

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 17 March 2011

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

### Summary

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The complainant asked the Legal Services Commission (the "public authority") to release information relating to a provider under the duty solicitor scheme and one of its named solicitors. The public authority released some information but refused to disclose the remainder using the exemptions under sections 40(2) (personal data) and 43(2) (commercial interests) of the Freedom of Information Act 2000 (the "Act"). During the Commissioner's investigation the public authority changed its position in respect of the information withheld under section 40(2), claiming by reference to section 12 of the Act that to provide it would exceed the appropriate limit.

The Commissioner's decision is that the public authority properly applied the appropriate limit to the information covered by parts (1) and (2) of the request. In respect of the opening part of the request he finds that the exemption at section 43(2) is not engaged but that some of the information withheld under this exemption is properly exempt under section 40(2) as its disclosure would breach the Data Protection Act (the "DPA"). The complaint is therefore partially upheld.

The public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

### The Commissioner's role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the

requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

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2. The public authority's website provides the following information about the Duty Solicitor Scheme<sup>1</sup>:

***"What is the Duty Solicitor Scheme?"***

*The scheme is made up of the Court Scheme and the Police Station Scheme.*

*The purpose of the court scheme is to ensure that almost anyone who appears before a magistrate or youth court for the first time in connection with a criminal charge can receive advice and representation free of charge from a competent solicitor.*

*The purpose of the Police Station scheme is to provide 24-hour free legal advice to suspects being questioned by the police. Suspects have a legal right to be informed by the custody officer that they have the right to independent legal advice whether this is their own solicitor or if the defendant requests the duty solicitor. The police then ring the Duty Solicitor call centre, First Assist [First Assist were replaced by Ventura on 1 April 2010]. This is a telephone bureau paid for by the CDS [Criminal Defence Service]. First Assist will arrange for a solicitor to attend".*

3. According to *"The Duty Solicitor Arrangements 2008"* publication<sup>2</sup>:

*"'Defence Solicitor Call Centre' or 'DSCC' is the call centre provided on behalf of the LSC by an independent contractor to deal with requests for Advice and Assistance (for both Own Solicitors and Duty Solicitors) from Clients at the Police Station. 'Duty Solicitor' means a solicitor, or employed barrister, who is admitted to a Scheme under these Arrangements".*

The public authority provides further background information about the Defence Solicitor Call Centre on its website<sup>3</sup>.

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<sup>1</sup>[http://www.legalservices.gov.uk/docs/forms/Guide\\_to\\_General\\_Contracting\\_and\\_CDS.pdf](http://www.legalservices.gov.uk/docs/forms/Guide_to_General_Contracting_and_CDS.pdf)

<sup>2</sup>[http://www.legalservices.gov.uk/docs/cds\\_main/DutySolicitorArrangements2008\\_Final.pdf](http://www.legalservices.gov.uk/docs/cds_main/DutySolicitorArrangements2008_Final.pdf)

4. The DSCC records basic details of the detainee and the alleged offence before passing the case on to a duty solicitor. This is an outsourced service which is currently provided by Ventura. The solicitor may be one who has been selected by the detainee or they may be the next one available on a rota which will be automatically assigned when a new case is entered on the system. The allocated solicitor will have a personal identification number ("PIN") and this PIN will be assigned to that case.
5. Ventura can run various reports from the DSCC including information about a PIN such as cases assigned to that party and the location of the detainee, e.g. a particular police station. Once a case has been dealt with there are various 'outcome codes' which can be used by Ventura to finalise and close the case; none of these is 'NFA'.
6. The following background information is available online:

*"The Duty Solicitor's Manual"<sup>4</sup>, and  
"Criminal Defence Services at the Police Station and in Court"<sup>5</sup>.*

7. The public authority has explained that it interprets the term NFA as:

*"'NFA' refers to no further action required for the duty solicitor, and is a way of classifying the outcome of a case... This outcome could be recorded on the actual day of arrest at the police station (if, for example, the individual concerned accepts a caution) or following further police enquiries if the individual does not accept a caution but the police do not take the matter further".*

8. The processes followed in carrying out peer reviews can be found online on the public authority's website<sup>6</sup>. It states the following:  
*"Peer review is a quality assessment tool. It directly measures the quality of advice and legal work carried out by legal aid providers."*

*"Peer reviewers are experienced legal aid practitioners. They assess a stratified random sample of a provider's case files using*

