



The Law Society

Adjudication in a matter raised by Mr Bob Brewis

Law Society Freedom of Information Code

June 2011

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1 The Issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it refused a request from Mr Bob Brewis for all the information held in connection with an investigation by the Solicitor's Regulation Authority.

2 The Background

This is a necessarily brief summary of a complex case. In September 2008 Mr Brewis complained to the Solicitors Regulation Authority (SRA) about the behaviour of employees of a firm of solicitors (referred to here as R& Co) who had drawn up a Will for an elderly relative (referred to here as Mrs P) who had since died. The Will had included a substantial bequest in favour of a former partner of R&Co, referred to here as Mr N. Though retired, he had continued to deal in person with Mrs P on the firm's behalf, acting as a clerk. The Will also included some late codicils which Mr Brewis believes are suspect. He believes that the way Mr N had behaved, and the way other staff of R&Co had behaved, put the entire validity of the Will in doubt.

After investigating his complaints the SRA decided in February 2010 to refer the matter to an Adjudicator and an SRA caseworker prepared a report for the Adjudicator, suggesting that the conduct of three employees of R&Co be referred to the Solicitors Disciplinary Tribunal.

Instead, in July 2010 the Adjudicator reprimanded two of them for having breached a Solicitors Practice Amendment Rule. She also found that Mr N had failed to advise Mrs P to seek independent legal advice with regard to the money she intended to leave him under her Will, but that his conduct in doing so did not make it undesirable for him to continue to be employed by a solicitor. She said that, had Mr N still been on the Roll of solicitors, she would have reprimanded him too.

The following month the SRA closed its file on the case. Mr Brewis was critical of the Adjudicator's findings and wrote to the Legal Services Ombudsman (LSO) in August 2010.

In February 2011 the LSO, having concluded her investigation, wrote to Mr Brewis and, although she concluded that there had been an unsatisfactory delay in the SRA's handling of the case, she determined that its investigation had been otherwise satisfactory and that the Adjudicator's decision had been reasonable. She said that the SRA had therefore been justified in closing its file.

On 25 March 2011 Mr Brewis wrote to the SRA, citing the Freedom of Information Act, and asking for all the information it held in connection with its investigation. In particular he said he wanted to see all correspondence which had not previously been copied to him, including that between the SRA and R&Co or its employees.

On 1 April the Law Society acknowledged his request, referring Mr Brewis to its Freedom of Information Code ("the Code"). On 21 April Mr Bob Stanley, the Society's Information Compliance Manager, emailed Mr Brewis to say that the information he had requested fell within section 14.5 of the Code, which states that the Law Society does not have to release information about specific investigations arising from its regulatory role.

Mr Stanley said that, in applying this exception to the release of information, the Code required the Society to carry out a public interest test. In this case, he said it was the Society's view that it would not be in the public interest to release the correspondence Mr Brewis had requested. Mr Stanley said that in reaching its decision the Society had taken into consideration the fact that information disclosed in response to Freedom of Information (Fol) requests was deemed to have been put into the public domain. He said that if there had been an expectation on the part of employees of R&Co that their correspondence with the SRA would at some subsequent time be published then it was reasonable to assume that this might have dissuaded them from being as open in their submissions to the SRA as was desirable. Mr Stanley said that the SRA regulated the solicitor's profession in the public interest and it was important that as much information as possible that was relevant to an investigation was placed before it.

Mr Stanley concluded that the Society's view was that to publish the information Mr Brewis had requested would be likely to prejudice the legitimate regulatory activity of the SRA and would clearly, therefore, not be in the public interest. He drew Mr Brewis' attention to the fact that, under the Code, he could have the matter referred to the independent adjudicator.

On 10 May Mr Brewis emailed Mr Stanley to express his disappointment. He said he had strong reason to believe that several of R&Co's employees had not told the truth and that there had been a cover-up. He believed the employees had unquestionably been involved in a conspiracy to defraud the estate of Mrs P by more than half a million pounds and that he had evidence to prove it. Mr Brewis said that the Devon & Cornwall Police had asked him to request the SRA & the LSO for all the civil case information to be released so that they could pursue "the criminal aspects" more vigorously.

Mr Brewis argued that the SRA investigating officer in this case had recommended a Tribunal but that she had been overruled. He believed that the SRA Adjudicator had failed to mention the factors surrounding the public interest test and that she had not done her job properly. Mr Brewis concluded by asking for the Society's decision to be referred for adjudication.

On 11 May, having had the matter referred to me by Mr Stanley, I asked the Law Society to make a submission in defence of its decision, and I invited Mr Brewis to make a submission if he wished to do so as to why, under the Code, the information should have been released.

