The Law Society

Adjudication

Law Society Freedom of Information Code
February 2016

An Adjudication in a matter raised by RH.

1. The issue

1. Whether the Law Society ("the Society")[1] acted appropriately and in accordance with its Freedom of Information Code of Practice ("the Code") when, in response to a freedom of information request, it declined to release to RH ("the Applicant"), information relating to its decision to not fully comply with the disclosure of documents specified in the Adjudication in a matter raised by YZ *("YZ"*). That adjudication was dated 31 July 2015.

2. The Society's refusal of the Applicant's request was initially based upon paragraph 14.8 of the Code (legal professional privilege). Following the referral of the matter for adjudication, the Society also cited paragraph 14.7 of the Code (policy development) in relation to some of the withheld information.

2. Background

3. In late 2014 the activities of a certain named solicitor ("the named solicitor") led to comment in the national media. Subsequently, a number of individuals made information requests to the Society in relation to the named solicitor, his practice and the claims he made about himself. One of those information requests ultimately resulted in the adjudication in *YZ.*

4. Following the finalisation of the adjudication in *YZ*, the Society stated that it was considering its positon with regard to complying with the disclosure directed in that adjudication.

5. I understand that the Society choosing not to comply with an adjudication, whether as a temporary expedient or at all, is extremely rare: indeed the adjudication in *YZ* may be unique in this regard.

6. Paragraph 17 of the Code provides that the Society *"will normally accept the Adjudicator's decisions, but, exceptionally, our Council may decide not to accept his adjudication".* I understand that the Society has never referred an adjudication to its Council further to paragraph 17 of the Code.

[1] By virtue of the current wording of the Code for the purposes of this adjudication, that term should also be taken to include the Solicitor's Regulatory Authority (*"the SRA")*, where applicable.

7. Whilst it considered its position, the Society accepted that the adjudication in *YZ* should be published on its website. However, it said it wished to do so in a redacted form, pending a final decision regarding compliance with the adjudication as a whole.

8. The Society asked if I would agree to such a redacted publication. I did so on the basis that it would be a temporary measure, whilst the Society considered and finalised its position.

9. The redacted version of the adjudication in *YZ* was duly published on the Society's website[2].

10. I am told that, immediately following the adjudication in *YZ*, the Society was in communication with the named solicitor. The Society said that during the course of that communication the named solicitor threatened injunction proceedings against it to prevent the disclosure directed in *YZ.*

11. In the course of its submissions to me in this matter, the Society stated that currently *"it is defending legal action against it"* in relation to *YZ.* I understand that legal action to be the injunction proceedings which are being pursued by the named solicitor. I am also aware that, separately, the Society was threatened with legal action by a third party.

12. On 10 September 2015 the Applicant made an information request to the Society. It was in the following terms:

> *"May I ask please for copies of any documents recording or relating to the following:*
>
> *(i) the decision not to publish the adjudication in YZ in full,*
>
> *(ii) the lack of compliance with the decision of the adjudicator in YZ and*
>
> *(iii) whether or not to put YZ to the Council of the Law Society as provided for by paragraph 17 of the Law Society's FOI Code.*

13. The Society responded on 25 September 2015. It refused the Applicant's request as set out below, adopting the Applicant's numbering when doing so:

> *"(i) Any documents relating to this point are being withheld under paragraph 14.8 of the Code. This allows us to withhold information if it consists of advice from*

[2] Due to an error on the part of the Society, the redacted elements of the adjudication were, for a period of time, readable in the version published on-line.

the Society's legal advisers relating to court action we are or may be involved in, or other legal issues affecting us, and its release would harm our legal interests.

(ii) As (i) above.

(iii) As (i) above."

14. On the same day, the Applicant asked for the matter to be referred to adjudication. The Society made that referral to me on 28 September 2015.

15. Subsequently, on 30 September 2015, the Society told the Applicant (in response to a separate request for information) that the named solicitor had, in fact, applied for an injunction against it seeking to prevent the disclosure directed in *YZ*. It did not provide a copy of the injunction in question to the Applicant[3].

16. Following the referral of the matter for adjudication, I wrote to both the Applicant and the Society and I invited them to make any submissions they felt appropriate in support of their respective positions.

17. When inviting the Society to provide its submissions, I asked it to ensure that any such submissions were full and complete and referred to any and all exemptions that it wished to rely on in support of its position.

18. At the same time, I asked the Society to provide me with a full and complete copy of all of the disputed information which it was seeking to withhold in this case. I asked the Society specifically to confirm that the information it was providing to me represented a full and complete record of all of the in-scope information it held.

19. On 13 October 2015, having again reviewed the withheld information, the Society disclosed a further limited amount of information to the Applicant.

20. On 26 October 2015, the Applicant provided his initial submissions to me. Whilst he noted that the Code placed the onus on the Society to establish that information should be withheld, those submissions were full and detailed, running to some 21 pages.

[3] Likewise, I do not have, and have not sought, a copy of that application, although I am told by the Society that the matter has been listed for hearing.

21. On 4 November 2015 the Society provided its submissions to me, together with a copy of the information which it said was a full and complete copy of all the material it sought to withhold.

22. At this point, the Society also stated, for the first time, that it also wished to rely on the exemption at paragraph 14.7 of the Code to withhold some of the information. Accordingly, the copy of the information provided to me by the Society was divided into two parts, albeit with some duplication between the two. One part comprised the material which the Society wished to withhold under paragraph 14.8 of the Code (the exemption it had originally cited) and the other comprised the material which it wished to withhold under paragraph 14.7 of the Code, the exemption which it raised for the first time during the adjudication process[4].

23. It was notable that in its submissions to me the Society did not make any arguments in relation to the public interest balancing exercise either for or against disclosure of the withheld information. The Applicant objected to this, arguing that in the absence of such arguments, the Society's case must inevitably fail. He invited me to strike out the Society's case at that point, an invitation which I declined.

24. The Applicant subsequently made further submissions in support of his position by way of an email dated 10 November 2015.

25. Following receipt of the parties' submissions, I undertook a detailed review of the withheld information provided to me. As a result of that review it became evident that, despite the Society's assurances, the information it had provided was not a full and complete record as it had said. This was so not least because the information provided ended abruptly on 12 August 2015, whereas the Applicant's request was for any in-scope information held up to and including 10 September 2015.