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<sup>3</sup>[http://www.legalservices.gov.uk/criminal/defence\\_solicitor\\_call\\_centre.asp#changes](http://www.legalservices.gov.uk/criminal/defence_solicitor_call_centre.asp#changes)

<sup>4</sup>[http://www.legalservices.gov.uk/docs/criminal\\_contracting/Duty\\_Solicitor\\_Manual\\_April\\_06\\_\(version\\_7\)\\_post\\_consultation\\_minus\\_appends\\_-\\_110406.pdf](http://www.legalservices.gov.uk/docs/criminal_contracting/Duty_Solicitor_Manual_April_06_(version_7)_post_consultation_minus_appends_-_110406.pdf)

<sup>5</sup> [http://www.legalservices.gov.uk/LSCIL3E\\_Dec08.pdf](http://www.legalservices.gov.uk/LSCIL3E_Dec08.pdf)

<sup>6</sup> [http://www.legalservices.gov.uk/civil/how/mq\\_peerreview.asp](http://www.legalservices.gov.uk/civil/how/mq_peerreview.asp)

*a standard criteria and ratings system. They determine the quality of advice and legal work provided to clients in a particular category of law."*

*"Following this assessment the reviewer makes an overall judgement about the provider's quality of advice and legal work."*

*"Following the review of a sample of files, the peer reviewer writes a detailed report. The report contains their findings along with both positive areas and areas for improvement, and the overall quality rating.*

*The overall quality of advice provided is assessed using a 1–5 rating."*

## The request

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9. On 17 November 2009 the complainant made the following information request:

*"I hereby request ... the following information regarding [name removed], duty solicitor, hereinafter referred to as [initials removed], of the firm Baxter Brown McArthur - BBM*

*Results of peer-review and all information for all available years to present relating to*

- 1 Her general rate of No Further Outcomes - NFAs - in comparison to other solicitors*
- 2 Her rate of NFAs at Kingston-upon-Thames Police Station in comparison to her overall rate of NFAs*
- 3 The total of calls to BBM under the duty-solicitor scheme and the total and proportion of these which are allocated to [initials removed]*
- 4 The total of calls to BBM from Kingston-upon-Thames Police Station and the total and proportion of these which are allocated to [initials removed]*

*It would be helpful to have this information at the earliest opportunity as it may be relevant to legal proceedings [sic] currently in prospect which must be launched by 4th December.*

*If you consider you are not obliged to supply me with this information then please can you inform me soonest with your reasons, to give me maximum opportunity to challenge this".*

10. On 18 December 2009 the public authority provided its response. It provided details of total calls to BBM under the duty solicitor scheme and included a breakdown specifically from Kingston-upon-Thames Police Station; it clarified that this showed the number of individual telephone calls made rather than the number of cases allocated to BBM as several calls could be made in connection with any one case. It advised the complainant that it was unable to provide any information about the named individual by virtue of section 40(2) (personal information) as this was her 'personal data' and to do so would breach the Data Protection Act ("DPA"). It further advised that to provide the peer review of BBM would breach section 43(2) (commercial interests) of the Act, but confirmed that: *"BBM have met the quality and performance standards..."*.

11. On 19 January 2010 the complainant sought an internal review of the refusal. He queried reliance on sections 40(2) and 43(2). He also stated:

*"I think it should have been clear from the context of my letter that in my questions 3 and 4 I did not mean total of telephone calls to BBM but cases allocated to BBM as it is not of the nature of telephone calls to be allocated to a particular person. You could have clarified this matter with me but did not".*

12. On 16 February 2010 the public authority provided its response. It upheld its previous position in respect of the peer review. It provided more detail as to why it believed the details of the named solicitor were properly exempt by virtue of the DPA. Regarding parts (3) and (4) of the request it advised the complainant:

*"I do not agree that your request for 'The total calls to BBM' clearly means the total number of duty solicitor cases allocated to BBM. I am therefore satisfied that the LSC complied with the FOIA in providing you with the information you specifically requested.*

*However, I am treating the contents of your letter as a new request for information and I have asked the team responsible for processing FOIA matters to consider your request and respond to you".*

## The investigation

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### Scope of the case

13. On 13 April 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
14. On 5 August 2010 the Commissioner commenced his investigation. He asked the complainant to confirm that he wanted him to consider the following issues.
  - That the results of any peer review of BBM should be disclosed.
  - That any information relating to the solicitor is not 'personal' and should be disclosed, i.e. parts (1) and (2) of the request.
  - That LSC interpreted parts (3) and (4) of the request incorrectly and should have known that he wanted details of cases rather than telephone calls.
15. On 26 August 2010 the complainant confirmed that this is what he wanted to have considered.
16. The Commissioner here notes that the complainant has not challenged the actual information provided in respect of the proportion of calls passed to the named solicitor under both parts (3) and (4) of the request, having only complained about its interpretation of his request as '*telephone calls*' rather than '*cases*'. This is further evidenced when the complainant sought his internal review and stated: "*it is not of the nature of telephone calls to be allocated to a particular person*". The Commissioner has therefore only considered the public authority's interpretation of this part of the request.

