



The Law Society

Adjudication in a matter raised by VS
Law Society Freedom of Information Code
November 2012



1. The issue

Whether the Law Society acted appropriately in accordance with its Freedom of Information Code when it declined to release the name of an Investigating Officer in the Intelligence and Investigation Unit the Solicitors Regulation Authority who had made a decision in connection with investigations into firms implementing tax mitigation schemes.

2. The background

On 2 August 2012 an applicant known here simply as VS emailed the Law Society's Information Compliance Manager, Mr Bob Stanley, with questions about the work of the Solicitors Regulation Authority (SRA) and its investigations and case work concerning firms of solicitors which had implemented Stamp Duty Lands Tax (SDLT) mitigation schemes.

On 31 August Mr Stanley provided her with answers to each of these questions, but VS replied by return saying that in a number of instances the answers had been incorrect or the questions had been evaded. She said that she therefore wished the matter to be referred to the adjudicator.

Having read the Society's answers and VS's explanation of why she found some of them "incorrect, evasive and misleading" I told the Law Society that I did not think it appropriate for me to adjudicate until the Society had first replied to VS on each of the points she had raised, in the hope that it would prove possible at least to narrow the areas of disagreement which might then need to proceed to adjudication.

On 28 September, after a delay caused by staff illness, the Society replied in detail to VS. The Society accepted that there had been an error in its original answers because the information which the SRA Supervision Unit held had not been collated. It had been obtained from a Forensic Investigations Officer and had concentrated only on inspections which he himself had carried out rather than on all inspections. The Society apologised and went on to provide information in response to most of VS's original ten questions. [VS subsequently asked further questions arising from some of those answers, but that is not the subject of this adjudication].

One of her original questions had been about "the name[s] of the decision maker or adjudicator" in certain investigations into firms implementing SDLT tax mitigation schemes. In querying the Society's first response to this, VS had referred to a previous FOI Adjudication (*John Whitehouse* – January 2009) in which the Society had released the name of an Adjudicator.

In its revised response of 28 September the Society continued to withhold the name of an SRA staff member who had issued closure letters. The Society argued that the staff in question were not Adjudicators, and that the FOI Adjudication in the John Whitehouse matter to which VS had referred was not analogous. The Society said that in the Whitehouse case the Society had agreed to provide the name because appointed Adjudicators performed a regulatory, publicly accountable function. Given that the SRA staff who issued closure letters were not appointed Adjudicators, the Society considered this information to be personal data which should therefore be withheld under section 16 of its Freedom of Information Code ("the Code").

On 5 October I wrote to VS and to the Society to clarify the subject of this adjudication, namely the Society's decision to withhold the name of the decision maker. I invited both parties to make submissions as to whether or not the Society's decision to withhold this information had been appropriate in accordance with the Code. Because the Society had

relied upon section 16 of the Code I pointed out that, unlike the other parts of the Code, section 16 reflects a statutory duty imposed upon the Society by the Data Protection Act 1998 (DPA) not to disclose personal data unfairly. I said that this faced an FoI adjudicator with particular difficulties which had been outlined in many of my previous adjudications (including that of Mr Whitehouse) and that, although I might be able to express an opinion as to how the Society had interpreted its responsibilities under the Act in any given case, I could not require the Society to release information publication of which it judged would breach the DPA.

3. Submission by VS

On 6 October VS made a submission. She stated that her primary interest had been to identify how many SRA matters relating to firms involved in SDLT mitigation schemes had resulted in decisions by internal SRA decision makers to issue non disciplinary “letters of advice” or decision letters confirming that no further regulatory action was necessary (as opposed to decisions for internal sanctions, or referrals for adjudication or to the Solicitors Disciplinary Tribunal).