26. I raised this with the Society. When doing so, I referred the Society to a numbered list of potential categories of in-scope information which the Applicant had set out in his submissions to me. I also bore in mind that the Applicant had had previous experience of an information request made to the Society which itself involved information which had initially been lost or misplaced by the Society. Accordingly I asked the Society to specifically confirm that it had considered, searched for, and identified all in-scope information falling into the possible categories set out by the Applicant in his submissions.

[4] In accordance with the established jurisprudence in the Information Rights Tribunal (see, for example, *Birkett v Department for the Environment Food and Rural Affairs* [2011] EWCA Civ 1606), I accept that it is permissible for the Society to seek to rely on such a "late" exemption for the first time at the adjudication stage. However, I would strongly discourage such a practice becoming routine under the Code. It is much better to see the Society marshal all of its arguments at the outset and making a full and reasoned refusal to an applicant, before a matter reaches adjudication.

27. In response, on 22 December 2015 the Society provided to me an additional and substantial body of withheld information. That material comprised of email exchanges running to several hundred pages, albeit with very considerable duplication arising from a number of lengthy email chains being repeatedly reproduced in the format the material was provided to me.

28. In its email providing this additional information, the Society addressed each of the numbered categories of information identified by the Applicant and it confirmed that it had undertaken appropriate searches in relation to such information.

29. The Society also stated that its failure to provide this material to me earlier was *"purely as the result of an administrative error"* on its part, for which it sincerely apologised.

30. At this point I consider appropriate to register my concern at being provided with such a substantial body of material at such a point in the adjudication process, and then only after I queried matters with the Society. This is especially the case, given the Society's previous clear and unequivocal assurances that it had already provided me with all of the in-scope information which it held.

31. However, having reviewed all of the information now provided to me by the Society, and taking into account its renewed assurances, I am therefore content that the withheld information before me represents a complete copy of all the recorded information held by the Society which falls within the scope of the Applicant's information request. I proceed with this adjudication on that basis.

3. The Applicant's submissions

32. The Applicant provided me with a detailed set of submissions, which ran to some 21 pages in total, including an annex.

33. I do not repeat here each and every point raised by the Applicant in those submissions; however, I have carefully read them and I have duly considered each of the points they make. The overall thrust of the Applicant's submissions is most conveniently summarised by quoting the first two paragraphs of the Annex to those submissions:

> *"A1. My position is that, on a proper analysis of the material falling within the scope of my requests, (a) only a very small part will stand any chance of being covered by paragraph 14.8 and (b) none will be covered by paragraph 14.7 (not least because my requests have nothing to do with policy development).*

A2. In any event, paragraphs 14.8 and 14.7 are subject to the public interest test. For the general reasons set out in paragraphs 9 to 18 of my submissions, the public interest is in favour of disclosing the material sought by my requests."

34. With regard to paragraph 14.7 of the Code, the Applicant argued that the Society's policy making process ended some years ago when the Code itself came into force and therefore that paragraph could not apply.

35. With regard to the public interest balancing exercise, the Applicant put forward a number of arguments as to why he said the public interest in disclosure outweighed the public interest in maintaining the exemptions claimed by the Society. In brief, he said:

> *"The Society's failure to comply with its own Code reflects poorly upon it and demands a proper public explanation."*

36. He maintained that the Society's interests in upholding the exemptions it claimed were purely private interests, and not public ones:

> *"The public interest in understanding the Society's failure to comply with the decision in YZ outweighs any private interest which the Society may have in not explaining that failure.*
>
> *... The Code is part of the Society's constitution, not something which the Society can disregard when it likes...The public interest in approved regulators complying with their own procedures vastly outweighs any interest of the Society in not complying with its own voluntarily adopted procedures."*

37. With regard to the question of legal professional privilege, the Applicant said:

> *"the circumstances in this case are indeed exceptional. There are compelling reasons for concluding that the public interest lies in favour of disclosure, even if the material in question falls within paragraph 14.8:*
>
> *...A very important point of principle is involved, in that the Society cannot claim to be committed to openness while failing to comply with a decision of the Adjudicator or to put the matter to its Council, which is what the Code says it must do. Even if* [the named solicitor] *had applied for an injunction, that would not prevent compliance with the decision in YZ or prevent the Society from referring that decision to the Council.*

…If the Society only complies with the Code when it wants to, the Code is worthless

…These matters demand to be ventilated, not suffocated, and the Society's refusal to allow that to happen needs to be investigated fully. The Code is intended to enable investigation[5]*, but the Society is (mis)using the Code in an attempt to prevent it. The inevitable impression is that the Society has something to hide."*

38. He maintained that the Society should not *"seek to hide behind legal privilege when required to explain a failure to comply with the Code*." He said:

"The Society has not identified in any interest in withholding the information beyond the general interest which could be prayed in aid of a refusal to disclose any piece of privileged advice. It has not explained why it is important that the requested material remain secret or what particular public interest is being served by keeping it secret. It therefore appears that the only interest which would be benefited by keeping the material secret is the Society's own private interest in not having to comply with the Code or explain itself…

… If the Society is permitted to fail to comply with the decision in YZ while failing to provide full answers to my legitimate requests about that failure, the Code will cease to serve any useful purpose…There is no public interest in maintaining any claim to privilege: the only interest in that regard is the Society's private interest, which cannot prevail over the public interest in favour of disclosure."

39. With regard to the public interest balance in relation to paragraph 14.7 of the Code, the Applicant stated that:

"The factors in favour of disclosure are obvious and overlap in large part with the points which I have made above in relation to paragraph 14.8. In the context of a failure by the Society to comply with a decision of the Adjudicator and a failure to obtain the Council's consent to that course of action, the need for transparency is overwhelming.

…Without that transparency, the entire ethos of the Code is undermined and the Council's stated commitment to "maximum openness" becomes meaningless."

4. The Society's submissions

[5] In fact, the Code is intended to provide a qualified right of access to information, not permit investigation, *per se.*

40. During the course of the adjudication process the Society reviewed the withheld information and decided for the first time to rely upon paragraph 14.7 of the Code as well as paragraph 14.8, the exemption it had originally cited, as a basis for withholding elements of the requested information.

