The Law Society

Adjudication

Law Society Freedom of Information Code
November 2014

1. The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code ("the Code") when it refused to disclose the names of the authors of a Practice Note on Sharia Succession rules and various emails from and to members of the Committee which had been responsible for the Practice Note.

2. Background

On 9 September the applicant wrote to The Law Society with questions concerning the recently published *Sharia Succession Rules* Practice Note ("the Note"). He asked who the individual author(s) had been, whether any religious organisations or lobbyists had been consulted before the decision to publish the Note, and which, if any, "feminist/women organisations and lobbyists had been consulted.

In responding, the Society withheld the name(s) of the author(s) of the Note, citing under section 16 of the Code, which aims to ensure that people's personal data is properly protected. The Society said that no "Sharia Law experts" had been consulted and that no external individuals or organisations had lobbied the Society or been involved in drafting the Note.

The applicant wrote again on 29 September, this time asking the Society to confirm that two people he named had been the authors of the Note. The two were a partner and a consultant in an LLP offering legal advice. The applicant supplied a print-out from the firm's website, showing the consultant's profile in which it was said he had been the author. The applicant went on to say that he found it extraordinary if the Committee had not consulted any external religious organisations, and that he remained unclear as to whether any women's groups had been consulted. He therefore asked for copies of "all notes and communications made from" the Committee in respect of the Note.

In response, the Society explained what it said had been the role of two individuals the applicant had named, confirming that they had been members of the Wills & Equity Committee ["the Committee"] which was responsible for the Practice Note. The Society also provided a range of documents in response to the request for all notes and communications from the Committee but in doing so the Society withheld some names of Committee members, again under section 16 of the Code. The Society also withheld further emails which it said had been exchanged between members of the Committee and the Society's staff prior to the decision to launch the Note. The Society said it was withholding these under section 14.7 of the Code, because releasing them might hamper the free and frank exchange of views within the Society or harm the effective conduct of its public affairs. This section of the Code reflects wording in the Freedom of Information Act.

On 9 October the applicant wrote to the Society to say that he believed the information was being withheld unreasonably, and he asked for adjudication.

On 13 October, in order to clarify the Society's response to the applicant's first request, I asked which, if any, religious or feminist groups (as the applicant had described them) had been consulted. In reply, the Society said that it "*does not*

usually consult external bodies when preparing practice notes and we did not on this occasion. So none of the groups characterised as religious or feminist groups…….were consulted". I passed this response to the applicant on 15 October and invited both him and the Society to let me have a written submission to help me adjudicate on what I believed were the two outstanding matters for me to consider:

- The Society's refusal to identify the names of the authors of the Practice Note (as distinct from members of the Committee responsible for it), and

- The Society's refusal to release the emails it had withheld under section 14.7 of the Code.

I pointed out to the applicant that, on those occasions when the Society cites section 16 of the Code in withholding personal data, I can express an opinion as to whether its decision is appropriate but I cannot require the Society to disclose the information. That is because, unlike other sections of the Code, section 16 reflects a legal obligation on the Society imposed by the Data Protection Act (DPA) to handle personal data appropriately, and I am not able to require the Society to act in a way it believes may be contrary to law.

3 Submission by the applicant

On 20 October the applicant made his submission, of which this is a summary.

He said that the Society had published its Sharia Succession Rules Practice Note in March 2014. He had complained that the Society should not have given what he called 'discriminatory religious guidance' to its members, and there had been exchanges of correspondence between him and the Society. He had then made the FoI requests that are the subject of this adjudication.

The applicant said that the Practice Note had attracted widespread media attention and criticism, and he provided links to some of that coverage.

The applicant drew attention to the Society's stated belief in being open about what it did, and to its commitment to behave as though the FoI Act applied to its own activities. He said [and the adjudicator accepts] that it is for the Society to justify why information sought should not be disclosed, rather than for the applicant to show why it should be. He said that information should be disclosed unless it falls within details of a personal nature about someone else and is thereby protected under the DPA or within one of the limited exceptions under point 14 of the Code.