VS said that the SRA had provided the names of Adjudicators in relation to some of the decisions to refer firms to the Solicitors Disciplinary Tribunal (SDT). However, it was known that some of the decisions to refer to the SDT had been made internally without reference to the Panel of Adjudicators. She asked what the Law Society’s reasons might be for refusing to disclose the names of SRA decision makers under paragraph 16 of the Code. In particular, she wondered in what way the Society believed that disclosure would breach the data protection principles set out in the DPA. VS wondered whether the Society had asked the individual internal SRA decision makers how it should respond to her initial request. If they had been asked, and had refused, she wondered whether the Society had considered why they might have done so. If the Society had not asked permission of the individuals concerned, VS wondered how that squared with the public interest in disclosure of their names, with the need for transparency and accountability in relation to the SRA’s decision making framework, and with the statutory basis from which internal SRA decision makers derived their power and responsibility to make decisions. She attached a separate document in which she discussed the statutory framework and the SRA’s own decision-making framework. She cited a statement from the SRA’s Compliance Committee of June 2011 that “*Adjudicators include employees of the SRA*”, and that “*Decision makers include adjudicators but also any person making formal decisions for the SRA*” and that “*in making decisions, adjudicators and other decision makers are part of the internal decision making structure of the SRA.*”

VS said that, in the earlier FoI Adjudication (*Whitehouse* – January 2009) the Society had indicated that the names of Adjudicators could be disclosed because they “*performed a regulatory publicly accountable function*” but that the Society now maintained that disclosure of the names of internal SRA decision makers was inappropriate because “*the SRA staff in question are not Adjudicators*”. She also noted what she said was a growing trend for even referrals to the SDT to be made without reference to any member of the Panel of Adjudicators.

On 8 October VS added further to her submission. She said that the Information Commissioner and the Guidance from his Office (ICO) confirmed that a refusal under the DPA was appropriate only if disclosure would breach the first principle in the DPA – the requirement to process (including releasing) personal data fairly and lawfully. She referred to the Commissioner’s Decision about Shropshire Council of 30 January 2012. Among the questions considered by the Commissioner in that case was the seniority of the individuals whose names were being withheld and whether they had been asked to give permission for their names to be released.

VS said that fairness included factors like the reasonable expectations of the individuals and the nature of those expectations bearing in mind the individuals' public roles and seniority. ICO decisions considered such things as whether individuals had refused consent and whether the information requested arose in relation to the individuals' private or public lives such that it may be disclosable notwithstanding the individuals' personal preferences.

VS said that in this case the information related exclusively to the SRA decision makers' public lives. She believed that SRA decision makers were adjudicators under the SRA's own policies and the Law Society considered the names of Adjudicators to be disclosable. Internal decision makers were equally responsible for making decisions which affected the professional lives of solicitors. The decision makers had direct discretion to determine whether to close matters down with letters of advice or the equivalent, or to refer matters to the SRA Legal Department to pursue disciplinary action. She said that in some cases the usual step of the decision maker making a formal report for consideration by an Adjudicator had been entirely by-passed.

VS repeated the ICO Guidance that these factors must be balanced against principles of accountability, transparency and legitimate public interest. She felt that the factual background and the manner in which the SRA had sought to provide information needed to be borne fully in mind in this FoI adjudication. She thought that refusal to disclose the names in this context inappropriately relied on DPA grounds and avoided accountability and transparency in the SRA's decision making process.

4. Submission by The Law Society

On 19 October, after a delay caused by staff illness, the Law Society made its submission. It said that the Society's view was that it would be unfair to publish the names of SRA employees who, in the course of their normal duties, made decisions in connection with investigations into firms implementing SDLT tax mitigation schemes. The Society said that the SRA regulated the profession in the public interest but this did not mean that those employed by the SRA should be held individually accountable for decisions they take in carrying out their jobs. The SRA itself was responsible for such decisions rather than individual employees.

The Society believed that if decisions were made by the Chief Executive of the SRA or one of his senior management team then a convincing case could be made for those decisions to be publicly attributable to those who made them. But it was the Law Society's view that in this case it would be a breach the data protection rights of the employees concerned to publish their names as decision makers. They were not ultimately responsible for the decisions they make so should not have such details of their day to day roles disclosed in response to FoI requests.

If the Society disclosed the names of the employees requested, the Society believed it would amount to unfair processing of personal data and would be a clear breach of the first Data Protection Principle.

5. Further enquiries

Having considered both submission, on 19 October I wrote to the Law Society to ask for clarification on a number of issues VS had raised.