41. In relation to paragraph 14.7 of the Code, the Society said that the information it withheld under this paragraph did not contain legal advice but did contain discussions on the Society's policy relating to:

I. Whether to accept the adjudicator's decision in *YZ* in full;
II. Whether paragraph 142 of the adjudication in *YZ* should be redacted before publication on the Society's website;
III. Whether the schedule to the adjudication in *YZ* should be redacted before publication on the Society's website;
IV. Whether to refer the matter to the Law Society Council under paragraph 17 of the Code; and
V. The application of the Society's General Regulations.

42. The Society argued that if these emails were published, it would have the effect of deterring Law Society and SRA employees from putting their views in writing in subsequent cases where similar issues are raised. It said it was important that those employees felt free to state their views on the Society's policy relating to these matters in the knowledge that those views would not subsequently be published.

43. In relation to paragraph 14.8 of the Code, the Society argued that paragraph was engaged because *"The withheld emails all contain or relate to legal advice received from the Society's legal advisers."*

44. It said that the emails in question related to legal advice on:

I. Whether to accept the adjudicator's decision in *YZ* in full;
II. Whether paragraph 142 of the adjudication in *YZ* should be redacted before publication on the Society's website;
III. Whether the schedule to the adjudication in *YZ* should be redacted before publication on the Society's website; and
IV. Whether to refer the matter to the Law Society Council under paragraph 17 of the Code.

45. The Society said that not all of the emails it sought to withhold under paragraph 14.8 of the Code contained legal advice, but those which did not were either seeking such advice or they flowed from the advice received. It was the Society's submission that those emails were legally privileged and could not be published without prejudicing the Society's legal interests.

46. The Society also noted that it was, at the time of making submissions, defending ongoing legal action against it which related to the adjudication in *YZ*; accordingly it was especially important that such legally privileged material was not published[6].

47. Finally, the Society noted that some of the emails had been withheld under both paragraphs 14.7 and 14.8 of the Code. This was because both exemptions applied in relation to such material.

48. In its submissions to me, the Society presented no argument whatsoever on the question of the public interest balancing exercise. When the Applicant objected to that omission, the Society responded by saying that the public interest balancing exercise only applied to *"regulatory information"* – it said the information requested here was not regulatory in nature and therefore, no public interest balancing exercise was necessary.

5. The Applicant's further submissions.

49. The Applicant strongly objected to the Society's positon regarding the application of the public interest balancing exercise and, as noted above, he invited me to strike out the Society's case. I did not do so and in his email to me of 10 November 2015, the Applicant made the following points*:*

> *1. The equivalent parts of the FOIA are subject to the public interest test and the opening words of paragraph 14* (sic) *make clear that the Code is intended to replicate that aspect of the FOIA.*
>
> *…It would require very clear words in the Code to opt out of the public interest test, in circumstances where the equivalent exemptions in the FOIA are subject to that test.*

[6] It is evident that, at the time of the Applicant's request, that such legal action had, at the very least been threatened and was anticipated. It has not been confirmed on what date proceedings were actually issued.

2. *Paragraph 6 of the Code divides information into just two classes: representative information and regulatory information. My requests do not relate to information about the Society's representational role. They are concerned with its regulatory role, including its failure to disclose the regulatory information which the Adjudicator directed it to disclose in YZ.*

   …The SRA has no representational role: its function are (sic) *purely regulatory.*

3. *On 31 January 2011* [the Society] *sent a document … in response to a freedom of information request... It states expressly that the public interest test applies to paragraphs 14.7 and 14.8. Whether the information is representational or regulatory makes no difference to this.*

6. Adjudication

Introduction

50. The issues presented by this adjudication are not straight forward. This is because, as is the case with previous adjudications under the Code, this adjudication highlights a number of areas in which the Code, as it currently stands, has significant shortcomings.

51. In part, these shortcomings arise from the separation of functions of the Law Society and the Solicitor's Regulatory Authority ("the SRA"), a division which is not reflected in the Code. The Code predates that separation of functions and has not been updated to take account of it.

52. In part, however, those shortcomings also arise from the wording of the Code itself which is, in part, ambiguous.

53. With this in mind, and in order to reconcile those ambiguities, I direct myself to consider paragraph 3 of the Code which, in effect, sets out what can be regarded as the "Overriding Objective" of the Code. That paragraph reads:

"3. The Freedom of Information Act 2000 (we call it 'the Act' in this document) says that public bodies (including some professional bodies) have to allow access to

the information they hold, unless there are proper reasons not to release it. We expect the Act to be extended to apply to the Society. Even though the Act does not yet apply to us, we are following it as if it did, and this Code should be read on that basis."

(Adjudicator's emphasis)

54. It is clear from this that the overriding objective of the Code is to provide a mechanism, so far as possible (and subject to the distinction made in the Code between regulatory and representative information discussed below), which allows the Society to deal with information requests made to it as though it was subject to the Freedom of Information Act 2000 ("FOIA").

55. Accordingly, in the case of any ambiguity, I favour the interpretation which most closely reflects the operation of FOIA.

56. Given this, I consider that an adjudication under the Code must be analogous to a complaint to the Information Commissioner under section 50 FOIA, or to an appeal of a decision notice to the First Tier Tribunal. Both these stages are inquisitorial in nature and they both allow for a full merits review of a decision which is based on an independent interrogation of the disputed information at issue. The question to be determined in an adjudication is not whether or not one side "wins" and one side "loses", but rather whether recorded information held by the Society should properly be withheld or disclosed under the Code as it currently stands.

57. As Upper Tribunal Judge Stockman recently observed in *Jones v The Information Commissioner* (GIA//607/2012) at [55] – [57], when discussing the Court of Appeal decision in *Birkett v Department for the Environment Food and Rural Affairs* [2011] *EWCA Civ 1606:*

"....It seems to me that the important point is that an appeal to the FTT is not a reviewing process but a full de novo consideration of the issues. ...the tribunal is not confined to consideration of the issues raised by the Information Commissioner's decision, the grounds of appeal, the response to the appeal or the reply.

...Birkett makes it clear that the FTT's role is not to review the decision of the Information Commissioner but to consider de novo the propriety of releasing the information".