3.1 Disclosure of the authors' names

The applicant then outlined the reasons why he believed the Society should disclose the names of the authors of the Practice Note. He accepted that such information usually falls under the DPA and should thereby be protected. But he submitted that it should be disclosed in this instance both because the individual authors have waived their right to protection by disclosing that they are the individual authors, and that exemption s31 of the DPA applies. He said that, until recently, it had been claimed on their website that the two individuals he named were the individual authors of the Practice Note. He believed that if they were happy to disclose the fact that they had been the authors then the Society could not claim that such data was still protected

under the DPA, because they had waived their rights to privacy. The applicant said it was also fairly obvious that they were the authors, because a previous article on their website was very similar to the Practice Note itself.

The applicant claimed that s31 of the DPA 1998 applied, offering exemption in relation to "regulatory activity" which:

- *Is designed to protect members of the public against dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of persons authorised to carry on any profession or other activity (ss (2)(iii)); AND*

- *Is any function which is of a public nature and is exercised in the public interest (ss (3)(c)).*

The applicant went on to provide a link to the advice of a barrister who, he said, had suggested that if solicitors were to act on the Practice Note they may be breaching the Equality Act 2010. He summarised this advice as stating that the Practice Note may give rise to direct discrimination by solicitors acting upon it. He submitted that, if individual solicitors were to be put at risk in breaching the law or committing malpractice by following a particular Practice Note they should have a right to know who its individual authors are. So, he said, requesting details of the individual authors was designed to protect the public against malpractice, seriously improper conduct or unfitness or incompetence by the profession.

The applicant added that the Practice Note included a recommendation of a book co-authored by one of the two people he had named, and he thought that meant that undisclosed authors could promote and profit from their own work in a way he implied was improper.

3.2 Disclosure of notes and communications from the Committee in respect of the Practice Note:

The applicant then outlined why he believed the public interest was in favour of disclosure of all the Committee's notes and communications.

He believed that the Practice Note undermined the Rule of Law, of which equality before the law was a principal component. He thought the Practice Note was inherently discriminatory. He cited section 3.6 as saying:

> *The male heirs in most cases receive double the amount inherited by a female heir of the same class. Non-Muslims may not inherit at all, and only Muslim marriages are recognised..... Similarly, you should amend clauses which define the term 'children' or 'issue' to exclude those who are illegitimate or adopted.*

He believed that this undermined the Rule of Law because the Society, was being seen to endorse and promote discrimination on the sole basis of sex, religion and whether someone was born in or out of wedlock.

He contrasted this with Principle 1 of the Solicitors Code of Conduct 2014 ("*uphold the rule of law and the proper administration of justice"),* the principle which, he said, overrode all others.

He went on to say that the Practice Note is outside the Society's remit. He believed that questions of theology were contentious issues and should rightly be debated in the public sphere, which he believed was one of the rationales behind FoI Act. But it was not the Society's role to get involved in such issues because, he believed, it lacked expertise. The Practice Note gave no explanation, for example, in its introduction as to why it had adopted a Sunni version of Islam. He wondered whether the Society was claiming that Sunni is the one true version of Islam?

The applicant also believed that the Practice Note was unnecessary. He said that Parliament had recognised the need for testamentary freedom, subject to the Inheritance (Provision for Family and Dependants) Act 1975. He was unaware of any proposal to change that position.

He further argued that the Practice Note changed the public's *perception* of the Legal Profession and how it practises. He cited the Society's introduction to Practice Notes in general as saying::

> *Practice notes are for our members and represent our view of good practice in a particular area. Following the advice in these practice notes will make it easier to account to oversight bodies for your actions.*

The applicant believed that, the Practice Note in question could change how the profession practised the law or, at the very least, how the public perceived it to. He cited again the advice of a barrister that if solicitors were to act on the Practice Note they might be breaching the Equality Act 2010 (or at least be *perceived* to by members of the public). He believed that solicitors acting on the Practice Note were therefore running the risk of misconduct or malpractice.

He added that the Solicitors Regulatory Authority had recently said in a Solicitors Disciplinary Tribunal Hearing that it did not record ethical/Code of Practice calls it received from Solicitors, nor provide written advice. So he believed it was left to the Society's Practice Notes to advise its members in writing in how to conduct their professional affairs and what amounts to good practice.