In relation to the Information Commissioner's decision in the Shropshire County Council case I asked whether the Law Society had sought the individual decision-maker's permission

for his name to be published and what the answer had been. I also asked for an understanding of the seniority of the individual within the SRA's structure.

I referred to VS' observation that the SRA's website (<http://www.sra.org.uk/sra/how-we-work/decision-making/compliance-committee-statement-june.page>) contained the statement about its decision-making framework: " *'adjudicators' includes employees of the SRA and external members...and ... 'Decision makers' includes adjudicators but also any person making formal decisions for the SRA*". I also recalled that in the Whitehouse Fol adjudication the Society had been prepared to release the name of an adjudicator because he performed "a regulatory publicly accountable function". In the light of this I asked why the Law Society thought a different approach was appropriate in this case.

In reply, the Society said that it had asked the individual decision-maker in question for permission for his name to be published but he had declined to give it. The Society said that the individual was an Investigating Officer in the SRA's Intelligence and Investigation Unit: he sat at a relatively low level in the organisation with no management responsibilities. Although he was making 'a formal decision for the SRA' he was not ultimately responsible for that decision. He reported to the Investigation Team Manager who would have responsibility for those decisions.

The Society argued that a distinction needed to be drawn between external adjudicators (as in the Whitehouse case) and those SRA employees who perform a decision-making role as part of their employment with the SRA. The difference was that external adjudicators performing a regulatory function were individually accountable for their decisions and also therefore publicly accountable for them, whereas SRA employees took decisions on behalf of the SRA itself which, as a body, was accountable for those decisions. The Society accepted that the wording on the SRA's website to which VS had referred was "rather unclear" and would be amended accordingly.

On 23 October I shared these replies with VS to give her an opportunity to address them.

6. Further submission by VS

In response, on 1 November VS made a wide-ranging submission. She repeated her concerns that the information she had been given originally by the Law Society had been misleading and appeared to have come from one particular individual. But she pointed out that her request had always been for the names of all SRA decision makers in relation to SDLT cases and not just the one who might, for whatever reason, have refused his consent.

VS quoted the Information Commissioner as having made clear that the reason for an information request was a relevant consideration to determine the fairness of disclosure. In that context VS explained at length the reasons for her request. In assisting solicitors investigated for SDLT schemes she had become aware that non-disciplinary "letters of advice" had been issued to some whereas others had been referred to the SDT or, under what she called this "threat", had been required to sign regulatory settlement agreements admitting to all allegations and accepting disciplinary sanctions despite the draconian affect that had on them. She believed this indicated inappropriate, inconsistent, unfair and potentially biased investigations and decision-making across the SRA, within departments and within individuals' case loads.

VS went on to recall the handling by the Law Society of her request for information and the fact that the Society's first responses had been incorrect. She believed they had also been evasive and misleading, designed to withhold information. She regarded this question of handling as essential to the current adjudication.

VS then raised another Decision of the Information Commissioner which concerned the release by Harringey Council of correspondence concerning funding for housing. The correspondence included the names of staff but the Commissioner said they should not be redacted because the “*staff roles are public-facing....being members of [Harringey’s] resident involvement team, so it would not be unfair to disclose them*”. The Commissioner had added that “*...the actions of [Harringey] cannot properly be examined without knowledge of the identities of its staff in this case*”.

VS said that the Commissioner’s decisions demonstrated that dealing with FoI versus the DPA was a balancing act which required consideration of all circumstances surrounding the particular request.

She believed there were some broad distinctions, for instance requests for names alone rather than names with contact details, particularly personal as opposed to business contact details. She pointed out that she was not asking for “sensitive” personal data, but merely for names of SRA internal decision makers acting in an exclusively professional and what she called public-facing capacity.

VS said that, in balancing competing requirements, the IC considered the strength of the public interest in the provision of the information, against any legitimate expectation of the data subject. She referred to ICO Guidance saying that “*...information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned*” and that “*while it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on damage or distress to an individual acting in a personal or private capacity. The exemption should not be used, for instance, as a means of sparing officials embarrassment over poor administrative decisions*”.

VS said that the Commissioner’s presumption appeared to be in favour of disclosure unless there was a good reason against it, rather than the other way round.