(Adjudicator's emphasis)

58. Likewise, I consider the fundamental purpose of an adjudication is a *de novo* consideration of the propriety of releasing withheld information. Where necessary I will place appropriate weight on my own detailed consideration of the disputed information. I will also always reserve the right to ask any questions of my own which arise from that consideration and will always ultimately form a view based upon the contents of the withheld information itself and the propriety or otherwise of its disclosure.

59. It is with this in mind that I approach this adjudication and the particular and challenging questions it presents.

The Issues

60. The issues in this case may be summarised as follows:

i. Has the Society undertaken a full and complete search to identify all of the recorded information which it holds and which falls within the scope of the Applicant's request?

ii. Is paragraph 14.7 of the Code engaged in relation to any or all of the recorded information which is held by the Society and which falls within the scope of the Applicant's request?

iii. Is paragraph 14.8 of the Code engaged in relation to any or all of the recorded information which is held by the Society and which falls within the scope of the Applicant's request?

iv. If any in-scope recorded information is held by the Society which engages either paragraphs 14.7 or 14.8 of the Code, is the public interest balancing exercise engaged in relation that information?

v. If the public interest balancing exercise is engaged in relation to such information at (iv) above, does that balancing exercise favour maintaining the exemption in either paragraph 14.7 or 14.8 of the Code, or does it favour disclosure of that information?

vi. Finally, is there any in-scope recorded information held by the Society which does not engage either paragraph 14.7 or 14.8 of the Code and if so, should it be disclosed?

i) The Searches

61. Following my initial correspondence, on 4 November 2015 the Society assured me that it had undertaken a full and complete search for all of the in-scope material it held in relation to the Applicant's request. It said that it had provided me with a full copy of the information in question.

62. However, that assurance was not correct. Having reviewed the information provided by the Society, it was evident to me that it was not, in fact, complete. I raised this with the Society. The Society acknowledged that it had not, as stated, provided me with full copies of all of the in-scope information which it held. It apologised for this failure, which it said was the result of an administrative error, and it duly provided me with copies of additional information. Although voluminous, the great majority of the new material provided were in fact duplicates, comprising of numerous repeated copies of lengthy email chains. There remained, nevertheless, an appreciable amount of material not previously provided to me.

63. I take the Society's apology for its error in good faith, but the error itself is troubling. Whilst always making allowances for the occasional administrative oversight, I do not consider it unreasonable to expect the Society to fully review the disputed information it is providing to me to ensure that it is complete, before giving an explicit assurance to that effect.

64. The Society's administrative error in this case is to some degree compounded by the fact that it has previously made a not dissimilar error – in that case involving the loss or misplacing of information files - when dealing with an earlier information request made by the Applicant. Such administrative errors do little to instil confidence in the Society's handling of information requests.

65. Nevertheless, having now reviewed the complete body of further information provided to me by the Society, I am satisfied that there are not any points raised by that review which cause me to further question its completeness.

66. Given that, and the renewed assurances provided by the Society, I am satisfied that, on the balance of probabilities, the information provided to me comprises a copy of all of the

recorded information held by the Society which falls within the scope of the Applicant's request.

ii) Is Paragraph 14.7 of the Code engaged?

67. Paragraph 14.7 of the Code provides that information is potentially exempt from disclosure if:

> *"14.7 ...it is about 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*."

68. The Applicant's information request was for details relating to the Society's decision not to publish the adjudication in *YZ* in full, its lack of compliance with that adjudication and the question of whether or not to refer the matter to the Society's Council.

69. The Applicant argued that his request could not engage paragraph 14.7 of the Code because it was not a request for information which related to policy development work which had been, or was being, undertaken by the Society. He said that any policy development in relation to the Code ended at the point the Code came into force.

70. The Society argued to the contrary, saying that the information it withheld under paragraph 14.7 related to its live policy discussions on precisely the issues referred to in the Applicant's request.

71. The first limb of paragraph 14.7 of the Code requires a consideration of whether or not the information in question is about work the Society is doing, or has done, to develop its policies.

72. It is evident from my review of the withheld information that, as a matter of fact, the Society had not previously been called on to consider its position in relation to the circumstances which arose following the adjudication in YZ. The Society was understandably concerned, for reasons which were not fanciful, by the position it might find itself in at that point of time if it did comply in full with the adjudication in YZ. Not least, this was because it was faced with the tangible threat of litigation which, as it transpired, ultimately did materialise and did result in injunction proceedings being issued.

73. Consequently, it is clear that the Society's staff (both its legal advisors and others) were actively developing the Society's position, and its response to the circumstances it faced, in

real time. In short, at the time of the Applicant's request and immediately beforehand, it was in the process of developing its policy on how to respond to the situation it faced.

74. Accordingly, I find that, with the exception of a small body of material discussed below, the information which the Society says engages paragraph 14.7 of the Code was focused on developing the Society's policy positon and its response to the circumstances in which it felt unable to comply with certain aspects of an adjudication at the time that particular adjudication was made. The withheld information records the Society's internal discussions on this point.

75. It is also clear that from the face of the material that, in the event of similar circumstances arising in future, the discussions recorded in the withheld information are highly likely to form the basis of the policy adopted by the Society in such a future case. Therefore, whilst the discussions in this case were clearly reacting to circumstances they were, nevertheless, also equally clearly discussions focused on developing the Society's wider policy on the point.

76. At the time of the Applicant's request on 10 September 2015, that policy process was still very much a live one; the information requested in this instance recorded work the Society *was doing at that time* to develop its polices in response to the questions of i) whether or not to publish the adjudication in YZ in full, ii) whether or not to comply with the disclosure directed in that adjudication, and iii) whether or not to refer the matter to the Society's Council.

77. Consequently, I find that the first limb of paragraph 14.7 is satisfied.

78. The second limb of paragraph 14.7 of the Code imports a prejudice test; it must be the case that the Society considers that[7] disclosure would hamper the free and frank exchange of views or harm the effective conduct of public affairs.

79. The withheld information contains free and frank exchanges between various members of the Society's (and SRA's) staff, including analyses of the course of action being proposed. From the face of the withheld information, at the time of the Applicant's request, those discussions were clearly ongoing.

80. The Society argues that to disclose such live information would have a significant chilling effect and would hamper the free and frank exchange of views in future similar cases.