3.3 Precedent of previous adjudications

Finally, the applicant referred to an FoI adjudication in a case brought by *Mr Lawrence Downey, (September 2008)* in which the adjudicator had stated:

> *There is a strong public interest in seeing how a regulatory authority arrives at its policy decisions, what views were taken into account and what contrary views may have been expressed. In my judgement there is a compelling public interest in public authorities arriving at policy decisions which are well-informed and well tested. A regulator that can achieve both is likely to command a high degree of public confidence.....*

The applicant said that the widespread media attention and criticism of the Practice Note showed what a strong public interest there was in having the information requested disclosed. He went on to cite a further extract from the *Downey* adjudication:

> *There may well be cases where some known or even suspected factor about alleged impropriety or inappropriateness in a decision-making process might shift the balance of public interest in favour of the publication of advice which had been intended to be purely internal.....*

The applicant said that the fact that the Solicitors Regulatory Authority had withdrawn its endorsement of the Practice Note in July 2014 clearly raised a suspicion as to the alleged impropriety or inappropriateness of its publication. He thought such suspicions were not allayed by a comment towards the end of the Practice Note where, at 5.3, it said that further information could be found on the Islam Channel TV. He said that in 2010 (as noted by *Private Eye*) *Ofcom* had ruled that the Islam Channel had broken the broadcasting code when a speaker advocated marital rape and described women who wore perfume outside the home as prostitutes.

The applicant concluded by submitting that if such suspicions did not amount to a public interest in having the information requested disclosed then no such suspicions ever would.

4 Submission by The Law Society

On 30 October the Society made its submission, of which this is a summary.

4.1 Disclosure of the authors' names

The Society addressed two of the arguments put forward by the applicant: that the website profile of one of the named individuals included a claim that he and the other individual were authors of the Practice Note, and that the applicant believed his request feel within the exemption allowed by section 31 of the DPA.

The Society said it was true that one of the individuals had made such a claim on his profile but that this had been a mistake which had since been corrected. The Society enclosed a copy of the amended profile.

As regards section 31, the Society said that it applied to the 'subject information' provisions of the DPA and that this meant that some categories of personal data may be exempt from disclosure in response to a *subject access request* [adjudicator's emphasis] if to disclose those data would be likely to prejudice legitimate regulatory functions. The Society said that section 31 had no relevance to the non-disclosure of personal data in response to an FoI request.

The Society made additional points in support of withholding the names of the Practice Note authors. It said they had always been under the impression that they would not be publicly named as the authors, and the Society believed it would be a breach of the 'fair processing' principle of the DPA (the first data protection principle) to disclose their names contrary to these reasonably held expectations. It also believed that naming the authors of Practice Notes might well act as a disincentive for many of the Society's volunteer committee members.

The Society said that all Practice Notes had *traditionally* [adjudicator's emphasis] been issued under The Law Society's 'umbrella'. They were, after all, a collective

work and, while some might contribute more than others, these were work for and on behalf of The Law Society.

The Society argued that, if the names were to be disclosed, the authors in this case would be put in the position of being clear potential targets for all those who did not agree with sharia succession principles and did not think the Society should be involved in advising solicitors about them. It would mean without doubt that they would no longer feel comfortable being involved in writing Practice Notes in the future, nor would they be able to speak for the Society at events. Others on committees might feel the same, if a precedent were set of disclosing authors' names when requested.

Finally, the Society said that the authors themselves had not suggested the writing of the Practice Note: they had been asked to do so by the then chairman of the Wills & Equity Committee, and the Practice Note had been approved not only by the whole committee but also by other areas/departments of the Law Society.

4.2 Disclosure of notes and communications from the Committee in respect of the Practice Note:

The Society said there had been a number of emails between Wills and Equity Committee members and members of the Society's staff preceding the decision to launch the Practice Note. These had been withheld under section 14.7 of the Code, which allows the Society to withhold information 'if it is about the work we are doing or have done to develop our policies, where we think that giving the information would hamper the free and frank exchange of views or harm the effective conduct of public affairs'.

The Society listed the documents it had provided to the applicant in response to this part of his request, including Minutes and Papers from the Committee. The Society said these were all what it called 'output' documents, but it drew a distinction between these and the emails which, it said, formed part of the process of policy formulation.

The Society's view was that when policy proposals were being drawn up for consideration, what it called 'inclusion' was required and each person being included needed to be able to speak frankly in order that the best quality output could be achieved overall. To disclose the emails relating to this Practice Note would, in the Society's view, hamper the free and frank exchange of views necessary for the development of policy.