She then identified what she thought were the Law Society’s reasons for withholding the information: a suggested lack of seniority of SRA internal decision makers; a suggested distinction between them and Adjudicators; and the refusal by one of them for disclosure of his name. She believed that the Society appeared unable to give any detailed arguments on why disclosure would be unfair.

She said that the Law Society had said nothing about whether the individual(s) concerned might suffer any personal damage or distress (as opposed to personal accountability) from disclosure. As for the individual’s seniority, VS said that this was only one of a number of considerations: it was not determinative. She cited comments in an Information Tribunal case (*Home Office v Information Commissioner* Ref: EA/2011/0203) that “*each individual’s case must be determined on its own facts.... it would not be appropriate [...] to impose a blanket policy on the disclosure or withholding of individual’s [sic] names based solely on an individual’s grade*’. VS said that the Commissioner had confirmed that the “*correct approach is to focus on the specific nature of the role and the relationship to the information rather than a simple cut off.*”

VS pointed out that paragraph 64 of the SRA’s decision making framework stated that team managers ensure competence, but decision makers are “*personally accountable*”. She said the Society had confirmed that Investigating Officers applied their own judgment on whether to issue on-site certificates, rather than “adverse reports”. She said that all the closure/warning letters she had seen were sent by officers in their own names. She believed that SRA decision makers had a publicly facing role with significant discretion: they could close down investigations or submit full reports which lead to sanctions which could affect the ability of solicitors to remain in practice.

VS said that in distinguishing between adjudicators and internal decision makers the Law Society had said that SRA employees took decisions on behalf of the SRA itself which, as a body, was accountable for those decisions. She believed that this ignored the fact that decisions were frequently made without reference to Adjudicators: of the cases she had asked about it appeared that independent Adjudicators had been involved in only two SDLT cases.

She pointed out again that the SRA's own decision-making framework said that "*Decision makers*" includes adjudicators but also any person making formal decisions for the SRA". She noted that the Law Society had now said the framework might be amended in response to her request and she believed that this could not be right.

Referring again to the Information Commissioner's view in the Harringey case that "*the actions of [the body itself] cannot properly be examined without knowledge of the identities of its staff*", VS said that the actions of the SRA could not properly be brought to account without disclosure of the names of all decision makers who had issued letters of advice or the equivalent, or whose decisions not to had led to sanctions or referrals to the SDT.

On 2 November VS also asked that the adjudication should take account of a further decision by the Information Commissioner in 2010 concerning the Northern Ireland Public Prosecution Service's attempt to withhold the names of its staff and police officers whose identities would have become clear if paperwork surrounding a decision to prosecute had been released.

7. Decisions of the Information Commissioner

In her submissions VS referred to several different cases considered by the Information Commissioner and argued why his decisions might be applicable to the current case. None offers a perfect analogy to the circumstances of the current case, but those of Shropshire County Council, the Northern Ireland Public Prosecution Service, and Harringey Council appear to me to be most pertinent. On 3 November I gave the Law Society notice of my intention to take these Decisions into account and asked for their responses in each case. There follows a summary of what I consider to be the key aspects of each Decision cited by VS, followed in each case by the Law Society's *verbatim* response [which I have edited only to avoid repetition].

7.1 Information Commissioner's Decision: Shropshire County Council (Ref: 50372275)

This case from January 2012 concerned a request for the names of two council employees (and of their manager) who had attended a private property at the time it was entered by the police.

The Commissioner drew a distinction between information about employees' private lives and public duties. The former attracted a higher degree of protection.

The Commissioner considered that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse.

Considering what might be the reasonable expectations of an individual concerning his personal data, the Commissioner believed that the seniority of an individual acting in a public or official capacity should be taken into account: the more senior a member of staff, the more

likely that he or she would be responsible for making influential policy decisions, while more junior employees would be unlikely to expect their to be disclosed. Where junior employees were less likely to be accountable for decisions taken by a public authority, the Commissioner considered that the benefit to the public of disclosing the information about them would be minimal.

