



The Law Society

**Adjudication in a matter raised by Underwoods Solicitors**  
Law Society Freedom of Information Code  
July 2012



## **1. The issue**

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it declined to release information identifying firms of solicitors in the “Assigned Risks Pool” of the Solicitors Regulation Authority.

## **2. The background**

On 18 May a firm of solicitors, Underwoods, emailed the Law Society to ask for details of “all the firms of solicitors who have been assigned to the Solicitors Regulation Authority Assigned Risks Pool since the beginning of that scheme and the years in which they were in the pool”.

On 22 May the Society declined to provide the information, withholding it under section 14.9 of the Society’s Freedom of Information Code (“the Code”). The Society told Underwoods that this allowed it to withhold information if disclosure could harm the Society’s commercial interests or those of anyone it might have a commercial relationship with. In arriving at this decision, the Society said, it had taken into account the fact that any information released under the Code was deemed to be placed in the public domain and not merely disclosed to the organisation making the request.

The Society informed Underwoods that they had the right to have the matter referred to the independent Freedom of Information adjudicator. Later that day Underwoods confirmed that they wanted referral and the Law Society provided me with the exchanges of emails between the two parties.

On 25 May I asked the Society to provide me with a written submission explaining why it believed it had acted appropriately under the Code. I also invited Underwoods, if they wished, to make a submission as to why they felt the Society had not done so.

## **3. Submission by the Law Society**

On 31 May the Law Society made its submission. It said that being in the Assigned Risks Pool (ARP), or having been in the ARP, indicated that a firm had been uninsurable by the market at some point. The Society said that this could have been because the risk profile of the firm was too great or it could have been due to problems in the market, either related to brokers or insurers, whereby insurance was not put in place by the renewal date, resulting in firms being in the ARP for a short period before securing cover on the open market. The Society said that an example of this had occurred in 2001 when the ARP had doubled in size compared to 2000 and 2002 because an insurer had not renewed the policies of firms with low premiums, resulting in a significant number of low risk firms finding themselves in the ARP for a short period.

The Society said that there was undoubtedly a stigma to being in the ARP which was likely to have an adverse impact on the commercial interests of firms if the information were put in the public domain.

The Society argued that, if a person asserted a claim against a firm, that person could request details from the firm of the qualifying insurer relevant to the claim. If the firm failed to provide the information then the claimant could request the same information from the SRA. In this way, said the Society, people who needed to know the identity of a firm’s insurer had a means of accessing that information.

The Society said that the details of the firms insured by each qualifying insurer and the details of each firm's qualifying insurer were not in the public domain. It was the Society's view that to publish the information requested would be likely to have a detrimental effect on the commercial interests of the firms involved and that this harm would far outweigh any public interest in the information being made available.

#### **4. Submission by Underwoods**

Because the nature of this case was unusual, and to ensure that each party addressed the relevant issues under the Code, I provided a copy of the Law Society's submission to Underwoods. On 2 June Underwoods made their own submission.

Underwoods said that the information they had asked for was regulatory information, and section 18 of the Code stated that where requests for regulatory information were denied it was for the Adjudicator to decide if it was in the public interest for the information to be released. Underwoods said that the information requested related to firms of solicitors which were struggling to survive and, as a result, were vulnerable to interference from unscrupulous third parties. This was especially relevant now that non-lawyers could own and run law firms. Underwoods believed it was very much in the public interest to know which solicitors could be relied on to take on a case because they had assessed its merits, considered whether it was within their competence and given proper consideration to the interests of their client, and which firms were accepting instruction on cases without any merits simply in order to hit targets imposed by their funders for marketing purposes.

Underwoods believed this issue to be strongly linked to the need to uphold the reputation of the profession in the eyes of the public. They believed that a decision withholding information because it was considered commercially detrimental to firms of solicitors who were themselves, in Underwoods' view, potentially detrimental to the legal and financial wellbeing of the public, constituted false accounting. It hid problems that the public had a right to have advance notice of. Underwoods argued that, when any such problems came to light, the fact that the information had been known to the relevant authorities but concealed for commercial reasons undermined the trust people had in the profession as a whole.

Underwoods also disputed the Law Society's statement that any information released (under FoI) was deemed as being placed in the public domain. They believed this was not an acceptable reason for withholding this information and not a consideration that the Code of Practice granted them the power to apply. Underwoods said that, by citing this argument, the Law Society had unilaterally imposed an overly broad reason for withholding information, a refusal that the Code did not make provision for, and in a way that was contrary to the Freedom of Information Act's intended aim.