### Chronology

17. Following receipt of the complaint, the Commissioner raised some initial enquiries with the public authority. In its response of 10 June 2010 it advised him that:

*"In relation to the parts of the request relating to [name removed], the LSC did not gather the information requested, although we did cite section 40(2). The LSC does not directly hold the information requested and to obtain it would have involved the creation of new reports as well as liaison with the Duty Solicitor Call Centre (DSCC). Following our initial assessment of the overall effort (and costs to the DSCC) in the gathering of this information we did not feel it justified to carry*

*out this work when our view was that the information would constitute personal data as defined under section 1 of the Data Protection Act 1998”.*

18. On 1 September 2010 the Commissioner commenced his investigation and raised further queries with the public authority.
19. On 30 September 2010 the public authority provided its response. As a result the Commissioner raised further queries regarding the information recorded during the administration of the duty solicitor scheme.
20. On 26 October 2010 the public authority contacted the Commissioner to discuss the case. It followed up this discussion with an email on 27 October 2010 stating that it no longer believed that it actually held the information in respect of parts (1) and (2) of the request, providing some details of the types of information recorded in connection with calls handled under the duty solicitor scheme.
21. The Commissioner explained the changes to the complainant and asked whether he would consider withdrawing his complaint in respect of these elements of his request. However, the complainant still required a decision on all of the elements of his complaint.
22. The public authority later reverted to its previous position that compliance with parts (1) and (2) of the request would exceed the appropriate limit. It advised that it wished to aggregate the costs of compliance in respect of these two parts.

## **Analysis**

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### **Substantive procedural matters**

#### **Section 1 – general right of access**

23. Section 1(1) of the Act states:

*‘Any person making a request for information to a public authority is entitled –*

- a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- b) if that is the case, to have that information communicated to him.’*

### ***Parts (3) and (4) of the request***

24. The complainant has asked the Commissioner to consider whether or not the public authority was correct to interpret parts (3) and (4) of his request in the way that it did. As explained above, the complainant believes that *“it should have been clear from the context of [his] letter”* that he wanted the public authority to provide him with the number of cases passed to BBM rather than the number of telephone calls and that it could have clarified this with him.
25. The Commissioner notes that in parts (3) and (4) of his request the complainant has specifically asked for *“ the total of calls...”*. This is how the public authority has interpreted the request and it has responded accordingly and provided figures of the total calls to BBM from 2002 to 2009 as well as the total (known) calls from Kingston-upon-Thames Police Station to BBM. The Commissioner further notes that in its response it has stated:

*“You have requested the total number of calls to BBM under the duty solicitor scheme. This information displays the number of individual telephone calls made by the Defence Solicitor Call Centre (the DSCC) to the BBM. Please note that this is not a representation of the number of cases accepted by BBM. This is because it is possible for the DSCC to make more than one call to a Solicitor Firm for any given case.”*

*“We only hold information in relation to Kingston Police Station. We also do not hold the total number of calls made to BBM from Kingston Police Station, because it is possible for the Police to call BBM direct, and we do not record these calls. The ... figures shows [sic] calls made by the DSCC in regards to cases logged to Kingston Police Station”.*

26. The Commissioner considers that the public authority correctly interpreted the request and could not reasonably have been expected to revert to the complainant for further clarification. Indeed, the Commissioner believes that it further complied with its duty to provide advice and assistance under section 16 of the Act by explaining what was included in the figures it provided.
27. The Commissioner further notes that the public authority properly recognised that, when he sought an internal review, the complainant was making a new request and it advised him that it would deal with this separately (which the Commissioner understands that it did do).



28. Accordingly, the Commissioner finds no breach of section 1 in respect of parts (3) and (4) of the request.

## **Section 12 – cost of compliance**

29. Section 12(1) provides that -

*“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit”.*

30. Section 12(4) provides that -

*“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –*

- (a) by one person, or*
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*

*the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”*

31. For clarity, there is no public interest element to consider when looking at section 12, which serves merely as a cost threshold.