The Commissioner considered there was a general public interest in furthering accountability and transparency but that, in the Shropshire case, this was outweighed by the reasonable expectations of the two individuals who had attended the private property and by the possible consequences to them of disclosure. He judged, however, that it would not be unfair to publish the name of their superior because, although he had played no part in the particular events concerned, he had a reasonable expectation as head of a department that his identity should be known, and there was a public interest in its being known.

In reaching the decisions not to release the names of the more junior staff the Commissioner took account of the claim that publishing the names of individual council officers could lead to their being the target of campaigners.

7.2 Law Society response

“The Law Society is not a public authority although we do operate voluntary [sic] FoI Code. The Information Commissioner considered that ‘employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse.’ This is not the case with SRA employees. The SRA employees involved in this matter were not senior employees and should not expect their names to be disclosed into the public domain.

There would be possible consequences of disclosure of the names of the SRA employees in this case. Those firms operating Stamp Duty Lands Tax mitigation schemes are involved in a campaign to assert the legitimacy of those schemes and publication of the names of employees other than those accountable for decisions to proceed with regulatory action would be unfair on those employees.”

7.3 Information Commissioner’s Decision: Northern Ireland Public Prosecution Service (PPS) (Ref: FS50235260)

This case concerned a request to the PPS to release all the papers concerned in a decision to prosecute some individuals for criminal damage and obstruction. The PPS said that the identity of its staff and the police officers involved was personal data which it would be unfair to disclose.

The Commissioner considered that the police officers were acting in the course of their professional capacity and none of the documents contained information about the personal lives of any of them. The officers therefore would have an expectation that their names would be released to the general public, if so required.

The Commissioner considered that there was a legitimate interest in allowing the public to have the opportunity to scrutinise the work of police officers to ensure that they were carrying out investigations properly.

The Commissioner therefore found that disclosure of the information would help ensure that the actions of the PPS are transparent and accountable.

The Commissioner was of the view there was an interest in the public finding out the names of the officers involved in the case so as to understand how the investigation was conducted.

The greater the degree of involvement of an officer the greater that public interest was. The Commissioner did not find that any of the police officers would incur damage or distress in having their names released given their public-facing role.

The Commissioner considered whether or not names of senior PPS staff involved in the case should be released. He believed that it was senior personnel who made a decision to proceed with the prosecution. The Commissioner said that these roles therefore involved a significant level of personal judgment and individual responsibility. The senior staff would therefore have an expectation that their names would be released to the general public, if so required.

7.4 Law Society response

“The Society would draw a distinction between the public duties of a police officer and the duties of an SRA employee with an involvement in taking decisions as to whether regulatory investigations are to be escalated to the next level of the SRA’s processes. The Commissioner found that ‘disclosure of the information would help ensure that the actions of the PPS are transparent and accountable.’ The SRA employees in this case are not accountable for the regulatory decisions they have made so publication of their names would not help to ensure that the actions of the SRA were transparent and accountable. The SRA ensures transparency and accountability in a number of other ways including the publication of regulatory decisions on its website along the names of accountable Adjudicators and senior employees.”

7.5 Information Commissioner’s Decision: Harringey Council (ICO ref:FS50437448)

This case concerned the release of correspondence from the Council concerning funding for housing and containing the names of Council employees. The Commissioner said that these names should not be redacted because the staff roles were “public-facing”, being members of Harringey’s “resident involvement team”, and so it would not be unfair to disclose them. The Commissioner also said that Harringey’s actions could not properly be examined without knowledge of the identities of its staff in this case.

7.6 Law Society response

“The SRA employees in this case are not ‘public-facing’ in the same way as the Harringey employees. It would not be necessary for all SRA staff involved in the regulatory decision-making process to be named in order for the SRA’s actions to be properly examined. The SRA’s decisions are published on its website along with the names of accountable Adjudicators and senior employees.”

8 Adjudication

Section 16 of the Society’s Code reflects the legal obligation imposed upon the Law Society by the DPA not to disclose personal data unfairly. I am unable to direct the Society to disclose information the release of which it believes would breach the Act, but I can express an opinion about the Society’s reliance upon section 16 of its Code, based upon the facts and submissions in this case and upon my understanding of the approach taken by the Information Commissioner.

