

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2011

Public Authority: Legal Services Commission
Address: 85 Gray's Inn Road
London
WC1X 8TX

Decision (including any steps)

1. The complainant has requested information about peer reviews of solicitor firms who provide services as part of the duty solicitor scheme. He originally wished to know all scores, which are on a scale of 1 to 5, but later reduced this to only cover scores of 1 to 3. This has been withheld by the public authority under the exemption at section 43(2) of FOIA.
2. The Information Commissioner's decision is that this exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - It should disclose the withheld information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Information Commissioner has previously issued a decision notice on a similar matter. The reference number is FS50306834 and the notice can be found on his website.
6. Within its response to the complainant the public authority has explained the following:

“The LSC’s peer review system

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)*

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.

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.

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.

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).

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".

7. When asked whether it conducted any 'quality checks' of providers prior to being included on the Duty Solicitor Scheme, the public authority explained that:

"In order to be awarded a contract, and so be eligible to join police station duty rotas, providers must meet our quality requirements. These are set out in the Information for Applicants (IFA) document¹, against which providers were assessed during the last tender for the current contracts in summer 2010.

Paragraph 5.9 refers to the need for providers to hold either the LSC Specialist Quality Mark (SQM)² or the Law Society Lexcel practice management standard³. These ensure that providers gave [sic] systems and processes in place to deliver high quality advice, client care and case management, and are key quality assurance tools.

Paragraph 10.19 of the IFA onwards sets out the Pre-Qualification Questionnaire (PQQ) criteria which ensure that we only contract with firms that meet our minimum standards, for example, those that have three years' experience of delivering specialist legal advice. Paragraph 10.34 onwards sets out the Invitation to tender (ITT) criteria which ensure that we only contract with firms that meet our minimum service requirements. These include arrangements for effective supervision, which is essential to ensure quality advice is given to clients.

¹ http://www.legalservices.gov.uk/docs/cds_main/IFA_26march10v2.pdf

² http://legalservices.gov.uk/criminal/contracting/quality_mark.asp

³ <http://www.lawsociety.org.uk/productsandservices/lexcel.page>

Only providers that meet all these standards were awarded a contract, and these requirements are also ongoing. The Standard Criminal Contract also contains measures designed to ensure that the quality of services provided by contracted firms working on the duty solicitor scheme. For example, the contract places additional service requirements on duty solicitors from paragraph 9.42 of part B of the specification.

Providers are required to inform the LSC of any changes in their business, and each provider is assigned a LSC contract manager who works with the firm to ensure their compliance with the contract and adherence to best practice guidelines”.

Request and response

8. On 21 April 2011 the complainant wrote to the public authority and requested information in the following terms:

“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.”

9. On 26 April 2010 the complainant amended this request by replacing the final words *“threshold competence”* with *“grading (on a scale of 1-5 or whatever is/was applicable)”*. This was acknowledged by the public authority on 27 April 2011.

10. The public authority extended the time for providing a response whilst it undertook a public interest test. On 5 July 2011 it provided its response stating that it had withheld all of the information under the exemption at section 43(2) of FOIA. It further advised:

“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...”

11. The Information Commissioner has therefore considered the case in the absence of an internal review.

Scope of the case

12. On 18 July 2011 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled.
13. During the investigation the public authority offered to provide a list of 'successful' peer reviews to the complainant, i.e. those where a score of 1, 2 or 3 was achieved, with various caveats, but would not break down the list into individual scores. This offer was declined; however, the complainant did advise that he was happy to remove any scores of 4 and 5 from the scope of his request. The Information Commissioner will therefore no longer consider these scores; the public authority was apprised of this change.

Reasons for decision

14. Section 43(2) of FOIA provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
15. For the Commissioner to agree that section 43(2) of the Act is engaged the public authority must first demonstrate that prejudice would, or would be likely to, occur to the commercial interests of the public authority itself or any other third party. On this occasion it has claimed that disclosure *would be likely* to prejudice these interests.
16. In line with previous tribunal findings, when considering prejudice the Information Commissioner will firstly identify the applicable interest(s) within the relevant exemption. Secondly he will consider the nature of the prejudice claimed. And, thirdly, he will consider the likelihood of this prejudice occurring.

