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Date: 5 July 2011

Dear 

RE: YOUR FREEDOM OF INFORMATION ACT (FOI) REQUEST

1. I write on behalf of the Legal Services Commission ("LSC") in response to your request for information dated 21 April 2011. You asked:

"Please may I have details of all peer reviews for all firms carried out by the LSC within the last five years, giving dates of review, number of cases reviewed and threshold competence."

2. You amended your request by email on 26 April 2011, replacing the final words ("*threshold competence*") with "*grading (on a scale of 1-5 or whatever is/was applicable)*". We acknowledged this amendment to your request by email on 27 April 2011.
3. On 18 May 2011, we wrote to you explaining that our preliminary view was that this information is exempt from disclosure by virtue of section 43(2) of the Freedom of Information Act 2000 ("FOIA") and the balance of the public interest under section 2(2) of FOIA. Both of these statutory provisions are explained below. We also informed you that, in accordance with section 10(3) of FOIA, we needed to extend the deadline for responding to your request, and that we aimed to respond to you by the end of June 2011. This extension was needed in order for us to obtain input from the parties whose interests may be affected by the disclosure of this information, and to weigh that input against the public interest in the disclosure of the information you have requested.
4. We have now been able to do so. This letter sets out our substantive response to your request. I can confirm that the LSC does hold the information you have requested. Having considered and weighed up the input we have received on this matter, however, the LSC maintains its preliminary

view, namely that all of the information you have requested is exempt from disclosure by virtue of section 43(2) FOIA and the balance of the public interest.

5. A full explanation is set out below. It may assist, however, if I begin by explaining the nature and purpose of the LSC's peer review system about which you have sought information.

The LSC's peer review system

6. When a firm of solicitors becomes an LSC "provider", it enters into a contract with the LSC. One of the terms of that contract is that the provider may be subject to the LSC's independent peer review process, which has been developed by the Institute of Advanced Legal Studies. This entails peer reviewers, who are experienced legal practitioners, assessing a random sample of the provider's case files according to a standardised system of criteria and grades. The provider is then given a grade of 1-5, which are explained as follows:

Excellence (1)
Competence Plus (2)
Threshold Competence (3)
Below Competence (4)
Failure in Performance (5)

7. Providers may not ask to be peer reviewed. Instead, providers are selected for assessment at random, or where the LSC has reason to suspect that provider to be delivering work of poor quality.
8. Peer review grades are treated as current or valid for a period of three years only. At any one time, the majority of the LSC's providers do not have a valid peer review grade.
9. The provider is contractually obliged to achieve a grade of 1, 2 or 3. If the provider is graded 4 or 5, it may submit representations as to why it should have received a higher grade. If, upon consideration of those representations, a grade of 4 is upheld, the provider is deemed to be in breach of contract. The LSC may then impose sanctions in accordance with that contract. A provider which receives two peer review grades of 4 or 5, or a combination of grade 4 and grade 5, is deemed to be in fundamental breach. The LSC may then terminate that contract.
10. As the foregoing explanation suggests, peer review is the tool by which the LSC checks that the "standard of work" conditions of its contracts are being met to at least the threshold level of competence. It is not intended to be a tool for ranking providers from best to worst, but simply for ensuring that the minimum acceptable standards are being met. Having ratings of 1-3, rather than awarding a single 'pass' rating, makes the peer review process more flexible as it allows the LSC to set a different minimum quality standard in some instances. For example, the minimum quality standard for CLA telephone advice providers and for individuals who wish to become peer reviewers is a 2. So, in these instances, grades 1 and 2 are useful. In addition to being a contract management tool, peer review also aims to give providers detailed feedback to assist and encourage them to continue to improve their quality. Having a grading scale of 1-5 makes this feedback more precise. It

gives providers a better indication of how much they need to improve in order to achieve the highest possible rating (if they wish to do so).