8.1 The Law Society's FoI obligations

First, I should address the point made by the Law Society (7.2 above) that, unlike the bodies which were the subject of the Commissioner's Decisions, the Society is not a public authority and it is not funded by the taxpayer. That is, of course, true: if it had been designated a "public authority" it would be subject to the Freedom of Information Act and to review of its decisions by the Commissioner. However, in anticipation of, or perhaps even to forestall, its being so designated, the Law Society determined a decade ago to adopt its own voluntary FoI Code which it declared would mirror the Act, with an external route of appeal to an independent FoI adjudicator. In my judgment it is therefore not open to the Society to aspire to a lower level of transparency or accountability than that applying to public authorities, albeit that its commitment to freedom of information is given on a voluntary basis.

8.2 ICO Guidance

I agree with VS that this matter requires a balance between freedom of information and data protection. I also note no case can be determined simply by reference to other cases, and that each must be decided on its own merits and taking account of its own circumstances. The ICO offers Guidance on the application of the Freedom of Information Act in respect of Requests for Personal Data about Public Authority Employees:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_req/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

This Guidance addresses most of the questions raised in the various Decisions of the Information Commissioner referred to by VS (and summarised in section 7 above). I will therefore rely upon it, rather than upon the arguments in each of the individual Decisions, in determining this case.

The ICO lists factors to take into account in determining whether publication of personal data about an employee would be fair: the consequences of disclosure, the employees' reasonable expectations and the balance between the employee's rights and any legitimate public interest in disclosure.

8.3 The Consequences of Disclosure

The Law Society says (7.2 above) that firms operating SDLT mitigation schemes are involved in a campaign to assert the legitimacy of those schemes, so publication of the names of employees other than those accountable for decisions to proceed with regulatory action would be unfair on those employees.

The ICO Guidance says that, if an authority wishes to claim that there would be adverse consequences on the employees in the event of disclosure, it must be able to put forward some justification for this claim. The Law Society has simply asserted that publication would be unfair because of the existence of a campaign. I do not find that persuasive.

8.4 Employees' Reasonable Expectations

The ICO offers a number of tests to assess the reasonableness of an employee's expectations.

Personal or professional?

The first is whether the information relates to the individual's professional role or personal life. In this case the information consists simply of the individual's name, but it is sought in order to associate that individual with his professional duties, not with any aspect of his

personal life. The ICO Guidance says information about an employee's actions or decisions in carrying out his job is still personal data but that, given the need for accountability and transparency about public authorities, there must be some expectation of disclosure. But that expectation may be affected by the following factors.

Seniority?

The ICO Guidance says that senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions. But the ICO recognises that the terms 'senior' and 'junior' are relative, and it is always necessary to consider the responsibilities of the employees in question.

In this case the Law Society says the Investigating Officer sits at a relatively low level in the SRA and has no management responsibilities. The Society says that, although he was making 'a formal decision for the SRA' he was not ultimately responsible for it: that responsibility rests with the Investigation Team Manager.

Though there is an apparent contradiction in saying that an individual makes a decision but is not responsible for it, I am persuaded that in this instance accountability for the appropriateness of his team's decisions to issue closure letters is discharged by the Manager rather than by the individual team member. The individual is certainly not responsible for major policy decisions. Despite the confusing and contradictory statements which VS identified on the SRA's website that "*adjudicators' includes employees of the SRA and external members...(and)... 'Decision makers' includes adjudicators but also any person making formal decisions for the SRA*" I am satisfied that there is a qualitative difference in terms of autonomy and responsibility between an SRA Investigating Officer and an external Adjudicator who, as the Law Society says, performs "a regulatory publicly accountable function".

In this connection I note that, in the Northern Ireland Public Prosecution Service case, the Commissioner believed that the individual who took the decision to prosecute had exercised a significant level of personal judgement and individual responsibility such that he would have an expectation that his name might be made public. It seems to me that there is a significant difference between prosecution and regulatory enforcement. I also find it significant that although the Investigating Officer had the authority to issue letters of advice or closure notices he had no power to institute disciplinary proceedings or referrals to the Solicitors Disciplinary Tribunal: the authority to do that rested solely with legal advisers, senior management, or the Chief Adjudicator. The decision *not* to refer a firm for further enforcement action appears to me to be the exercise of a significantly lower level of responsibility.