5 Further submission by the applicant

In response to an invitation for him the respond to some of the arguments put forward by the Society, the applicant made a further brief submission on 3 November.

5.1 Disclosure of the authors' names

The applicant said that the purpose of having the individual authors disclosed was not to target the individuals but simply to try and establish how and why the Practice Note had come into being. The applicant said that if a solicitor had a concern about the conduct of other solicitors in their professional capacity then he was under a duty

to report them to the Solicitors Regulation Authority, but he had no intention of communicating directly with the individuals nor of referring them to the SRA. His concern was with The Law Society as a whole.

The applicant then said that he was still able to find the names of the authors in a page on the Society's own website, and he attached a link to it. That suggested to him that the Society was initially happy to have the names disclosed and had sought to remove them (albeit not very effectively, he thought) when the Practice Note subsequently generated controversy.

He said he remained of the opinion that section 31 of the DPA was relevant because concerns had been raised about whether solicitors acting on the Practice Note would be breaching the Equality Act 2010. The Law Society itself had not responded to those concerns despite the advice of the Counsel he had cited having been sent to them..

5.2 Disclosure of all notes and communications from the Committee in respect of the Practice Note:
The applicant believed that the information so far provided by the Law Society had not been sufficient to allay the concerns he had raised and therefore there was an overriding public interest in having all notes and communications disclosed. The controversy that the Practice Note had generated (and continued to generate) supported the release of all this information.

6 Adjudication

A copy of the Practice Note is found is at http://www.lawsociety.org.uk/advice/practice-notes/sharia-succession-rules/).

It is clear from the press coverage provided by the applicant that the Practice Note has proved controversial. I recognise, therefore, that there is a public interest in discussion of whether the Society has or has not acted appropriately in publishing it. The applicant clearly thinks it has not: he argues that the Practice Note was unnecessary, that the Society acted outside its remit in producing it, that it undermines the Rule of Law, and that solicitors who follow it might be in breach of the Equality Act 2010. These are all matters for members of the Society to debate, or possibly for the Courts to test: they are not a matter upon which I can express an opinion. My role is solely to determine whether the Society acted appropriately in accordance with the Code when it withheld the names of the authors of the Practice Note and the communications concerning it between the Committee and staff of the Society.

In connection with the latter question, the Society provided me with copies of dozens of emails apparently written between staff and officers of the Society and members of the Committee, though most names and other identifiers have been redacted. I read all of them. They discussed possible amendments to the draft Practice Note while it was in formulation and then issues concerning its launch. It was clear that, whoever the original drafters of the document were, it was subject to discussion among staff and Committee members, and that the Committee made amendments to it before it was finalised. It is clear that, as the Society claims, the final document was "owned" by the Committee and by the Society.

6.1 Disclosure of the authors' names

The applicant accepts that the names of the authors might properly be regarded as personal data, the publication of which is restricted by the DPA and therefore by section 16 of the Code. However, he argues that the restrictions should not apply in this case, both because the authors have waived their rights to privacy by declaring their authorship, and because section 31 of the DPA exempts a public authority from some of its provisions in relation to certain regulatory activities.

It is accepted that the individuals named by the applicant as authors of the Practice Note were identified as such in profile of one of them on his firm's website, though the profile has since been amended to delete that reference. The Society says the original claim was "a mistake". It accepted at an early stage that the two individuals were members of the Committee responsible for drawing up the Practice Note. The applicant says it is apparent that they wrote it, both because their firm's website said so and because the Practice Note itself bears a striking resemblance to an article on that website.

The Society accepts that some might contribute more than others in the preparation of Practice Notes, but that they were collective efforts, under the umbrella of the Committee and of the Society as a whole. It asserts that authors had no expectation of their names being made public, and that to do so might both breach the "fair processing" principle in the handling of personal data and deter volunteers from serving on committees in future. The Society also argues that in this particular case, in view of the controversial nature of the subject matter of the Practice Note, naming the authors might put them at some risk.

These are finely balanced arguments and, in this particular case, they are also rather arcane. The applicant believes he knows who the authors are and says they have identified themselves publicly. The Society acknowledges that they played a role but is reluctant to confirm that they are "the authors". I accept that, whether documents are drafted by staff or by volunteer Committee members, once adopted by the Society they are Law Society documents for which the Society, not the individual writers, must take full public responsibility.

