspect'. Mr Brooks also suggested to Mr Schofield that he might like to consider whether the request for information should be made as a 'subject access request' under the Data Protection Act 1998 ('the DPA'). He pointed out, however, that the DPA included a public interest test for regulatory information, not entirely dissimilar to the one applied to s.14.5 of the Code.

Mr Brooks said he agreed with Mr Stanley that the information concerned fell within s.14.5. Mr Brooks said that the issue turned on the public interest test and 'whether the public interest in transparency is outweighed by a public interest in non-disclosure'.

On the facts of this case Mr Brooks concluded that the public interest was best served by not disclosing the information, because doing so would mean putting it into the public domain. He said there were three reasons which militated against disclosure and which outweighed the public interest in transparency. First, the investigation was still underway, and the fairness and integrity of the process should not be prejudiced by disclosure. Second, the information requested was personal information about both Mr R and Ms S, and there was no real public interest in disclosing opinions expressed, or allegations made, about individuals unless and until they had been proved to be founded or unfounded. Third, said Mr Brooks, an assurance of confidentiality in respect of information provided to regulatory investigations was needed in order to ensure that informants would provide information and co-operate with investigations.

Mr Brooks went on to say that there were additional grounds upon which he felt obliged to decline Mr Schofield's request. He said that, under the Code, personal data could not be released if disclosure would breach any of the data protection principles. He said that the Society now followed the guidance of the Information Commissioner's Office ('the ICO') and entitled 'Determining what is (*sic*) Personal Data'. This held that information which was being processed to decide something about an identifiable individual would be regarded as personal data, even when the information was not 'obviously about' that individual. Mr Brooks said that, according to this analysis, the information Mr Schofield had requested constituted personal data about both Mr R and Ms S, and its release would breach both the first and second principles of the DPA. Mr Brooks concluded that, as a matter of law, personal information which the Society acquired for regulatory purposes could only be used for regulatory purposes.

Mr Brooks advised Mr Schofield that, if he was dissatisfied with the outcome of his review, he could refer the matter to the FoI Adjudicator. In a letter dated 4 September Mr Schofield asked for such a referral, but apparently the Society did not become aware of the request until 25 September. On that day it was referred to me for adjudication.

On 5 October I received copies of the correspondence between Mr Schofield and the Society concerning his request, and I invited both parties to make a submission concerning the way the Society had applied the provisions of the Code. Both submissions were received on 20 October.

#### **4 Submission by Paul Schofield**

Mr Schofield said he was acting for Mr R, a solicitor, who was the subject of an investigation by the SRA, and that he had requested information about the evidence against his client before formulating a written response to that investigation. He said the request was therefore for information 'within the confines of the SRA investigation' and, if forthcoming, the material would simply have been used to inform further written submissions made by or on behalf of Mr R. In other words, said Mr Schofield, the request has never been about the entry of any information into the public domain.

He advanced two arguments: that the Law Society had acted incorrectly in treating his request as having been made under the FoI Code; and that, if it was properly regarded as having been made under the Code, the exemption in s.14.5 should not have been applied.

Mr Schofield provided a copy of e-mail exchanges he had had with the SRA between 12 and 27 May, showing that his original request on 12 May had been for an

explanation of a letter sent by Ms S to the SRA, and for 'copies of all communications between Ms S, the LRC, SRA and the LSC and any other interested party'.

He said that, in its letter of 11 June, the Society had incorrectly treated the request as being made under the Code. In reality it related to disclosure of material held by the Society which was similar to material which had already been disclosed.

Mr Schofield added that he had now written to the Law Society requesting a response on what Mr Brooks had called the 'regulatory dimension' and asking, as Mr Brooks had suggested, for the forms with which to make a 'subject access request' on behalf of Mr R under the DPA.

Moving to his argument that, even if his request had rightly been considered under the Code, s.14.5 should not have been applied, Mr Schofield said that it was 'not a request for information from a member of the public who would, if the information was released, place it in the public domain'.