11. It is important to appreciate that, although peer review grades are not intended to be read as a “league table” of comparative performance, they are very likely to be interpreted as a league table by those outside of the LSC.
12. Having explained the purpose of the peer review system, I also wish to highlight certain features of the process which are relevant to our response to your request.
13. Although a grade of 3 indicates that the minimum standard has been attained, the peer reviewers’ report also sets out a number of development needs or areas in which the provider needs to improve. A grade of 4 or 5, in contrast, is a much stronger endorsement of the provider’s performance in that assessment. It is important to note, however, that a provider who receives a grade of 3 has no contractual right to submit representations in support of a higher grade. Such a provider may consider its work to be worthy of the stronger endorsement associated with a grade of “excellent” or “competence plus”, but its grade of “threshold competence” remains in place.
14. The LSC considers that this approach to be justified on two grounds. The first is that, as explained above, the objective of peer review is to ensure that minimum performance standards are being met in accordance with LSC contracts. Submissions from providers scoring 1, 2 or 3 are not necessary for this objective. The LSC therefore considers that it would be disproportionately costly to allow all providers the right to make representations.
15. The second justification for the current approach is that a provider’s peer review score is not made public. This means that even if a provider who received a grade of 3 considers its work in fact to be of grade 1 standard, it can nonetheless feel assured that it will suffer no commercial disadvantage by any kind of comparison with other providers, because clients and potential clients will not be aware of the peer review grades awarded to any given provider.
16. More detailed information about the LSC’s peer review process is available on our website: http://www.legalservices.gov.uk/civil/how/mq_peerreview.asp

The right of access to information under FOIA

17. Section 1(1) of FOIA creates a right of access to information held by public authorities. This right is qualified by, among other provisions, Part II of FOIA, which contains a number of grounds on which information may be exempt from disclosure. As I have mentioned, the LSC considers the exemption at section 43(2) to be engaged here. This provides as follows:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

18. This is a qualified exemption, meaning that, under section 2(2)(b) of FOIA, it takes effect only to the extent that

“... in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

19. This requires that the public interest in disclosing the particular information you have requested be weighed against the public interest in maintaining the exemption under section 43(2). This information is exempt from disclosure only if the latter outweighs the former.

Engagement of section 43(2)

20. In deciding whether the information on peer review results which you have requested falls within section 43(2), the first question is whether that information relates to “commercial interests”.
21. The Information Commissioner’s Office (ICO) has issued guidance on the meaning of “commercial interests”. This guidance states that *“a commercial interest relates to a person’s ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services”*. The guidance also makes clear that an *indirect* relation to the activity of buying and selling is sufficient to constitute a commercial interest.
22. By application of this guidance, the LSC considers that information about providers’ peer review results relates to their commercial activities. This is confirmed by decision notice FS50306834, issued by the ICO in response to your previous request under FOIA to the LSC. A copy of that decision notice is appended to this letter for your reference. We refer you in particular to paragraphs 57-82, which deal with section 43(2).
23. At paragraphs 72-74 of that decision notice, the ICO explained why it was satisfied that information about peer review results relates to a commercial interest:

“72. The provision of a duty solicitor is a statutory right of an arrested person (a “detainee”) rather than being the actual purchase or sale of goods or services, although a detainee is initially able to state a preference for a solicitor if they so wish. Having been appointed a duty solicitor the detainee concerned may or may not elect to have that solicitor continue to represent them, if required to do so. If the party were aware that the duty solicitor provided was from a poorly performing firm, or rated unfavourably compared to other providers, then it is likely that they would select an alternative. This could therefore have a future impact on the revenue for the provider if they were less likely to be selected. Any poor performance which is made public may also have a knock-on effect of making that firm less likely to be selected for business other than via the duty solicitor scheme.

73. In his guidance, the Commissioner states:

“There may be circumstances where the release of information held by a public authority could damage a company’s reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance. In

these circumstances the commercial interest exemption may be engaged. However it should be noted that there is no exemption for embarrassment, only where there is a real risk of such harm being caused could the exemption be engaged”.

74. Because release of the peer review could have a direct detrimental effect on BBM’s ability to secure business, particularly were it to be deemed to be in any way ‘unsatisfactory’, the Commissioner is satisfied that the withheld information does relate to a commercial activity.”