Applicable interests

17. In line with his previous decision in case reference FS50306834 the Information Commissioner considers that the requested information properly relates to commercial activities.

Nature of the prejudice

18. In his previous decision the Information Commissioner considered that there was insufficient prejudice identified and evidenced by the public

authority to engage this exemption. It was his view that the public authority had not submitted any convincing arguments to demonstrate how disclosure of the requested information in that case would be likely to prejudice the commercial interests of that particular service provider and he also noted that the public authority had provided no evidence from the provider itself.

19. On this occasion the public authority has also advised that disclosure would be likely to prejudice its own commercial interests. It believes this to be the case because:

"... many providers whose peer review results are released are likely to consider themselves to have been unfairly treated. This is because ... 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."

"... [D]isclosure 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."

"... [T]hat 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."

20. The public authority has also indicated that it believes disclosure would be likely to prejudice the commercial interests of the providers concerned. It summarised its view of the prejudice that would be likely to be caused by disclosure as follows:

- *firms with a peer review rating of 3 (threshold competence) are discouraged from appealing but often are not happy with their scores;*
- *not all providers have been reviewed and therefore the disclosure would not be reflective of the whole profession – firms with the highest scores could receive more business than firms that had not yet been reviewed (therefore providing an unfair commercial advantage); and*
- *peer review is not the only measure of quality.*

Likelihood of the prejudice occurring

21. As regards the public authority's argument that disclosure would harm its relationships with the service providers as it is their understanding that the scores are 'private', the Information Commissioner acknowledges that there is a common concern amongst public authorities about the impact that the disclosure of information may have on their relationships with other parties. However, he believes that third parties which wish to enter contracts with the public sector should now be aware and understand that, as a result of the FOIA, there will be a greater degree of public scrutiny of their performance than those acting only in the private sector; as the parties concerned are all providers working in the legal profession the Information Commissioner would expect them to be better aware than most. The providers should therefore already be aware of the greater presumptions in favour of the disclosure of information provided for by the FOIA whilst, at the same time, recognising that the FOIA contains provisions which will allow public authorities to withhold information which is likely to cause harm to the commercial interests of third parties, if the public interest lies in maintaining the exemption. In light of these factors, the Information Commissioner does not believe that disclosure of the information in question would unduly affect the relationships between the public authority and the service providers.

22. Furthermore, the Information Commissioner does not accept that the public authority has adequately demonstrated that disclosure in this case would be likely to set a precedent for future disclosure.

23. The Information Commissioner does understand the other concerns raised, any of which could affect the public authority's budget if it found it necessary to change its current way of conducting reviews. However, this would be based on its belief that any providers with a score of 3 objected and asked for their scores to be reassessed, something which is currently discouraged. The Information Commissioner does not accept that this would necessarily be the case and there is no evidence to support this as the providers were not contacted. A score of 3 demonstrates that a provider has met the required threshold, which shows that work undertaken by that provider is deemed to be of a suitable quality to provide that particular service. Had it failed to meet this threshold then disclosure of this fact may cause some detriment as it might be inferred that there is some inadequacy, but this is not the case.
24. The Commissioner is also not persuaded by the public authority's argument that disclosure of this information might deter service providers from participation in the duty solicitor scheme. He considers that contracts of this nature are lucrative to the parties concerned and it is unlikely that they would willingly exclude themselves from the duty solicitor scheme. The information requested only relates to 'successful' providers.
25. The Information Commissioner has seen no evidence to support the public authority's view that disclosure of the requested information would be likely to prejudice its own commercial interest. Whilst it is possible that disclosure may have one or more of the effects stated, the Information Commissioner does not accept that such a result is more likely than not, and he concludes that the exemption is not engaged in this regard.
26. As part of its deliberations the public authority contacted three relevant professional bodies to ascertain their views regarding disclosure: the Law Society, the Legal Aid Practitioners Group and the Advice Services Alliance. It restricted its enquiries to these bodies as it believed there were too many service providers to contact individually. Whilst the Information Commissioner understands this approach he believes that the views of a selection of providers from each score parameter would have been particularly useful in this case.
27. Again bearing in mind that, at the time of asking, each body believed it was considering disclosure of all five grades, these are examples of the views expressed:

"It is highly likely that those providers who are awarded a higher rating will be judged more favourably than those who have achieved a lower grade and the reputation of those with lower

results may be damaged as a consequence of disclosure. In turn, there is a real risk that this will impact on providers' ability to attract new legal aid and privately paying clients and /or damage the confidence that existing clients have in them. Plainly this could have a substantial impact on the commercial interests of those firms which are in competition with each other to provide legal services".

"It is therefore our view that there is a very real and significant risk that unfavourable comparisons will be drawn and that this will be prejudicial to firms awarded lower grades".

"The ... Committee consider this an absolute minefield and have asked me to decline to give [a 'Committee] view".

"There were a huge range of responses from my committee to this, ranging from a desire to be open about results to concerns about people being unable to appeal the level three result and the difficulties that would cause.

'My view is that it should remain confidential – other audits remain confidential.'

'I have just searched GPs surgeries on line can [sic] came up with a whole raft of ways of comparing KPIs for them. It is difficult to argue that there is much difference between us and GPs ie we are (mostly) privately owned businesses paid public money to provide a public service'.

'How can we speak for the firms that have been peer reviewed - or indeed how can the profession speak for those firms. Information Tribunal decisions on the Commercial Interests exemption suggest that only the firm / organisation in question can assert potential damage to its commercial interests. The LSC should be asking all of the firms that have had peer reviews'.

Many committee members worried about the lack of an appeal mechanism for a level 3 result and that would be unfair to those providers".

"We have consulted our members on the matter of the publication of peer review results. They hold divergent views. Whilst some feel that publication would draw attention to the very important issue of the quality of legal aid work, others feel that the information is indeed commercially sensitive and that publication could have an unfair negative effect on some providers.

The unfairness would arise from the fact that some of the information is now very old and may be wholly out of date due to changes in staff; providers are likely to have been reviewed in only one area of law when they have contracts in several; not everyone has been peer reviewed; and those who have been awarded a peer review score 3 have no opportunity to appeal.

We understand that the decision to publish may ultimately be made by the Information Commissioner. If the results are published, a full list of all providers should be made available with information about all the areas of law they cover, alongside an outline of the peer review process. Where they have been peer reviewed, the result should be given, accompanied by the date of the review. Where no review has been carried out, this should be indicated”.

28. Unfortunately, the public authority did not provide any evidence to support its view that providers are *often not happy* with the results of their peer reviews. However, the Information Commissioner notes that providers are not 'forbidden' from appealing if they are unhappy with their scores; presumably they will still endeavour to do so if they are particularly discontented. The Information Commissioner appreciates that a provider with a score of '3' would be happier with a score of '1' or '2' as it would be natural to want a 'higher score'. However, as the public authority already seems to be aware of this factor he considers that it should be taking steps to address any shortfalls of the current peer review system. Additionally, it must still be borne in mind that '3' is deemed adequate to provide a service.
29. The Information Commissioner accepts that not all providers have been reviewed. He also accepts that this may result in those with a successful review being those which are the preferred service provider were a detainee given a choice of provider. However, the Information Commissioner also here notes that the public authority has offered to provide a list of 'successful' providers, ie those with a score of 1-3, without a further breakdown. Although the public authority stipulated that it would need to also provide further explanations with such a disclosure, this is obviously something which it could also provide with full disclosure. It therefore follows that the public authority cannot consider that there is any real prejudice to those which have not been peer reviewed at all as it is prepared to release a list of those which have been successfully reviewed, albeit with various caveats.
30. The Information Commissioner also enquired about a detainee's choice of service provider. He asked whether or not a detainee could request a different provider if they were unhappy with the one initially provided

through the duty solicitor scheme – if, for example, they wanted a provider with a 'higher score'. He was advised as follows:

"... I can confirm that client choice of provider is central to the criminal defence system, both in the police station and at court. If a client, having received advice from a provider, wants to request advice on the same matter from a second provider, either through the duty solicitor scheme or on an "own client" basis then they are able to do so.