However, in his second submission, the applicant has provided a weblink to a page on the Society's own website which refers to one of the named individuals as follows:

"He is a member of the Law Society's Wills and Equity Committee and has co-authored a practice note on Sharia Inheritance Law with [the second named individual]."

Irrespective of whether that information was simply copied directly from the website of the firm where the two individuals work, the fact remains that it constitutes information which has been, and currently is, published by The Law Society. On that basis, the Society cannot now withhold the information on grounds that it would breach the individuals' privacy to publish it, since it has already breached any privacy that might have existed.

Turning to the applicant's claim that section 31 of the DPA relieves the Society of its obligations in this case, I must make clear that I am not a lawyer, and the Courts are the proper place to test the Act. However, having read it with care, it appears to me

that the applicant is wrong in two respects. Firstly, as the Society argues, the exemption offered by section 31 appears to apply to subject access requests [where an individual seeks to exercise his right to obtain personal data which is held about himself] and not to an FoI request. Secondly, as I read section 31, it appears to protect certain types of regulatory activity from damage by disclosure, and those types of activity do not seem to me to include the activities of The Law Society in publishing the Practice Note.

Taking all these matters into account and considering that the Society has already published the names of the two individuals on its website, claiming them to have co-authored the practice note, I must conclude that it can no longer rely upon section 16 of the Code in withholding the information. I therefore find for the applicant in this respect. I have arrived at this decision on the basis of the facts in this particular case, and without prejudice to the question as to whether the authorship of such Practice Notes in general should be disclosed.

6.2 Disclosure of notes and communications from the Committee in respect of the Practice Note:

The applicant argues that the Practice Note is inherently discriminatory; that it undermines the Rule of Law; and that it will change public perceptions of the solicitors' profession. As already stated, these arguments are matters for the Society, its members, and perhaps for the Courts, but are not a matter for this adjudication.

The applicant cited an adjudication from 2008 in which I said:

> *"There is a strong public interest in seeing how a regulatory authority arrives at its policy decisions, what views were taken into account and what contrary views may have been expressed. In my judgement there is a compelling public interest in public authorities arriving at policy decisions which are well-informed and well tested. A regulator that can achieve both is likely to command a high degree of public confidence.....".*

In the original adjudication that sentence continued as follows:

> "….*but both the Act and the Code recognise that space may be needed for a frank exchange of views and advice between decision-making bodies and their advisers, unfettered by the threat of publication"*

Having omitted that part of the quotation, the applicant went on to cite the remainder of the paragraph, namely:

> *" There may well be cases where some known or even suspected factor about alleged impropriety or inappropriateness in a decision-making process might shift the balance of public interest in favour of the publication of advice which*

> *had been intended to be purely internal, but I do not see such arguments here*." [*Downey*, August 2008]

I should therefore begin by making clear that nothing in any of the documents I have seen gives rise to any suspicion of impropriety or inappropriateness in the decision-making process in this case. It seems clear to me that the emails withheld by the Society and disclosed to me in redacted form consisted of frank exchanges about the content, wording, and launch of the Practice Note. These included discussion of how much detail should or should not be included; what terminology was most appropriate and accurate in describing the status of what the Society eventually decided to term "Succession Rules"; and whether it was appropriate for the Society to produce such a Practice Note for Sharia alone or whether a similar approach was desirable for some other religions or denominations or for rules applying in other national jurisdictions.

All of these matters seem to me to be proper issues which the Society should have discussed in developing its policies. I can well imagine that, especially on what was recognised as a potentially controversial topic, free and frank exchange of views might well have been inhibited if the individuals engaged in the correspondence had had an expectation that it might be published.

Section 14.7 of the Code (and the equivalent provision in the Freedom of Information Act, which the Code aims to shadow) exists precisely to enable policies to be formulated following full, free and frank exchanges of opinion, without risk of those exchanges being inhibited by the threat of publication. That must be strongly in the public interest and, to my mind, far outweighs the public interest in further disclosure about how the Society arrived at its decisions in publishing the Practice Note.

In the withholding of the email communications between members of the Committee and staff of the Society I therefore find for the Society.

Richard Ayre
Freedom of Information Adjudicator
3 November 2014