Underwoods observed that the government promotes the absolute freedom of markets and holds the rights of the consumer to be paramount, and they argued that concealing from the public information that is essential in making an informed choice as to which solicitor to instruct, was a manifest failure to protect the rights of the consumer.

Commenting directly upon the Law Society's submission, Underwoods observed that section 14.9 of the Code allowed the Law Society to withhold information if to disclose it would harm the Society's commercial interests or those of anyone it might have a commercial relationship with. Underwoods said that the Society claimed that disclosing the requested information would be detrimental to the commercial interests of the firms involved in the ARP. But Underwoods believed that, as a body with a supervisory role over solicitors, the Law Society did not, or at least should not, have a commercial relationship with these firms. Underwoods said that the Society's professed concerns were either towards firms it had a supervisory, not a commercial, relationship with, or towards firms that it should not have a

commercial relationship with. Underwoods believed that this put the requested information outside the scope of section 14.9.

Underwoods said that, from April 2012, the Legal Ombudsman would be using powers granted to The Office for Legal Complaints by The Legal Services Act 2007 to publish quarterly reports identifying all solicitors and law firms that have had formal complaints made against them, regardless of the outcome. Underwoods observed that, while this information was clearly detrimental to the commercial interests of those involved, the right of the public to know about these complaints outweighed the detriment.

Underwoods went on to argue that, if the public interest required publication of information relating to every formal complaint, there could be no justification for withholding information that allowed the public to know if the solicitor they were considering instructing was potentially about to go out of business. This information essentially amounted to a complaint about the standard of the whole firm made by the entirety of the commercial insurance market. Underwoods believed that this was immeasurably more serious than almost all of the complaints made against firms and currently listed in anonymised form on the Legal Ombudsman's website. It was therefore vital that it be made public.

## 5. Response by the Law Society

In view of the fact that Underwoods had introduced new arguments I summarised them and asked for the Society's responses to them. On 12 June I received those responses.

5.1 The following summary of Underwoods' arguments appears in italics, followed by the Society's responses to them.

*5.11 Underwoods said that the information requested related to firms of solicitors that were struggling to survive and as a result were vulnerable to interference from unscrupulous third parties. This was especially relevant now that non-lawyers could own and run law firms. Underwoods believed it was very much in the public interest to know which solicitors could be relied on to take on a case because they had assessed its merits, considered whether it was within their competence and given proper consideration to the interests of their client, and which firms were accepting instruction on cases without any merits simply in order to hit targets imposed by their funders for marketing purposes.*

**Law Society response:** Being, or having been, in the ARP indicates that a firm was uninsurable by the market at some point. This can be because the risk profile of the firm is too great or it can be due to problems in the market, either related to brokers or insurers, whereby insurance was not put in place by the renewal date, resulting in firms being in the ARP for a short period before securing cover on the open market.

There appears to be an assumption on the part of Underwoods that a firm in the ARP is a firm that is struggling to survive and therefore is a firm that is "vulnerable to interference from unscrupulous third parties". Whilst it is true that some firms that have been in the ARP have not survived other firms have and equally some firms not in the ARP have got into financial difficulties and have closed. Underwoods' concern about firms in the ARP having a conflict between acting in the best interests of clients and hitting targets imposed by funders relates to "licensed bodies" also known as "Alternative Business Structures" or "ABS", as this is the only form of practice that permits external investment. ABS are a very recent development, with the SRA granting its first licence in March this year. So far seven licences have been granted and none has been to firms that are in the ARP.

The SRA takes entry into the ARP very seriously, as demonstrated by the ARP Enforcement team, and the measures taken there to investigate, support, and where appropriate, close firms in the ARP.

*5.12 Underwoods believed this issue to be strongly linked to the need to uphold the reputation of the profession in the eyes of the public. They believed that a decision withholding information because it was considered commercially detrimental to firms of solicitors who were, in Underwoods' view, potentially detrimental to the legal and financial wellbeing of the public was false accounting. It hid problems that the public had a right to have advance notice of. Underwoods argued that, when any such problems came to light, the fact that the information had been known to the relevant authorities but concealed for commercial reasons undermined the trust people have in the profession as a whole.*

**Law Society response:** There has been no issue of “concealment”. The ARP is and always has been at the forefront of scrutiny both by the SRA and stakeholders (not least the qualifying insurers). The SRA has been transparent about the activities of the ARP and the Enforcement Team.