24. The LSC agrees with the reasoning of the ICO set out above, and concludes that the information you have requested relates to the commercial interests of providers. It is worth emphasising that many providers would be likely to suffer reputational damage as a result of their peer review scores being disclosed, and that this would place them at a disadvantage when seeking to attract new business or to retain clients, including in relation to non-legal aid work. In addition, it also considers that this information relates to the commercial interests of the LSC itself, namely the efficient and cost-effective administration of legal aid. Although this is publicly-funded, it is nonetheless a commercial activity undertaken in a competitive market. This is illustrated by the fact that, if providers considered themselves to have been unfairly treated by the LSC, they may simply take their business elsewhere.
25. The next question is whether disclosure of the information you have requested “would or would be likely to prejudice” the commercial interests I have identified. The LSC has concluded that disclosure of this information would be likely to do so. In reaching this conclusion, we have applied the established three-stage test for prejudice, as set down in the case of Hogan v IC and Oxford City Council (EA/2005/0030). First, the applicable interests protected by the exemption must be identified: I have done this above. Secondly, the nature of the prejudice being claimed must be considered: this prejudice must be real, actual or of substance. Thirdly, the likelihood of that prejudice occurring must be considered: the risk must be real and significant. I will now explain the LSC’s position on the second and third of these stages.
26. As I stated at the outset of this letter, we have sought the input of a number of bodies which represent the views of legal aid providers, namely the Law Society, the Legal Aid Practitioners’ Group and the Advice Services Alliance. Through these representative bodies, some providers have said that they would not object to disclosure of this information. Opposition to disclosure has, however been much stronger. Based on this evidence and the LSC’s own reasoning, we have concluded that there is a real and significant risk that disclosure of the information you seek would cause real, actual or substantial prejudice to the commercial interests of providers and of the LSC itself.
27. As regards prejudice to the commercial interests of our providers, the primary issue is that, as set out above, the results you request are very likely to be interpreted as a league table of comparative performance, even though this is not the purpose for which the information was created. We have considered whether or not we could counteract this by releasing this information with accompanying explanations as to its actual purpose. We firmly believe that, whatever our efforts in this regard, the reality is that this information would be read as a league table, and that this would affect how current and potential clients perceive those providers.

28. Support for this conclusion comes from the ICO's decision notice FS50306834 to which I have referred earlier in this letter. The ICO found that prejudice had not been demonstrated to the requisite standard in that case, but this was because – in contrast to the present case – the requested information concerned one provider only. At paragraphs 78-79, the ICO said this (my emphasis):

“78. The public authority subsequently argued in its internal review that disclosure of this information would lead to a likely comparison of the various providers. However, the Commissioner here notes that the request is only for one provider and the public authority has already stated that no such information has been put in the public domain. This does not therefore allow for any possible ‘comparison’ of providers and the Commissioner will therefore not consider this argument.

79. The public authority has already advised the complainant that BBM “...have met the quality and performance standards...”. The Commissioner does not therefore accept that disclosure of the results of that peer review is likely to hamper its future allocation of business. There may also be some potential prejudice to commercial activities were a ‘league table’ of results available depicting the results of all peer reviews, thereby allowing direct comparisons to be made. However, the request was not for this information.”

29. The LSC considers that there is indeed a significant risk that the information you have now requested would be used for making direct comparisons between providers, with the result that clients – both publicly-funded and private – would tend to divert their business towards those providers with the highest peer review grades. This accords with the ICO's view as expressed at paragraph 72 of the decision notice, which I have cited above. This would be substantially prejudicial to those with lower grades – in particular, to those who were graded 3 or 2 but were not allowed to make their case as to why they should be graded 1. This would also be substantially prejudicial to those providers who, through no fault of their own, were not reviewed in time for their grades to appear in the information you request. Again, we consider that clients would tend to divert their business away from such providers, the quality of whose work clients may perceive as uncertain.
30. These prejudicial effects would be felt by a large proportion of its providers. By way of illustration: in 2010-11, approximately 50% of providers who were reviewed were graded 3. Furthermore, for the period covered by your request, there is no peer review grade for the majority of our providers.
31. Turning to prejudice to the commercial interests of the LSC itself, two issues are relevant. First, many providers whose peer review results are released are likely to consider themselves to have been unfairly treated. This is because, as I have explained, a major part of the LSC's justification for not allowing providers with grades of 3 or above to submit representations in an effort to improve their grade is that such grades are not made public. Disclosure of the information you seek would amount to the LSC going back on this understanding, and this is likely to damage their relations with the LSC. This in turn would compromise the LSC's ability to carry out its business.