Mr Schofield argued that an email from the SRA on 27 May suggested to him that evidence was being held back for later use in disciplinary proceedings; that full disclosure had been given in other cases; that the SRA might have pre-judged the matter; and that the SRA seemed to have the right to 'cherry pick' some of the material requested, and to withhold disclosure of other material.

Mr Schofield argued that if his request was not granted, there was a real danger that the decision-making officer at the SRA would not have a balanced, accurate or fair representation of the facts before him when reaching a decision on whether to refer to Mr R to the Solicitors Disciplinary Tribunal.

He went on to argue unfairness in that, in an email to him on 13 May, the SRA had made it clear that Ms S seemed to have the benefit of 'protection' surrounding the details of her communications with the SRA and the LSC, whereas the SRA had declined to offer Mr R an equivalent assurance that his own communications would not be disclosed to her.

Finally, Mr Schofield argued that an email on 27 May in which the SRA had said 'the FI report is deemed sufficient evidence to put before the decision making officer', had made it clear that the investigative phase had concluded. He therefore took issue with Mr Stanley's claim on 6 July that releasing the information could be 'detrimental to (the) investigation'.

## 5 Submission by the Law Society

The Law Society said it had treated Mr Schofield's letter of 5 June as a request for information under the Code. Its submission reiterated the arguments in Mr Brooks' letter to Mr Schofield of 11 August, with some additional comments on the application of the public interest test.

The Society said that, when disclosure of information was requested, it was not always clear whether the requester was really making a freedom of information request or not. Where information from a regulatory investigation file was sought on behalf of one of the individuals involved in the investigation, the Society said, the requester did not always appreciate that disclosure of the information would constitute its entry into the public domain. In actual fact, said the Society, the requester often does not intend that the information concerned should enter into the public domain at all, since it involves personal information about him. The Society said that FoI was not about private access to personal information about individuals: it was about transparency of information in the public domain. That, said the Society, was why freedom of information did not entitle a requester to personal data even about himself. If a person wanted access to personal data about himself, then usually the better course was to make a subject access request under the DPA.

In this case, said the Society, Mr Schofield's request had been made in the course of his client's response to the SRA's regulatory investigation of him. The Society believed that the information requested fell within s.4.5 of the Code, on the basis that it was information about specific investigations, disciplinary cases or applications arising out of the Society's regulatory role. The Society said the issue turned on the application of the public interest test: whether the public interest in transparency was outweighed by a public interest in non-disclosure.

On the facts of this case, the Society considered that the public interest was best served by not disclosing the information sought. The Society said that it wanted to stress that the question was whether the information should be put into the public domain. Three reasons seemed to militate against disclosure and outweighed the public interest in transparency.

First, the investigation was still ongoing, and there was a public interest in ensuring that the fairness and integrity of the process itself was not prejudiced by the disclosure. Second, the information sought was personal information, both about Ms S and about Mr R. The Society said that in regulatory investigations there was no real public interest in disclosing opinions expressed, or allegations made, about individuals unless and until those opinions, or allegations, had been proved to be founded or unfounded. Third, an assurance of confidentiality in respect of information provided to regulatory investigations was needed in order to ensure informants would provide information and co-operate. On this basis the Society had decided to deny Mr Schofield's request.

The Society went on to say that, under the Code, personal data were exempt from being disclosed if disclosure would breach any of the data protection principles. In determining what data were 'personal data', the Society said it now followed the ICO's Data Protection Technical Guidance Note of August 2007 entitled '*Determining what is personal data*'. According to this, information which was being processed to decide something about an identifiable individual would be personal data, even when the information was not 'obviously about' that individual.

The Society said that, by this analysis, the information Mr Schofield wanted was personal data about both Mr R and Ms S. It effectively constituted expressions of opinion which Ms S would have made to the LSC and the SRA about Mr R's conduct. The Society believed that to disclose such information to a third party in response to what it called 'a pure information request' would breach both the first and second data protection principles. In particular, personal information which the Society acquired for regulatory purposes could as a matter of law only be used for regulatory purposes. On this basis, too, the Society had declined Mr Schofield's request.