3 Submission by Mr Brewis

On 26 May Mr Brewis made a brief submission as to why he believed the Law Society had been wrong to withhold the information.

He said he had evidence that R&Co and its employees had gone out of their way to distort the truth. He said that two named solicitors had written what he called intimidating and withering letters to Mr Brewis' own solicitor to discredit him. He said that those he complained about had had full access to his own correspondence (with the SRA) but that he had not been afforded a similar respect. Mr Brewis wondered what they had to hide. He believed it was in everyone's interest to validate what had been said and written in order to determine the complete truth.

Mr Brewis said that the Devon & Cornwall Police had asked him to request the SRA & LSO for all the information so that they could pursue other aspects of the case, notably attempted fraud. He believed that the LSO and SRA had misjudged his resolve to determine the truth, and that the release of the information was imperative for further investigations.

Referring to the need for "open justice" Mr Brewis said that the SRA's own investigating officer had recommended that this case should go to a Tribunal. Mr Brewis believed that, if that had been granted, all the evidence and information would have been released. He said that the SRA Adjudicator had failed to mention any of the factors surrounding the public interest test, and that release of the information was essential for justice to be seen to be done.

4 Submission by The Law Society

On 25 May the Law Society made a submission in defence of its refusal to release the information.

The Society said that all of the information contained in the file requested by Mr Brewis clearly related to a specific regulatory investigation (and was therefore subject to s.14.5 of the Code), but the Code also required the Society to decide whether or not it would be in the public interest to disclose the information. The Society said that, essentially, the issue to be decided was whether releasing otherwise exempt information would serve the public interest "to the extent that it outweighed the exemption". Was it better for the public to release or withhold the information?

In applying the public interest test, the Society said it had given consideration to the fact that once information had been disclosed in response to an FoI request it was

deemed to have been put into the public domain and not just disclosed to the person who had asked for it.

The Society said that it had taken account of three factors in weighing up the public interest in this case:

Content

The file concerned the SRA investigation into the way in which R&Co had dealt with a probate matter. The Society said that Mr Brewis had an interest in that matter but that that was not a relevant factor in deciding whether the information should be published. The Society considered that there could be no justification in publishing the contents of an investigation into the handling by a firm of solicitors of a particular probate matter. The content of the information was specific to the matter under investigation and did not include anything where publication would be in the wider public interest.

Background

The Society did not consider that there was anything in the background to this information such that releasing it would serve the public interest. The SRA investigation was based on information provided initially by Mr Brewis relating to what he believed to be misconduct on the part of R&Co. The Society said that there was nothing in the background to this particular case that would serve the wider public interest if it were to be disclosed under the Code.

Request

The Society argued that, while the reasons for the request were not a required consideration under the Code, the purpose of the request might be useful when considering the public interest. One of the public interest considerations was the individual's right to fairness and natural justice. For example, if allegations had been made about a requester, he or she ought to be given the right to respond to those allegations before a substantive decision was taken, even though this information would otherwise be exempt as relating to a specific investigation. The Society said that this was not the case here; Mr Brewis was the informant in this matter and there had been no allegations made against him.

The Society said that Mr Brewis had made five points to the Society in support of his request for disclosure of the information. First, he had claimed that R&Co's employees had not told the truth. Second, he had alleged that they had been involved in a conspiracy to defraud a deceased person's estate. Third, he had said the Police had asked him to request the information to aid its criminal investigations. Fourth, he had said that the SRA investigating officer had recommended a Tribunal but had been overruled. Finally, he had claimed that the SRA Adjudicator's report had failed in respect of accuracy, clarity, reasoning and logic.

But, said the Society, none of these five points was relevant in terms of weighing up the public interest in disclosing or withholding the information. The Society said that

Points 1 and 2 would have been examined by the SRA in the course of its investigation; point 4 was a comment on the process; point 5 was a comment on the competence of the SRA Adjudicator. As for point 3, the Society would not deal with a request of this nature from the police under the Code. The Society said that if the Police had asked Mr Brewis to request the SRA and LSO for 'all the civil case information' this was not a relevant factor in considering the public interest test. It was open to the Police to request information directly from the SRA and any such request would of course be considered by the Society on its own merits. If they thought it appropriate they could make an application to the court for a Production Order obliging the SRA to provide information.

Taking all this into consideration, the Society had decided that it would not be in the public interest to disclose the information requested by Mr Brewis.

In particular, the Society said it had considered the following question from the Society's 2009 document on the criteria for determining the public interest: "Will releasing the information promote confidence in the regulation of the legal profession to the extent that the exemption is outweighed?"