32. Secondly, disclosure in this case would set a precedent for future disclosure of information on peer review results. Fairness to providers may then require that the LSC changes its peer review process, either so as to ensure that *all* providers are reviewed at approximately the same time, or so as to offer *all* providers the right to submit representations in an effort to improve their grades. Either option would add very substantially to the LSC's costs in administering an already strained legal aid budget. Peer review costs the LSC an average of £1,169.40 per review. The LSC would need to undertake several hundred more peer reviews each year if we wished to ensure, in the interests of fairness, that all providers were reviewed at approximately the same time. The average cost of a peer review representation is £1,142.36. Therefore, if all category 3 firms made representations this would cost £185,062.32, which equates to approximately one-third of the peer review team's budget. It is also likely that, if it allowed all providers to make representations, the LSC would have to consider hundreds more submissions each year.
33. For these reasons, the LSC is satisfied that the information you have requested falls within the exemption at section 43(2) of FOIA. The next step is to weigh up the public interest in disclosure against the public interest in maintaining this exemption.

Public interest in disclosure

34. The LSC considers there to be very substantial public interest in the accountability of the LSC and the transparency of its quality control processes. The public should be kept informed about how the LSC ensures that its providers are delivering work of an acceptable standard. The public should also be kept informed about how providers have performed in the peer review process. These factors strongly point towards disclosure of the *type* of information you have requested.
35. Crucially, however, we firmly believe that these public interests are already being served. We take very seriously our commitment to transparency and accountability. We therefore publish full details about how the peer review process works. We also publish detailed statistical data on the outcomes of this process, suitably anonymised so as to prevent the prejudicial effects described above.
36. All of this information is available on our website at the link provided above. In particular, the documents panel on the right hand side of that webpage contains a document setting out a detailed breakdown of peer review results, both recent (those conducted between April 2009 and January 2011) and historical (April 2005 to March 2009). A copy of this document is appended to this letter for your convenience. Details include: the number of reviews resulting grades of 1-5 (broken down by area of legal work); the number of representations submitted against grades; the success rate of those representations; the number of contract notices and terminations issued. This document is up-to-date as at 24 January 2011. We will continue to provide up-to-date anonymised information as regularly as is reasonably practicable.
37. We also consider that – because the majority of our providers were not graded at the time covered by your request – the information you seek would give only a partial picture of our providers' performance. That information

would therefore not provide for a complete or meaningful comparison between providers. In our view, this reduces the public interest in the disclosure of the information you have requested.

38. The LSC therefore believes that the public interest in transparency and accountability is served by disclosure of that information. We believe that there is very limited *incremental* public interest in disclosure of the *particular* information you seek. Peer review results on a provider-by-provider basis will unfairly harm the commercial interests of those providers and of the LSC, whilst delivering very little additional public interest benefit.

Public interest in maintaining the exemption

39. Disclosure of information under FOIA is to be treated as disclosure to the world at large. This would include current and potential clients of our providers. The LSC considers that the prejudicial effects of disclosure which I have explained above should be afforded substantial weight under the public interest test. I do not repeat these here, except to highlight the points which we believe to be of particular importance to this aspect of the public interest balancing test.
40. I repeat that, whilst the information was created for purely internal purposes of contract management, it is likely to be interpreted by current and potential clients as a league table for ranking the comparative performance of providers. Those without grades of 1 (either because they have a lower grade, or because they have not been graded) would, in relative terms, suffer reputational damage. The confidence of both publicly-funded and private clients in those providers would be undermined. This is likely to result in a loss of business. Alternatively, it would diminish those providers' prospects of attracting such work in future.
41. As I have mentioned, we consider these prejudicial effects to be both weighty and unfair. Disclosure of the information you request is likely to damage relations between the LSC and the affected providers.
42. I have also explained above that, if information such as this is to be routinely disclosed, fairness may demand that the LSC change its peer review process substantially. This would be a costly and burdensome exercise at a time of great strain on public finances, and on the legal aid budget in particular. We have therefore given this consideration substantial weight in our assessment of the public interest.

Conclusion

43. In conclusion, the LSC considers that the public interest factors favouring the maintenance of the exemption each carry substantial weight. Cumulatively, our view is that these interests very firmly outweigh the limited public interest in the disclosure of the particular information you have requested. We will therefore be withholding the information you have requested.

Right to review

As part of our obligations under the FOI Act, the LSC has an independent review process. In this case the Legal Director was involved in the original decision, therefore if you wish to appeal our decision you can refer direct to the Information Commissioner who can be contacted at the following address: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.

Please remember to quote the reference number above in any future correspondence.

Yours sincerely,

Chief Executive's Office
Legal Services Commission