The Society's submission then went on to address the public interest test. It provided a draft document setting out a set of criteria to be considered when applying the public interest test to qualified Code exceptions such as s.14.5. The Society said that it expected the draft to be adopted by the Society in November 2009, but in practical terms it was already being. [A copy of the draft is attached as an annex to this adjudication]

The Society said that, in the case of Mr Schofield's request, it did not consider that any of the criteria set out in the document for the release of information had been met. In particular, the Society said that it was unconvinced that placing the information requested in the public domain would promote confidence in the regulation of the legal profession to the extent that the 14.5 exemption would be outweighed.

## **6 Further submission by Paul Schofield**

Because the Society had submitted a hitherto unpublished document outlining its public interest criteria I obtained their permission to disclose it to Mr Schofield so that he might have the opportunity to comment upon the criteria and the way the Society had applied them in his case.

On 26 October Mr Schofield therefore made a further submission. He repeated his argument that Mr R simply wanted to both exercise, and be confident that he had exercised, his right to fairness and natural justice before the SRA took a decision

absolutely critical to him and his career. Mr Schofield said that Mr R did not seek disclosure of the material in order to place it into the public domain, in the normal sense. He simply wanted to be able to prepare his defence case prior to a quasi-judicial function being exercised which would have massive implications for him. Mr Schofield said that Mr R's right to fairness and natural justice was being severely restricted.

Having seen the Law Society's public interest criteria, Mr Schofield repeated his view that they had incorrectly channelled his request for what he called 'disclosure within the confines of an investigation' into an FOI request.

Mr Schofield took the opportunity to counter each of the three reasons that Mr Brooks had cited in his letter of the 11<sup>th</sup> August for not judging the public interest to be in favour of disclosure. First, Mr Schofield said the investigation into Mr R's activities was not 'still ongoing' but had concluded with the completion of the FI Report in May 2009. Mr Schofield asked rhetorically how disclosure of this material 'effectively between solicitors only' could conceivably prejudice the fairness and integrity of the investigation process, even if it was still ongoing. Second, he argued that the information was not personal information but rather what he called 'documentary material' such as letters, notes of telephone calls, minutes of meetings, and e-mails. Mr Schofield believed that this information 'must be professional as opposed to personal'. Third, in relation to the question of confidentiality, Mr Schofield asked why, if Ms S had been given an assurance of confidence, the Law Society had not relied upon the absolute exemption to disclosure specified in s.14.10 of the Code? He also wondered why some of the material had already been disclosed if she had been given such an assurance, and whether Ms S been approached to waive the confidentiality of what had been disclosed.

Mr Schofield said that he and Mr R were willing to provide an undertaking to limit his use of any material disclosed strictly for the purpose of preparing a response to the FI Report and, if necessary, preparing his defence in any proceedings before the SDT.

Mr Schofield said that the Law Society's public interest criteria were extremely relevant in this particular situation. The information he was seeking related entirely to matters of record about the nature and extent of the allegations made and opinions expressed by Ms S which had been the fundamental basis of the investigations carried out by the LSC and the SRA. He believed that release of the information was clearly in the interests of fairness and natural justice.



## 7 Further submissions by the Law Society

On 27 October, having read the Law Society's original submission and the comments by Mr Schofield, I asked the Society for further information about its claim that it needed to offer assurances of confidentiality to informants in an investigation.

The Society replied the same day to explain why it had not relied upon s.14.10 of the Code, which, without the need to apply a public interest test, would have enabled it to withhold information given to the Society in confidence,. The Society said that s.14.10 was based on section 41 of the Fol Act, the ICO's guidance upon which made it clear that, in the Society's words, 'the bar is set quite high if this exemption is to be relied upon'. The Society quoted the ICO as saying that 'the law of confidence... can present difficulties, particularly to those who do not have access to legal advice. For this reason, it may often be worth considering whether there are any other exemptions in the Act which may be more immediately relevant.' For this reason, the Society said, it had considered it more appropriate to rely upon s.14.5 and the personal data exemption in this case.