There is no question of firms in the ARP not having insurance cover, so there is no detriment to the public or clients in that respect, or in terms of their “financial wellbeing”. An example serves to illustrate the point. Firm X received a number of vexatious claims from a former client resulting in the firm’s insurer declining to renew cover. The firm entered the ARP and it took several years before the court struck out the claims as being vexatious, at which point the original insurer was more than happy to insure the firm again. During the period the firm continued to provide its clients with a good service as it had done prior to receiving the vexatious claims. At all times the clients of the firm enjoyed the same level of compulsory client financial protection.

*5.13 Underwoods observed that the government promotes the absolute freedom of markets and holds the rights of the consumer to be paramount, but Underwoods argued that concealing from the public information that is essential in making an informed choice as to which solicitor to instruct was a manifest failure to protect the rights of the consumer.*

**Law Society response:** Client protection is paramount and the scheme of qualifying insurance, underpinned by the ARP, ensures that no firm is “uninsured” and that all firms (whether in the ARP or not) have the same level of compulsory professional indemnity cover as set out in the Minimum Terms and Conditions. As such any argument of a “manifest failure to protect the rights of the consumer” is wrong. If the identity of a firm’s insurer(s) or the level of cover is of particular importance to clients then they can make their own enquiry of a firm they wish to instruct so as to inform their decision.

Any person who asserts a claim against a firm has a right to ask for and to be provided with information about the insurer relevant to the claim which may not necessarily be the firm’s current insurer. If a firm fails to provide the information then the SRA has discretion to release it. The SRA deals with around two thousand such requests each year.

*5.14 Underwoods observed that section 14.9 of the Code allowed the Law Society to withhold information if to disclose it would harm the Society’s commercial interests or those of anyone the Law Society might have a commercial relationship with. But Underwoods believed that, as a body with a supervisory role over solicitors, the Law Society did not, or at least should not, have a commercial relationship with these firms. The Society’s professed concerns were either towards firms it had a supervisory, not a commercial, relationship with, or towards firms that it should not have a commercial relationship with. Underwoods believed that this put the requested information outside the scope of section 14.9.*

**Law Society response:** The commercial relationship referred to here is a reference to the Qualifying Insurer's Agreements between the Society, the ARP Manager and each Qualifying Insurer, which contained a confidentiality provision as follows:

**"Confidentiality**

Except as provided in this Agreement, each party shall treat as confidential all information relating to persons insured by the Insurer, where such information would enable that person to be identified, provided that, where the Insurer reports to the Law Society any matter referred to in Rule 17.1 of the Rules:

the Law Society shall keep all such information confidential;

the Law Society shall not (except where and to the extent required by law or in the proper performance by the Law Society of its regulatory functions) at any time reveal any such information to any person other than a duly authorised employee of the Law Society or any of its subsidiaries; and

any privilege attaching to such information shall not be regarded as having been waived whether by virtue of such information having been provided to the Law Society or otherwise.

The provisions of clause 16.1 shall not prevent the Law Society making use of any information referred to in that clause for the purpose of bringing disciplinary proceedings against any person."

For the current indemnity period (commencing on 1 October 2011) the provision was amended by the addition of a new clause 16.3 as follows:

*"Notwithstanding any other provision of this Agreement the Law Society may, without limitation and in its absolute discretion, disclose and/or make available for public inspection the identity of the Insurer and any firm to which it provides a Policy pursuant to the terms of this Agreement. Nothing in this Agreement shall prohibit the Law Society from making such a disclosure, nor give rise to any liability of the Law Society, for breach of confidence or otherwise."*

*5.15 Underwoods said that, from April 2012, the Legal Ombudsman would be using powers granted to The Office for Legal Complaints by The Legal Services Act 2007 to publish quarterly reports identifying all solicitors and law firms that have had formal complaints made against them, regardless of the outcome. Underwoods observed that, while this information was clearly detrimental to the commercial interests of those involved, the right of the public to know about these complaints outweighed the detriment. Underwoods went on to argue that, if the public interest required publication of information relating to every formal complaint, there could be no justification for withholding information that allowed the public to know if the solicitor they were considering instructing was potentially about to go out of business. This information essentially amounted to a complaint about the standard of the whole firm made by the entirety of the commercial insurance market. Underwoods believed that this was immeasurably more serious than almost all of the complaints made against firms and currently listed in anonymised form on the Legal Ombudsman's website. It was therefore vital that it be made public.*