[7] I agree with the Applicant that the Code is unfortunately worded in this respect. I have therefore applied the test of whether it may reasonably be considered (as opposed to the Society simply considering) that disclosure would lead to the prejudice claimed.

81. Given the timing of the Applicant's request and the live and ongoing nature of the policy discussions, I accept that, in the present circumstances, there is very considerable weight in the Society's view. I regard it as inevitable that staff engaged in such discussions would be mindful of the potential for their advice to be disclosed, effectively in real time, during a live policy making exercise. Consequently, I consider that they would tend to be more circumspect in the tone and frankness of any advice they gave. Such an outcome would prejudice the Society's public affairs.

82. Equally, however, I am mindful that such a chilling effect will diminish over time, and if the information in question was to be requested at some future date when the Society's policy making process on the issue was concluded, my assessment of the prejudice argued by the Society may fall rather differently.

83. However, that is not the present case: the request which is the subject of this adjudication was for details of what were effectively live policy discussions.

84. Accordingly, I find that the Society was correct to conclude that paragraph 14.7 of the Code was engaged by the requested information specified in this case and that information was potentially exempt from disclosure under the Code.

iii) Is Paragraph 14.8 of the Code engaged?

85. Paragraph 14.8 of the Code provides that information is exempt from disclosure if:

> *"14.8 …it consists of advice from the Society's legal advisers relating to court action we are or may be involved in, or other legal issues affecting us, and its release would harm our legal interests (this is called 'legal professional privilege')."*

86. The Applicant argued that for the Society to be able to rely upon paragraph 14.8 of the Code, four elements must be satisfied:

1) *The material must be advice from the Society's legal advisers;*
2) *That advice must relate to court action involving the Society or other legal issues affecting the Society;*
3) *The advice must be such that releasing it would harm the Society's legal interests (not, for, example, its reputational or public relations interests); and*
4) *The advice must be such that it attracts legal professional privilege.*

87. Accordingly, he maintained that paragraph 14.8 of the Code only permits the Society to withhold privileged advice received from its legal advisers: it does not allow it to withhold correspondence in relation to that advice or the instructions seeking it. He said that:

> *"This may be a drafting error in the Code, but the wording of paragraph 14.8 is clear and must be applied strictly until the Society amends it. The Society has been aware of the inadequate wording of paragraph 14.8 since Richard Ayre's decision in the case of EJ in October 2012, in which he said that "There is … a need for the Law Society to revisit the wording of the Code in relation to legal professional privilege".*

88. In *EJ, GJ & HB* (October 2012) my predecessor, Richard Ayre, whilst expressing his concern regarding the wording of paragraph 14.8 of the Code, also clearly noted the inherently strong public interest in protecting *the principle* of legal professional privilege. Finding for the Society, he said:

> *"…the principle of legal professional privilege is an important one, and one that is recognised and relied upon day and daily in law. Without it, solicitors would feel inhibited in giving free and frank legal advice to their clients…*
> *There is a conflict here between the wording of the Code, which appears to me to be looser than the usual definition of "legal privilege", and the wider public interest …With some misgivings, I must follow my instincts about what is in the wider public interest and I am clear that release of the legal advice could be prejudicial. I therefore find for the Society.*
> *…There is … a need for the Law Society to revisit the wording of the Code in relation to legal professional privilege…"*

89. I share Mr Ayre's concern regarding the wording of the Code at paragraph 14.8. However, I also share his concern in protecting the strong public interest in maintaining the principle of legal professional privilege.

90. Therefore, whilst a superficially attractive reading, I do not think that the Applicant's interpretation of paragraph 14.8 of the Code can be right.

91. The reason for this is that such an interpretation would result in an automatic and very significant restriction of the Society's ability to rely on the important protection afforded by legal professional privilege across the board; that simply cannot have been in the mind of those drafting the Code.

92. For example, the Applicant's "strict" interpretation of paragraph 14.8 of the Code would profoundly prejudice the Society's position in conducting any litigation being pursued against it (as is the case here) or any litigation it was pursuing. A third party engaged in such litigation with the Society would be entitled to make a freedom of information request for legally privileged material held by the Society in relation to that litigation and they may be entitled to receive it, provided only that it did not consist of advice ***from*** the Society's lawyers. That is not a position which applies under FOIA itself and I find it entirely inconceivable that this was the intention of those drafting paragraph 14.8 of the Code.

93. Rather, I regard the wording at paragraph 14.8 of the Code to be an attempt (and perhaps one which is misguidedly simplistic) to put into layman's terms the complex concept of legal professional privilege; hence the use of that term in parentheses in the paragraph. It is those parentheses in the paragraph which I consider qualifies the whole of the paragraph and is the crux of the type of information which the paragraph is intended to protect, namely, such information as attracts legal professional privilege.

94. In reaching this conclusion, I remind myself of the overriding objective of the Code, as set out at paragraph 3, which is to facilitate the Society in conducting its affairs as though FOIA applied to it. It is clear that the Code as a whole is to be read on that basis, and section 42 FOIA provides, as may be expected, a potential exemption to disclosure of all categories of information attracting legal professional privilege. I find that paragraph 14.8 of the Code must be read on that basis, as being also intended to afford the same protection, however loosely worded (to echo Mr Ayre's phrase) that intention may have been expressed.

95. Turning to the withheld information here, the Applicant rightly points out that simply because correspondence involves a legally qualified individual it does not, by virtue of that fact alone, necessarily attract legal professional privilege.

96. However, in the present case, the information which the Society seeks to withhold on the basis of legal professional privilege clearly does comprise both direct legal advice[8] and other information which attracts legal professional privilege.

97. The Applicant argues that any information shared between the Society and the SRA must, by virtue of being shared, have waived any privilege. This argument appears to disregard the doctrine of common interest privilege. However, on the face of the information itself, that does not in any event appear to be the case.

[8] For the avoidance of doubt, that advice is contained exclusively in correspondence and not as a stand-alone advice.

98. In light of this analysis, I am content that the Society was entitled to argue that the information it withheld on the basis of legal professional privilege did attract such privilege. It is therefore potentially exempt from disclosure under paragraph 14.8 of the Code.

iv) The engagement of the public interest balancing exercise.