Responding to my request for information about the nature of the assurance it offered to people who provided information to an SRA investigation, the Society said that they were not given a standard assurance of confidentiality. But the Society believed that, even without such a blanket assurance, there was an expectation that, although not stated explicitly, conditions on disclosure were obvious or implied from the circumstances. The Society said that, despite this, it might well be that some of the information provided was subsequently made available to 'the other side', but any such disclosure would be at the discretion of the SRA based on the circumstances of the particular case.

On 1 November I asked the Society for further information about the way it had applied its own criteria for assessing the public interest in this case. I pointed out that in its submission the Society had said that it did not consider that any of the criteria had been met, and it then went on to cite in particular the criterion relating to promoting confidence in regulation of the legal profession. I referred to the final bullet point in the Society's criteria document (*'One of the public interest considerations is the individual's right to fairness and natural justice. For example, if allegations have been made about a requester, he/she ought to be given the right to respond to these allegations before a substantive decision is taken, even though this information would otherwise be exempt as relating to a specific investigation'*) and asked whether the Society had considered this and, if so, why it had reached the view that the public interest was against release of the information?

The Law Society replied on 2 November, saying that 'in terms of the public interest test... it would not serve the public interest to have personal data relating to [Mr R] and [Ms S] placed in the public domain'. The Society accepted that its original submission had not explained its thinking on the criterion relating to fairness and

natural justice. The Society continued: 'in essence what we are saying is that it cannot be in the public interest for personal data relating to both [Mr R] and [Ms S] to be placed in the public domain. Indeed it would be a breach of the Data Protection Act to do so. Mr Schofield (on behalf of [Mr R]) has had every opportunity to respond to the allegations made about [Mr R]. The Society does not believe that it is necessary, or indeed in the public interest, for the actual correspondence from Ms S to be made publicly available'.

The Law Society concluded by saying that its view was that the appropriate route for accessing personal data was via the DPA, and it pointed out that Mr Schofield had now duly made such a subject access request on behalf of Mr R.

## **8 Adjudication**

This case has raised several difficult issues. What matters to Mr Schofield is whether I uphold the Law Society's decision to deny him the information he asked for on Mr R's behalf. But first it is necessary to address the questions raised about the Law Society's use of the Code in this case.

### **8.1 The implications of a release of information under Fol**

Freedom of Information is about ensuring that information is publicly available unless there are good reasons otherwise. Information released under Fol is to be released to anyone who asks for it. Mr Schofield's no doubt genuine offer to keep confidential any information released to him and to Mr R misses the point. Providing information under Fol to the person who requested it makes it available for general publication to anybody else who asks for it.

### **8.2 Should the Law Society have treated this as a request under Fol?**

Mr Schofield did not cite Fol when he asked for the information. From his point of view it must seem particularly inappropriate for the Society to have chosen to treat his request under a set of rules which then led them to deny it to him.

However, people requesting information often do so without citing Fol, and in my early adjudications following the introduction of the Code in 2001 I encouraged the Society not to require a requester to use the magic words 'Freedom of Information' before considering whether the Code required the release of what had been asked for.

I cannot accept, therefore, that it was wrong of the Society to consider Mr Schofield's request under the Fol Code, though it would have been helpful if it had drawn his attention at an earlier stage to the what it now calls the appropriate method of seeking the information, a subject access request by Mr R under the Data Protection Act. Information released in that way is, by definition, available only to the subject of it.

### **8.3 Did the information requested fall within s.14.5 of the Code?**

My role is to determine whether, having decided to treat it as a request under Fol, the Society properly applied the exemptions to publication specified in the Code. Also, if s.14.5 was properly applied, whether the public interest was on balance for or against publication.