**Law Society response:** There is a distinction to be made between a complaint and a firm being in the ARP. We have explained above that there are many reasons why a firm might

find itself in the ARP through no fault of its own. In some years the market hardens and some good firms may find it difficult to get cover e.g. firms that have specialised in conveyancing in the past may find it impossible to get cover following a collapse in the property market as insurers are aware that such a collapse is normally followed by an upturn in conveyancing related claims.

5.2 In addition to providing those responses to the submission made by Underwoods the Society also provided the adjudicator with privileged legal advice it had received in December 2010 when faced with a similar request for information from the Council for Mortgage Lenders. The Society believed that it could not legally release the information requested without obtaining the consent of every firm affected and every Qualifying Insurer concerned.

## **6. Further enquiries**

16.1 In response, I asked the Society for a clear explanation of whether, having applied the new clause 16.3 referred to on 5.14 above with effect from 1 October 2011 it intended to exercise its discretion and release the information for 2011/12.

On 15 June the Society replied, saying the SRA wanted to move to a position where the identity of any firm's compulsory professional indemnity insurer was a matter of public record. The first step had been to introduce clause 16.3 into the QIA, giving the SRA the power to release the information, and a new rule 17.6 in the SRA Indemnity Insurance Rules 2011 along similar lines. The latter stated that the Society "may, without limitation and in its absolute discretion, disclose and make available for public inspection the identity of a firm's qualifying insurer. Nothing in these Rules shall act to prohibit the Society from making such a disclosure nor give rise to any liability of the Society, for breach of any obligations of confidentiality or otherwise."

The Society confirmed that it would be releasing the names of the firms in the ARP for 2011/12 to Underwoods as soon as the information had been obtained. The Society said that the SRA would be writing to all ARP firms affected to tell them that they were doing this and why.

16.2 On 16 June I asked further questions of the Society. If its position was that the commercial relationship it wished to protect was with the qualifying insurers, rather than with the firms of solicitors being insured, I asked how publication of the names of those firms could adversely affect the commercial interests of the insurers. Secondly, if the Society felt bound by the confidentiality clause in the Qualifying Insurer's Agreement I wondered why the Society had not relied upon section 14.10 of the Code, which enables information obtained under confidence to be withheld from publication. I also asked for clarification as to whether the names of the firms on the ARP had in fact been given to the SRA in confidence.

On 19 June the Law Society sent answers which I felt required further clarification, which I requested. On 20 June the Society provided that clarification. It said that, upon further consideration, the Society accepted that it was difficult to argue that publishing the names of the firms in the ARP would harm the commercial interests of their insurers. The Society therefore withdrew its reliance upon section 14.9 of the Code in this case.

However, the Society said that it did wish to rely on section 14.10 because the terms of the SRA Indemnity Insurance Rules imposed conditions of confidentiality on the information provided to the SRA by firms. The Society referred again to the privileged legal advice it had provided to the adjudicator to the effect that, with the exception of the current insurance year, the Society could not disclose information on whether a firm was in the ARP other than to those making a claim. The Society added that, where the information was provided to the

SRA by the insurers, the SRA was bound by the Qualifying Insurers Agreement which, again, did not allow disclosure of names of firms in the ARP other than those in the current insurance year. The Society argued that these contractual terms required that the information in question should not be published, and that there was an understanding on the part of all parties that the information was provided to the Society in confidence on that basis.

## **7. Further response from Underwoods**

In recognition of the fact that Underwoods had had no opportunity to address in their first submission the question of whether or not section 14.10 of the Code could be relied upon in this case, I sent them a summary of the Law Society's latest position - including the fact that the Society had said that it would provide the names of the firms in the ARP for 2011/12 - and I invited a further submission.

On 3 July Underwoods said they were pleased that the Law Society had decided to make the relevant information available for the period from 2011/2012 and they looked forward to receiving it. However, they could see no merit in the Society's reasons for refusing the historical information.