99. It is the Society's position that the public interest balancing exercise does not apply in the present case because the withheld information is not *regulatory information*.

100. Conversely, the Applicant argues that, in the event that the exemptions relied on by the Society are engaged, then the public interest balancing exercise does apply, and that the Society's failure to advance any argument in this respect is fatal to its case. In any event, he maintains that the public interest overwhelmingly favours disclosure of the information he seeks.

101. This question, in my view, is not straight forward; the Code is, at best, paradoxical on this point.

102. As noted above, the Code is to be read as though FOIA applies to the Society (paragraph 3). However, as a general rule, where FOIA applies to bodies which have similar functions to the Society, it is only in relation to such bodies as have a purely regulatory, and not a representative, function. A convenient analogy here is the General Medical Council (a regulatory body) to which FOIA does apply, and the British Medical Association (a representative body) to which it does not.

103. The Code was drafted before the Society and the SRA became separate entities. It has not been amended since, and the original drafting appears intended to reflect and address this overlap in functions when it draws an express distinction between the Society's regulatory and representative information. Specifically, paragraph 6 of the Code anticipates that, if and when FOIA is extended to cover the Society, then any such designation under section 5 FOIA will cover only *regulatory* (i.e. the SRA's) functions.

104. However, the paradox for the present analysis lies in the fact that paragraph 6 of the Code also goes on to provide that the Society will treat information about its regulatory and representative roles in the same way. Paragraph 6 reads:

"What the Code covers

6. When it applies to the Law Society, the Act will require us to release information about our regulatory role. But we are happy to let you have information about our representative role too, so this Code applies to both, and we will treat requests for both in the same way. We will also give you any general information you ask for about the Society and the way it works, though you will usually be able to find it on the website."

(Adjudicator's emphasis)

105. At paragraph 18, the Code then goes on to draw an explicit distinction between regulatory and representative information with regard to the application of the public interest balancing exercise:

"18. The Adjudicator will decide the case on the basis that you should be given the information you want unless we can show why, under this Code, you should not have it. In the case of regulatory information, the Adjudicator will consider whether the public interest requires us to give you the information, which is the test the Act uses. The Adjudicator's decision will be sent to you and the full text will be on our website."

(Adjudicator's emphasis)

106. It seems clear therefore that the intention of paragraph 18 of the Code is that, when a matter comes to adjudication, the public interest balancing exercise is to be applied to specifically *regulatory,* but not to other classes of information. This does not sit naturally with paragraph 6 of the Code.

107. In this case, I consider that I would have been considerably assisted to hear the Society's view of the operation of the Code on this point, and in particular, to have submissions regarding its own understanding of the apparent paradox between paragraphs 6 and 18 of the Code.

108. Regrettably, however, the Society has chosen not to expand on its position in relation to the application of the public interest balancing exercise, other than making the simple and bald statement that it does not apply in these circumstances. I take it that this assertion is based on its reading of paragraph 18 of the Code, and its stated view that the information in dispute here is not regulatory in nature.

109. The Applicant rejected the Society's position that the public interest balancing exercise was not engaged. He said that the Code covered only two types of information – that relating to

representative functions and that relating to regulatory functions. As the information he sought was clearly not representative in nature, and it related to a previous request which had been about regulatory matters, he said it must also fall into the regulatory category of information. Therefore, he said, the public interest balancing exercise applied. He contended that in the absence of any arguments in relation to the public interest balancing exercise from the Society, the presumption under the Code was in favour of disclosure.

110. In support of his case that the public interest balancing exercise was engaged, the Applicant referred me to the Society's correspondence with a third party in which he said that the Society confirmed that paragraphs 14.7 and 14.8 of the Code were subject to the public interest balancing exercise. On this point, I do not think that the Society's position is quite as the Applicant puts it. As I understand it, the Society does not dispute that the public interest balancing exercise will arise under paragraphs 14.7 and 14.8 of the Code in many cases. What it says here is that its engagement depends on the nature of the information under consideration - where the information is not regulatory in nature, the public interest balancing exercise does not arise (presumably) because of the provisions of paragraph 18 of the Code.

111. Nevertheless, the wording of paragraph 18 of the Code is, in my view, sufficiently clearly worded to support the Society's interpretation and to allow it to draw a distinction between the regulatory and other classes of information it holds. It seems to me that the authors of the Code, in making this distinction, might have aimed to anticipate the extent to which the Society's functions may become subject to FOIA at the time when it was responsible for exercising both regulatory and representative functions. This analysis is reinforced by the Code restating the Society's continued commitment to deal with information requests relating to its representative functions and general information it holds under the voluntary Code, even after it may be designated as a public authority for the purposes of section 5 FOIA.

112. Nor, in my view, is it correct to argue as the Applicant appears to do, that the only types of information which the Society holds will fall into the purely regulatory or the purely representative categories. There will be recorded information held by the Society which may not fall naturally into either category. I find this analysis is supported by the stand-alone reference to "general information" at paragraph 6 of the Code. Furthermore, there is a clear argument that the information which is the subject of this request falls into just such a category; the actual information which is the subject of this request does not appear either regulatory or representative in nature.

113. Therefore, in this case, even with the most permissive interpretation of what does and does not constitute regulatory information, I am not persuaded that the specific information requested in this case can reasonably be considered *"regulatory information"* for the purpose of the Code. The information sought here relates to the issues surrounding the Society's non-compliance with its voluntary Code[9]. Although the information requested in *YZ* may have related to regulatory matters, the Applicant's request here did not.

114. As the Code is sufficiently clear in distinguishing regulatory from other types of information and, in my analysis, allows the Society to apply the public interest balancing exercise only to such regulatory information I feel obliged, albeit with some reluctance, to conclude that the Society is entitled to say that no public interest balancing exercise is required in the present case.

115. However, the question of whether the Society should actually choose to dis-apply the public interest balancing exercise in a case such as this is a different question. Given the Society's stated commitment to the transparency agenda, such an approach appears counterintuitive.

116. The reason for this is that the question of why the Society should wish to avoid applying a public interest balancing exercise, preferring to treat such information as subject to a quasi-absolute exemption, also arises. It seems clear to me that any potentially inappropriate or damaging disclosure of information which is not regulatory in nature would, in any event, be amply protected by the application of the very public interest balancing exercise the Society seeks to dis-apply. The transparency agenda embodied in the Code may be better served by the Society exercising a degree of discretion on this point in appropriate cases and applying a public interest balancing exercise to both regulatory and non-regulatory information alike. I do not see that the Society's position would be prejudiced in doing so.