The Society had concluded that releasing the file, or any part of it, would not promote confidence in the regulation of the legal profession such as to outweigh the exemption. Rather, the Society submitted that releasing the file into the public domain would send out a signal that such information was likely to be made public in subsequent cases and that this would be likely to have a detrimental impact on the legitimate regulatory activity of the SRA in any such subsequent matters.

The Society said that the file contained sensitive information provided by the firm of solicitors to the SRA. The firm would quite rightly have had an expectation that the information it was providing to the SRA would have been kept confidential. Also, and in the Society's view crucially, there were no overriding factors in either the content or background of the information that weighed in favour of publication in any way. The Society believed that the request was motivated by a desire to gain access to information that would have been provided by R&Co with an expectation of confidentiality, and there was nothing in the content of any of that information that would serve the public interest if it were to be disclosed.

5 Response from Mr Brewis

Since Mr Brewis had not previously been aware of the tests the Law Society says it applies when determining the balance of public interest, on 26 May I emailed him, inviting any comment he might wish to make on the Society's conclusion to the question of whether releasing the information would promote confidence in the regulation of the legal profession "to the extent that the exemption was outweighed".

Mr Brewis' answer to the same question was "a resounding Yes". He said that he, too, needed reassurance and confidence in the system. Mr Brewis believed that the

Society made its decisions on a case by case basis, and in this case he believed that R&Co had behaved wrongly in a number of ways, allowing fake and fraudulent codicils on a Will and failing to give proper protection to a vulnerable client.

Mr Brewis believed that releasing the information would send out a clear message that the Society would not tolerate what he believed had been systematic and disgraceful behaviour and that where written correspondence or evidence of it existed it might, at the discretion of the Society, be released.

Mr Brewis repeated his view that in this particular case the need for open justice far outweighed the risk of any impact on R&Co. If they had nothing to hide they had nothing to fear.

Far from having a detrimental impact on the legitimate regulatory activity of the SRA, Mr Brewis believed that releasing the information would demonstrate a resolve by the Law Society that in some circumstances the release of information far outweighed in the public interest the protection of its members. He believed that, unless it was challenged, the Law Society would always side with the SRA. Releasing the information would give Mr Brewis confidence that the Society was doing its job.

6 Additional enquiries

On 31 May I attended the Law Society's offices in London and was given access to the information Mr Brewis had requested. Later I wrote to Mr Stanley to ask whether solicitors under investigation by the SRA were given any assurance, explicit or otherwise, that their replies would be treated in confidence.

On 2 June Mr Stanley replied that solicitors are not given any explicit assurance that information they provide to the SRA in connection with regulatory enquiries will be treated in confidence. Mr Stanley said that such an outright guarantee of confidentiality could not realistically be given but that there was nonetheless an implication that such information would be disclosed only in certain circumstances.

So far as conduct investigations were concerned, Mr Stanley said that the SRA would discourage any suggestion that information could be supplied "off the record". He said that letters from the SRA raising allegations generally included the statement that *"the reply may be used by the SRA for regulatory purposes including as evidence in any investigation, decision by us, or proceedings brought by or against us."*

Mr Stanley said that the key phrase was that the information supplied by the solicitor might be used for *'regulatory purposes'*, the implication being that it would not be disclosed for other purposes. However, he said that the Society's FOI Code would override that where disclosure was in the public interest.

Mr Stanley also supplied information on a solicitor's duty to cooperate with the SRA under the Society's rules. The key element, as regards the issue under consideration, is that solicitors are told that they "*must deal with the Solicitors Regulation Authority....in an open, prompt and co-operative way.*"

7 Adjudication

There is no doubt that the information in question falls within the category of regulatory information described in s.14.5 of the Code. That means that the Law Society is at liberty to withhold it, subject to the results of a separate public interest test. That test is simply whether the public interest is better served by disclosure or by withholding the information.

The Law Society is correct in pointing out that a release under FoI constitutes putting the information into the public domain. Information released to Mr Brewis would be available to anyone else who might ask for it.

Mr Brewis, as one of a number of beneficiaries of Mrs P's Will, has a clear *personal* interest in having access to all the available information about the way that it was drawn up and about the SRA's investigation of his allegations. The *public* interest requires a different test.

Among the questions the Society says it considered before reaching its conclusion about the balance of public interest was whether releasing the information would promote confidence in the regulation of the legal profession. That seems to me to be an unsatisfactory test. It must surely be the case that confidence in the regulation of the legal profession should be promoted only to the extent that the legal profession *is* well regulated. Put another way, the regulation of the legal profession deserves public confidence where it is effective, but if it is ineffective it may not deserve public confidence. One of Mr Brewis' arguments is that disclosure of the information would show whether regulation had been effective in this case. I am bound to observe that, since the LSO found that there had been an unsatisfactory delay in the SRA's investigation, it would seem that she believed that, at least to that extent, it was not. I conclude that the Law Society's argument against disclosure in this respect is unsustainable.