Underwoods pointed out that section 14.10 of the Code stated that information could be withheld if it "was given to us in confidence and giving you the information would put us at risk of legal action either for breaking a confidence or for breaking a contract." But Underwoods noted that the contractual term governing confidentiality which the Law Society wanted to rely on for the purposes of section 14.10 explicitly allowed it to reveal information "where and to the extent required by law". Underwoods argued that a statute requiring the disclosure of information where it is in the public interest to do so very definitely met this definition. Therefore, they argued, this section of the agreement and section 14.10 offered no justification for withholding the information, because the Law Society was expressly permitted by the terms of the contract to disclose the information in these circumstances.

Underwoods said that the Law Society's decision to amend the Qualifying Insurers Agreement to allow it to disclose such information undermined further its reliance upon s.14.10 in this case. The Society had taken steps to absolve itself of its duty of confidentiality in relation to this information yet wanted to use the same duty it had opted to undermine as justification not to reveal what was essentially the same information. Additionally, said Underwoods, there was no logic in withholding the historical information as the firms listed would either no longer be in the ARP and so had nothing to hide, or would still be in the ARP and this would be shown anyway by the 2011/2012 information that the Society intended to disclose.

## **8. Adjudication**

8.1 This has been a complex and difficult issue to resolve. First, I should address some of the questions of interpretation of the Code and of the Law Society's wider obligations which Underwoods have raised.

Underwoods disputed the appropriateness of the Society's statement that the release of information under FoI amounted to publishing it. I believe the Society's position is the correct one. It is a fundamental principle of FoI that information released to one applicant must be equally available to anyone else who might request it: release is therefore tantamount to publication – or at the very least to making it available to the public on request.

Underwoods also questioned whether the Society was able to rely upon section 14.9 of the Code at all, because they argued that the firms whose identities Underwoods wanted



released did not have a commercial relationship with the Society, being merely subject to the Society's regulatory authority. The Society initially argued that section 14.9 applied because the commercial interests at risk from disclosure were the interests of the qualifying insurer, with which the Society does have a commercial relationship. However, I agree with Underwoods that clause 14.9 cannot be used to protect the commercial interests of firms whose relationship with the Society is a purely regulatory, rather than a commercial, one. The Society's subsequent withdrawal of its reliance on section 14.9 in this case seems to be a tacit acceptance of that fact.

Underwoods argued that, as the Legal Ombudsman intended to start publishing the names of all firms of solicitors against whom complaints have been lodged, there must be at least as strong a public interest in the Society disclosing to members of the public the fact that a firm they might wish to instruct could be about to go out of business. I do accept that there is a public interest in the information sought by Underwoods being made available, but I also accept that it is not necessarily the case that all the firms whose names appear in the ARP are, as Underwoods put it, "struggling to survive": the Society has explained that other reasons too could also account for a firm's appearance in the ARP. I do not see an equivalence between firms against which complaints have been made and firms which, for whatever reason, may appear in the ARP.

Nonetheless it is a welcome step that the Society has re-written the Agreement with effect from October 2011 in order to enable it to disclose information imparted to it from that date. However, that change to the Agreement clearly does not absolve the Society from any duty it had under the prior Agreement in relation to information it received before 2011.

It seems to me clear that the previous Agreement does indeed place a duty of confidentiality upon the Society which, if it were to release information gained prior to 2011, might put it in breach of a contractual undertaking.

I do not accept Underwoods' argument that no purpose would be served by continuing to withhold such information because firms no longer on the ARP list have nothing to hide and those still on the list will be identified in any case by the release of the post-2011 data. Even if no obvious purpose were served by adhering to a contractual agreement - which I do not necessarily accept to be the case here - that does not make one party to it able simply to ignore its existence.

Nor do I accept Underwoods' argument that the clause in the Agreement which nullifies the Society's duty of confidence "where and to the extent required by law" is relevant here. I am unaware of any legal requirement upon the Society to publish the disputed information, and if there were such a requirement Underwoods' request under FoI would have been unnecessary.

For all these reasons I find that the Society was not entitled to rely upon s.14.9 in withholding the information requested by Underwoods, but it was and is entitled to rely upon s.14.10 in respect of information it received under the Qualifying Insurers Agreement prior to the change in the wording which took effect in October 2011. I therefore find for the Society in its withholding of that information. I also note, however, the Society's intended release of that information for 2011/12 has the effect of an undertaking to release it in all subsequent years.

**Richard Ayre**  
Freedom of Information Adjudicator  
6 July 2012