Public-facing?

The ICO Guidance recognises that it might be fair, irrespective of seniority, to release information about an employee who represents his Authority to the outside world, for instance as a spokesperson or at meetings with other bodies: this implies that the employee has some responsibility for explaining the policies or actions of his authority.

It is not at all clear that the Investigating Officer in this case falls into this category. The fact that, in the discharge of his duties, he may correspond with or talk to members of the public is insufficient, in my view, to make his role public-facing.

The General Policy adopted by The Law Society

The ICO Guidance recognises that an employee's expectation of privacy about his personal information may reasonably be influenced by the Authority's policy on disclosure. The Law Society, in adopting its FoI Code, has declared its commitment to transparency and openness. But it is clear that, within the organisation, this has not been taken as a sign that staff other than at senior levels are expected to be personally accountable to the outside

world. Past practice is a legitimate factor which would govern an individual's expectation of his identity being protected. In declining permission for his name to be released, it seems probable that the Investigating Officer had never been given any reason to expect that it would be.

Conclusion

Taking all of the above factors together, I think that the Investigating Officer had a reasonable expectation that his personal information would not be released in response to an FoI request.

8.5 Balancing Rights and Freedoms with legitimate interests

The ICO Guidance makes clear that, even though disclosure may cause distress to the employees concerned, and they may have a reasonable expectation that the information will not be disclosed, disclosure would not necessarily be unfair. A decision requires the balancing of any legitimate public interest in disclosure against the rights of employees.

Importantly, the Guidance points out that in section 40(2) of the FoI Act (which is the equivalent of section 16 of the Law Society's Code) the interaction with the DPA means that the usual assumption is reversed: it is disclosing, rather than withholding, personal information which needs to be justified.

Solicitors clearly have an interest in being able to be satisfied that the SRA's regulatory decisions are consistent and not capricious. There is a wider interest in the public being satisfied that any regulator takes its regulatory decisions fairly, on the basis of evidence, and without favour. Some of the information which VS originally asked for may throw light on these questions. However, it is hard to see how knowing the name of an individual Investigating Officer - or of all of them - would significantly further that general public interest.

8.6 Other issues raised by the parties in this case

VS referred to the Commissioner's comment in the Harringey case that that Authority's actions could not properly be examined without knowledge of the identities of its staff. It is not clear to me that that is true in the case of the SRA. Even if, hypothetically, different members of staff had been applying different standards in reaching decisions about the treatment of SDLT schemes it would be possible to establish that without identifying the individuals concerned.

VS has also repeatedly asked that this adjudication should take account of what she sees as the evasive and misleading way in which The Law Society handled her original requests for information. The Society accepts that several of its original answers to her were wrong, and that they were based upon incomplete data: it apologised for that and offered what it said were correct answers. Though VS continues to be in correspondence with the Society to seek clarification and to obtain further information I cannot see how these matters can directly affect the question I need to answer: whether the Society acted appropriately under the Code in withholding the name of the Investigating Officer.

Finally, I should note that VS' original request was for "the name[s] of the decision maker or adjudicator" in SDLT cases. During the course of a lengthy and detailed correspondence the Society said that it was holding the name of an individual Investigating Officer, and that is the subject of this adjudication. However, VS continues to want the names of all who may take decisions in SDLT cases: the principles addressed in this adjudication may guide the Society's response to further requests.

9. Finding

This has been a difficult matter to determine. It may well be that, when and if The Law Society is designated a public authority for the purposes of the Freedom of Information Act, the Information Commissioner would take a different view. I have, however, tried to apply the principles he has outlined.

I accept that there is a public interest in the information VS asked for being made available for the purposes of furthering accountability and transparency. However, I do not find it a compelling public interest such that it would outweigh the reasonable expectation of privacy for the individual in this case. I therefore conclude that The Law Society acted reasonably in interpreting section 16 of the Code in this case by withholding the identity of the Investigating Officer.

Richard Ayre
Freedom of Information Adjudicator
9 November 2012