The assumption in the contract is that a client should only receive advice on a case from a single provider, but it contains provisions to allow more than one firm to advise in exceptional circumstances. When a provider receives a request from a client who has already received advice from another firm they can only advise if the conditions set out in the contract apply, including that the client has reasonable cause to transfer from the first provider. The contract goes on to say that these exceptions cannot be applied where the client simply disagrees with the first advice and wants a second opinion, or there is no reasonable explanation for the client seeking further police station advice and assistance from a new provider.

If a client wanted to change solicitors based on peer review score, any new firm taking on the case would therefore have to be satisfied that this amounted to a 'reasonable cause to transfer' and record the reasons for this on file".

31. The Information Commissioner therefore concludes that knowledge of individual scores is unlikely to result in a loss of business for providers in these circumstances.
32. To support its position the public authority has also made direct reference to paragraphs 78 and 79 of the Information Commissioner's earlier decision. It particularly notes his comment that:

"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."

33. The Information Commissioner would like to draw attention to the fact that in his previous decision notice he stated that a 'league table' *may* be prejudicial, not that it *would*. Furthermore, such a league table would have incorporated the 'lower' scores, a factor which is no longer part of this investigation. Therefore, he does not consider that a fair comparison can be made between his earlier decision and this one.

34. The public authority believes that providers would be likely to suffer reputational damage were their scores released which would be disadvantageous to them in attracting business. It advised the Information Commissioner that it was particularly concerned because:

"... peer review is not the solitary mark of quality, [that] the scheme is not designed to be a public mark of quality and to disclose results would provide the public with misleading information".

35. The Information Commissioner does not agree that the fact that the data gives an incomplete picture is a valid reason for non-disclosure. Furthermore, he does not agree that those providers which have not been peer reviewed will be disadvantaged. Those who are reviewed are either chosen randomly or chosen as there are concerns about their performance. If there is no review then it is more likely to be the case that no concerns have been raised. Additionally, if the peer review system does not provide for reviews to be requested, or refused, and every provider has met the initial quality checks which enable it to be included on the duty solicitor scheme, then the Information Commissioner does not consider this argument to demonstrate any real likelihood of prejudice. He again notes that the public authority itself states: *"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"*.
36. The Information Commissioner is aware that the first responses given by the public authority were done so when it was under the belief that the request covered all scores given, including those for 4 and 5. He is willing to accept that were such scores to be made available then this would be more likely to have a detrimental affect on those service providers concerned, as it could be surmised that their services were 'inadequate'. However, the complainant has only asked for consideration of disclosure of those scores for providers who were 'successful'.
37. Furthermore, the providers themselves are not asked to keep this information 'confidential' and there would be nothing to prevent a provider from publicising its score were it so minded. If a provider thought this might be to its advantage then the Information Commissioner would suggest that it would readily provide this information were it asked.
38. The Information Commissioner believes it is important to consider the actual purpose behind the peer reviews. It is presumably to act as a quality check for the provision of services in various areas of criminal advice. If a provider is successful then their services are maintained. If

not then they will eventually be removed if they do not reach a satisfactory standard.

39. Although he understands the public authority's concerns that providers may be disadvantaged were the fact that they had 'only' met the minimum acceptable standards to be revealed, the Information Commissioner does not accept that it has sufficiently demonstrated that the likelihood of this prejudice occurring is more probable than not.
40. The Information Commissioner therefore concludes that the exemption is not engaged.

Right of appeal

41. Either party has the right to appeal against this decision notice to the first-tier tribunal (information rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the information tribunal website.
43. Any notice of appeal should be served on the tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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