117. Nevertheless, for the purposes of this particular case, I accept that the Code as it stands was designed to draw a specific distinction between regulatory and non-regulatory information. Accordingly, I consider that the Society is entitled to take the view that, where information engages paragraphs 14.7 or 14.8 of the Code, but that information is not regulatory in nature,

[9] I am not convinced by the Applicant's argument that *"the Code (being an arrangement which applies in relation to regulated persons) forms part of the Society's regulatory arrangements within section 21(1)(i) of the Legal Services Act."* and is therefore in the nature of subsidiary legislation. Section 21(1)(i) explicitly *concerns "any…rules or regulations (however they may be described), and any other arrangements, which apply to or in relation to regulated persons, other than those made for the purposes of any function the body has to represent or promote the interests of persons regulated by it…"* The Code applies to the Society itself as a body and not to *"regulated persons"* as individuals: indeed, such individuals' information is generally exempted from the operation of the Code by paragraph 16. Furthermore, even on the Applicant's interpretation, the Law Society, as the representative body would appear to fall outside this provision.

it is also entitled (but is not obliged) to say that the public interest balancing exercise is not engaged.

118. In reaching this conclusion I remain aware, however, of the shortcomings in the wording of the Code as it currently stands. As my comments above underline, the effect of this provision of the Code is at best paradoxical and at worst, may be interpreted as unhelpful to furthering the Society's commitment to the wider transparency agenda.

119. In light of this, and in the interests of completeness, I consider it appropriate to now go on to consider where the public interest balance would lie in relation to the withheld information, if it were to apply in this case.

v) The Public Interest Balancing Exercise

120. In the event that the public interest balancing exercise were to apply in respect of one or both of the exemptions engaged in this case, then set in the balance in favour of disclosure under both exemptions is the innate general public interest in transparency (a public good in itself) and, in the particular case of the Code, the presumption in favour of disclosure at paragraph 18 of the Code.

121. However, whilst there may be a strong level of interest on the part of sections of the public in knowing why the Society has not yet fully complied with, or published, an adjudication under its Code, and in seeing the deliberations underlying that decision, that is not the same thing as there being a strong public interest in those policy development discussions or legally privileged information actually being disclosed to the world at large. That is particularly the case when the issues are still live; in such cases considerably more than a general interest in transparency is needed to tip the balance in favour of disclosure.

122. In general terms, the Applicant argued that there was a profound public interest in disclosure in this case because of what he said was the Society's apparent willingness to "*disregard its own procedures"* in not complying with the adjudication in YZ. This, he said, had rendered the Code entirely "worthless".

123. The Applicant's public interest arguments fell into two broad camps – first, the interests the Society is seeking to protect by withholding the information are strictly private in nature and, second, the operation of the Code and the Society's public image in relation to it are so profoundly damaged by its handling of the adjudication in *YZ* that the public interest *"overwhelmingly"* favoured full and immediate disclosure of the material he sought.

124. He said that the interests which the Society sought to protect in relying on paragraphs 14.7 and 14.8 of the Code were purely "*private"* in nature, and not public ones, Such interests could not reasonably outweigh the public interest in knowing how and why the Society had come to adopt the course of action it had in relation to YZ. The purpose of the Code was not, the Applicant said, *"to save the Society's blushes".*

125. The Applicant was suspicious of the Society's position in withholding the information he sought and he maintained that, in this case, "the Society's use of … weak arguments creates the impression that there is something which it is seeking to conceal from the public, which will be dispelled only by full disclosure of the requested material."

126. Despite being aware of the ongoing litigation being defended by the Society which related to the adjudication in YZ, the Applicant did not address this aspect of matters in his public interest balancing arguments. However, the existence of that litigation is, in my analysis, of profound importance in assessing where the public interest balance lies in this case.

127. In my view the Applicant is therefore incorrect in his view that the interests that the Society is seeking to protect in withholding the disputed information are purely private in nature: it is indisputable that protecting a safe space for live policy deliberations and preserving the doctrine of legal professional privilege are matters which, in themselves, are in the public interest. Rather, the question is where the public interest balance lies in a given case.

128. With regard to legal professional privilege, it is a matter of trite law in the Information Tribunal that the protection of legal professional privilege is a good in itself; consequently there is an inherently strong public interest in protecting it under section 42 FOIA.

129. Whilst the information attracting such legal professional privilege can clearly also give rise to private interests which may favour withholding it, as the Applicant asserts, that is not the point of the protection afforded by the exemption. The public interest in protecting legal professional privilege is wider than that, and setting it aside lightly may damage the wider public interest. There needs to be a very strong reason for overriding privilege and ordering disclosure under both FOIA and the Code.

130. The strength of the public interest in protecting privileged material is particularly strong in a case, as here, where there is live and ongoing litigation. There must, in those circumstances, be exceptionally strong and compelling public interest arguments to set aside privilege. That

is simply not this case and the public interest arguments in favour of disclosure in the present case come nowhere close to doing so.

131. On this point, I would note that I consider the Applicant put his case extremely high, and indeed, much higher than it merited. In short, the thrust of his argument was that the Society's approach to, and handling of, the one case of *YZ* has rendered the whole of the Code *"worthless"*. The implication of the Applicant's positon was that the Society's entire commitment to freedom of information was in ruins. That is clearly a very considerable overstatement.

132. In making this point, I have had due regard both to the genuinely unique circumstances surrounding *YZ* and the position faced by the Society – particularly the litigation it is defending - and also to history of the Code, which has resulted in the promulgation of some seventy or so more or less uncontroversial adjudications over the last ten years. The Society's handling of the one case in *YZ* must be viewed in that context, and against the background of the circumstances facing the Society both at the time and immediately after the adjudication was published.