Another of the Society's arguments concerns the likely impact that the release of such information might have on the candour with which solicitors under investigation might respond in future to questions from the SRA. At the same time, the Society has confirmed that solicitors do have a professional obligation to co-operate with the regulatory bodies "in an open, prompt and co-operative way". The Society also says that solicitors under investigation are told that their replies may be used "for regulatory purposes", and although it is possible to imagine a debate about where the proper bounds of "regulatory purposes" might be drawn (for instance, it might be argued that the promotion of confidence in regulation of the legal system is a proper regulatory purpose) the Society helpfully accepts that a public interest test under the Code could override any such constraints.

It seems to me that, since a public interest test in favour of disclosure can override any expectation a solicitor might have of confidentiality, the fact that a solicitor might have such an expectation can hardly be used as a compelling reason to conclude that the public interest is better served by non-disclosure. Here too I find the Society's argument not to be persuasive.

In most cases, the Fol Adjudicator's role is to take a view as to the appropriateness of the Law Society's reasoning under the Code and to find accordingly. It is clear that I have not accepted two of the Law Society's principal arguments in this case. However, section 18 of the Code requires the Adjudicator to take an independent view about where the balance of interest lies in respect of the release of regulatory information. I must therefore consider whether there are other arguments which might weigh in favour of or against disclosure in this case.

In that context I must address Mr Brewis' argument that the Devon & Cornwall police have asked him to try to secure information from the SRA that would assist them in investigating possible fraud. Although clearly information released under Fol may in certain circumstances prove useful in a criminal investigation it seems a curious route for the Police to use to secure evidence. In any event, it would be perfectly open to the Police to make their own Fol request or, more plausibly, to seek an order through the Courts for disclosure of any evidence they need. I cannot accept that Mr Brewis is acting in any way as an agent for the Police in this case.

When it comes to making my own determination of where the balance of public interest lies, guidance from the Office of the Information Commission makes clear that the test is to be determined on a case-by-case basis. I have read substantial parts of the SRA files concerned in this case, and I have noted the subject matter of those I have not read in detail. They contain a great deal of personal data (including about other individual beneficiaries of Mrs P's Will, and about individual employees of R&Co against whom Mr Brewis has made allegations not merely of misconduct but of criminality). Even if redacted, the context in which the data appear might well enable those individuals to be identified if the information were to be made public, which would be the effect of granting Mr Brewis' request.

I have also asked myself whether, in general, people who complain to the SRA about the conduct of a solicitor would regard it as appropriate for all the contents of any investigation - including all the claims, counter-claims, and circumstances in which the client might have engaged the solicitor - to be made publicly available. I have concluded that the answer to that question is no.

I have therefore considered whether there are any special factors in this particular case which would weigh in favour of publication. Having examined the files I accept the Society's argument that the content is specific to the matter investigated by the SRA and does not include anything where publication would be in the wider public interest.

Finally, one of the tests of the public interest which the Law Society adopted in 2009 is whether “releasing the information (would) promote accountability and transparency to the extent that withholding the information under the exemption is unwarranted”. The Society’s submission does not refer to having applied that test in this case, but I think it appropriate to do so.

There is a clear public interest in the legal professional, and the legal regulators, being accountable for their conduct. If the SRA were otherwise unaccountable for the conduct of its investigations the public interest in effective regulation might well suggest that, in a case where the SRA’s own conduct is called into question, the information should be made publicly available despite any risk to the reputation of individuals. But the Legal Services Ombudsman exercises independent oversight precisely to investigate allegations of regulatory failure by the SRA and others. She has considered this case in detail and has concluded that, apart from an unreasonable delay in the process, the SRA investigation of Mr Brewis’ allegations was satisfactory and its Adjudicator’s decision was reasonable.

In this case the SRA has considered Mr Brewis’ allegations against the solicitors and has reached a judgement about them. The LSO has considered his claims of regulatory failure and has held the SRA to account for its conduct. I cannot therefore see that in this particular case the demands of accountability outweigh what I believe is a general public interest in the detailed content of SRA investigations not being made publicly available.

On balance, therefore, and although I am not persuaded by all the arguments it has advanced for non-disclosure, I judge the public interest in this case to be against disclosure and I therefore find for the Law Society.

Richard Ayre

Freedom of Information Adjudicator

12 June 2011