I do find that the information Mr Schofield requested fell within s.14.5 because it is clearly information about 'a specific investigation....arising from (the Law Society's) regulatory role'. That leads to the question of the balance of public interest.

### **8.4 Does the public interest favour publication of the information?**

It was partly at my request that the Law Society developed criteria against which to judge where the public interest lies in applying the qualified exemptions under the Code, but I had not seen the criteria before the Society submitted them in this case. In taking an independent view of where the balance of public interest lies I am not bound by the Society's criteria, but I take full account of the Society's reasoning. It is a surprise that, having included a criterion which specifically refers to a requester's right to fairness and natural justice, the Law Society has not explained, either to Mr Schofield or to me, why it felt that that criterion had 'not been met' in this case.

However, I think the question of how much information a regulatory body must release to someone it is investigating is a matter firstly for due process of the body concerned, and thereafter for review by the Courts if natural justice appears to have been breached by any failure of disclosure. At the risk of repeating myself, Freedom of Information is about ensuring that information is *publicly* available. I see no evidence that Parliament intended the Fol Act (which the Law Society aims to mirror through the Code) to determine the extent to which evidence in an investigation must be disclosed to the subject of that investigation.

I do not wholly accept the principle expressed in Mr Stanley's letter of 6 July that 'releasing information obtained in the course of an investigation *would* (my italics) be detrimental'. It seems to me self-evident that there will be instances where releasing *some* information might benefit an investigation, for instance by attracting witnesses

to come forward. It is equally clear that the release of some other kinds of information might be detrimental, enabling a wrongdoer to cover his tracks.

I do accept that releasing certain information while an investigation was underway might prejudice it, and I reject Mr Schofield's assertion that the investigation cannot be prejudiced in Mr R's case because it was concluded with the FIR report in May 2009. It seems to me that, unless it is abandoned, an investigation is not concluded until all the available evidence has been evaluated and a decision taken on whether to proceed, and in this case Mr R has not yet submitted his response to the SRA for its evaluation.

Although routine public disclosure of allegations made against an individual currently under investigation might offer transparency of the regulatory process it seems to me that any benefit would be clearly outweighed by the risks: unfair damage to reputations, a disincentive to witnesses to speak freely, and frustration of the investigation. There may be cases where a stronger public interest in disclosure of some or all of the information outweighs this presumption, but the suggestion that Ms S might have other motives for having made allegations against Mr R in this case seems insufficient reason for making it an exception to the general rule. I therefore find that the public interest in this case is against disclosure under the FoI Code of the information Mr Schofield requested.

## **8.5 The release of Personal Data under FoI**

Although the Society originally cited only s.14.5 of the Code as its reason for denying Mr Schofield's request, when that decision was reviewed internally by Mr Brooks he added an alternative reason: that the information concerned constituted personal data about Mr R or about Ms S or both. By the time the Society refined its arguments for this adjudication it seems to me that it was relying principally upon this exemption.

Parliament explicitly prohibited the release of personal data under the FoI Act because it would have meant general publication of information that an individual was entitled to keep private about himself. The Code similarly prohibits (in s.16) the release of personal data for the same reason, and because to make it publicly available would be a criminal offence under the DPA. I accept (and share responsibility for) the failure of s.16 to make clear that it applies not only to personal information about someone else but also about the requester himself.

In several previous adjudications I have said that I feel unable to adjudicate in cases where the Society relies upon s.16 in refusing to disclose information. This is because, even if I thought the Law Society to have withheld data wrongly under s.16, I could not require it to release that information if the Society believed that it would commit a criminal offence by doing so.

I therefore decline to adjudicate in respect of s.16, so the Society's decision to withhold the information on the grounds that it constitutes personal data stands. For what it is worth, however, and having considered carefully the ICO guidance as to what constitutes personal data, I agree with the Law Society's view that the definition would include much, if not all, of the information Mr Schofield requested.

I note that Mr Schofield is now pursuing a subject access request under the Data Protection Act on behalf of Mr R, which appears to be the more appropriate route.