133. Whilst it may not be satisfactory from the point of view of either the Applicant in this case or, indeed, the applicant in YZ, the Society's current position is neither entirely unreasonable nor entirely unexpected; in this case the Society must answer an application for an injunction from at least one member of the profession whom it knows, from its wider experience, to be litigious. The Society's stance here, as the Applicant seeks to argue, is not necessarily indicative of a wider disregard of its own Code or an excess of secrecy. Put simply, any reasonable and balanced analysis of the Society's position in the case of YZ must be viewed in the context of the ongoing litigation the Society faces. Therefore, its stance in this one case does not, as the Applicant asserts, render the whole Code *"worthless"*.

134. That is not to say that the Society could not have been rather more forthcoming in explaining its position, and the situation it faced, both to *YZ* himself and the wider public in general.

135. Likewise, it is also not to say that there is not some weight in the public interest arguments the Applicant advances. However, I consider that they are far from sufficient for the public interest balancing exercise to favour the risk of prejudicing the Society's position in ongoing litigation by disclosing the disputed information.

136. Nor, I would note, is the Society's position in relation to its response to *YZ* actually finalised at this point; it will not be, until such time as the litigation it faces is finalised. The weight of

the Applicant's arguments would have considerably greater force if that litigation were finalised.

137. The same considerations, albeit to a lesser degree, apply to the public interest in allowing a safe space, free from chilling effect, in which policy makers can discuss and develop policies and undertake a free and frank exchange of views when doing so. There is a public interest in preserving such a space for deliberations.

138. In respect of paragraph 14.7, at the time of the Applicant's request in this case, the Society's policy making process, and discussions surrounding it were very much alive and active; indeed, as noted above, the Society has still not reached its final positon in relation to compliance with the adjudication in *YZ*. Given the live nature of that process at the time of the Applicant's request, I consider that to direct disclosure of its policy discussions up to 10 September 2015 would have the effect of hampering the free and frank exchange of views in similar cases in future. That would tend to have a chilling effect in those future discussions. which in turn would inevitably be detrimental to the ability of the Society to properly undertake its public functions. That is something which would clearly be contrary to the public interest.

139. Set against this is the public interest in transparency regarding the circumstances the Society currently finds itself in in relation *YZ* and the position it has adopted.

140. It is a matter of public record that the Society is defending legal action against it in relation to *YZ*. There are injunction proceedings at large aimed at preventing the Society from disclosing the information identified in the adjudication in *YZ*. Depending upon the outcome of those proceedings, the Society may or may not comply with the terms of the adjudication and may or may not choose to invoke paragraph 17 of the Code and refer the matter to its Council. This is a truly unique set of circumstances in the context of the Code.

141. Set in this context and against the backdrop of a history of more or less uncontroversial adjudications, I do not find that the Society's position in this matter is by any means as unreasonable and suspicious - or indeed so damaging to its reputation and that of the Code in the eye of the wider public - as the Applicant seeks to argue. Given this, I am not persuaded that the public interest in having sight of the Society's live policy discussions at this point in time outweighs the public interest in preserving the need for a safe space for policy making.

142. However, in a case such as this, the public interest balancing exercise does not remain fixed with time: although it may clearly be detrimental to any free and frank exchange of views to disclose policy discussions whilst the policy making process is live and discussions are ongoing, with the passage of time and once the policy making process is concluded, the balance is prone to shift more strongly in favour of disclosure of such information. Accordingly, my assessment on this point may also be prone to change once the Society's position is finalised at the conclusion of the litigation it faces, or shortly thereafter.

143. Again, as I have already noted above, the Society could, in my view, be more forthcoming in articulating and publishing its position in this matter even at this point in time. For it to do so may serve to allay, at least in part, the suspicion and concern which the Applicant expresses.

144. In present circumstances, however, and to the extent I am called upon to consider the public interest balancing exercise under paragraphs 14.7 and 14.8 of the Code, I find that in the present case the public interest balancing exercise would favour maintaining the exceptions at those paragraphs and withholding the requested information.

iv) <u>In-scope information not engaging either paragraphs 14.7 or 14.8 of the Code.</u>

145. My review of the withheld information revealed a small body of information which falls within the scope of the Applicant's request, but which does not engage either paragraph 14.7 or 14.8 of the Code. That information comprises my own correspondence (and that of the applicant in *YZ*) with the Society.

146. The Applicant in this case and *YZ* are known to each other by virtue of their shared interest in the issues surrounding the named solicitor. The Applicant in this case is the individual "H" referred to in the adjudication in *YZ*. *YZ* has written to the Society and confirmed that he does not object to his correspondence being disclosed publically in response to this request, provided that it is suitably anonymised. He has not, however, set out in detail by reference to that material the information he considers may require redaction so as to avoid his anonymity being compromised.

147. Paragraph 16 of the Code provides that the Society *"must not"* disclose personal data under the Code. Given this, I do not direct the Society to undertake the redaction exercise in respect of *YZ's* personal data on a unilateral basis and I do not direct that it is required to publish that material. However, I do find that it would be permissible for it to do so, should it consider it appropriate and helpful. In the event that *YZ* contacts the Society again following this

adjudication and he specifies the redactions he would wish to see, I would ask that the Society facilitates that material being disclosed in response to this request.

148. Regarding that small element of the currently withheld information which involves my own correspondence with the Society, I can see no strong argument for that material to be withheld, subject to the redaction of contact details which in these circumstances comprise my own personal data, and any reference to the withheld information which was the subject of the adjudication in YZ.

149. On reviewing the complete body of information provided to me by the Society, it was also clear that certain limited elements of the information provided by the Society clearly fell outside of the scope of the Applicant's request. However, it appeared to me that this information (which was predominately one individual's sensitive personal data, amounting to a few lines of text here and there and contained in the body of various email chains), was not easily or practically removable from the bulk of the information the Society provided to me. Whilst the Society did not make any specific representations regarding this very limited amount of information, I am entirely satisfied that it fell outside of the scope of this request. Consequently, I have disregarded it for the purposes of this adjudication.

7. Finding

150. In light of the above, I find that the Society was correct to refuse to disclose the requested information in reliance on paragraphs 14.7 and 14.8 of the Code, but it was not correct to withhold the small amount of correspondence referred to in paragraph 148 above.

8. Steps

151. The Society is required to disclose the correspondence referred to in paragraph 148 above, subject the redaction of contact details.

Adam Sowerbutts

Freedom of Information Adjudicator to the Law Society

15 February 2016