32. Section 12 provides that a public authority is not obliged to comply with an information request if the cost of doing so would exceed the appropriate limit. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the “fees regulations”) provide that the limit for central government public authorities is £600. The fees regulations also provide that the cost must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours, and that the tasks that can be taken into account as part of a cost estimate are as follows:

- determining whether the information requested is held;
- locating the information;
- retrieving the information;
- extracting the information.

33. The task for the Commissioner in considering whether section 12(1) has been applied correctly is to reach a decision as to whether the cost estimate made by the public authority is reasonable. The analysis below is based upon the description provided by the public authority in support of its cost estimate.

34. Having analysed the correspondence, the Commissioner believes that there are two subsections of section 12 which are particularly relevant to this case.
- Section 12(1): removes the public authority's obligation to provide requested information where the cost of identifying, locating, retrieving and extracting the requested information would exceed the appropriate limit.
  - Section 12(4): allows a public authority to aggregate the cost of compliance with multiple requests in certain circumstances.
35. Analysis of the application of section 12 in relation to this case has therefore been as follows.
- Has the complainant made one request with multiple parts or multiple requests in one letter?
  - If the latter, can any of the requests be aggregated?
  - Would compliance with the first part of the request exceed the appropriate limit?

*Has the complainant made one request with multiple parts or multiple requests in one letter?*

36. The appropriate limit has only been applied to parts (1) and (2) of the original request. Section 12(4) can be engaged where one person makes two or more requests. It allows for the aggregation of these requests for the purpose of calculating costs in circumstances which are set out in Regulation 5 of the Fees Regulations<sup>7</sup>. This Regulation provides that multiple requests can be aggregated where two or more requests relate, to any extent, to the same or similar information.
37. Given the effect of section 12(4), the Commissioner first considered whether the complainant's letter of 17 November 2009 constituted a single request with multiple elements or multiple requests. The Information Tribunal considered a similar issue in *Fitzsimmons v ICO & Department for Culture Media and Sport* [EA/2007/0124]<sup>8</sup>.
38. Taking the Tribunal's decision in *Fitzsimmons* into consideration, the Commissioner would characterise the complainant's letter of 17 November 2009 as containing more than one request within a single item of correspondence.

*Can parts (1) and (2) of the request be aggregated?*

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<sup>7</sup> <http://www.opsi.gov.uk/SI/si2004/20043244.htm>

<sup>8</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i242/Fitzsimmons.pdf>

39. Having established that the complainant has made multiple requests in a single letter, the Commissioner went on to consider whether those requests could be aggregated for the purpose of calculating the cost of compliance. The Commissioner also asked the public authority whether or not it believed parts (1) and (2) of the request should be aggregated for the purposes of applying the cost limit. It replied that it believed this to be the case.
40. The Commissioner notes that these requests both relate to the performance of one named solicitor, with her being the focus. The Commissioner has therefore concluded that it is reasonable for both parts of the request to be aggregated for the purpose of calculating the cost of compliance because they follow an overarching theme about her performance.
41. Having reached this conclusion, the Commissioner will next consider the application of section 12(1). This removes the public authority's obligation to provide requested information where the cost of identifying, locating, retrieving and extracting the requested information exceeds the appropriate limit.

*Would compliance exceed the appropriate limit?*

42. As explained above, requests for a duty solicitor are coordinated via the DSCC which is currently managed by a service provider called Ventura. From corresponding directly with Ventura, with the agreement of the public authority, the Commissioner has ascertained the following.
  - When a person is arrested and requires the assistance of a duty solicitor the police will contact the DSCC. The DSCC creates a new case, with basic details about the detainee, and will contact the appropriate provider from a rota which is produced by the public authority. Once a solicitor has been assigned by the provider the DSCC will be advised accordingly. Each solicitor has a PIN and Ventura will enter this PIN on the case.
  - Every telephone call handled by the DSCC is assigned an 'event outcome code'. A list of these is appended to this Decision Notice in annex A. The final event outcome code entered appears in a 'status' field of each case. There is no event outcome code for 'NFA' nor is there anything which equates to the public authority's explanation regarding 'NFAs', as provided at paragraph 6 above.

- When asked what he understood the term 'NFA' to mean the DSCC contact at Ventura advised the Commissioner that it was a term he was not familiar with and it was not one which was used by staff at the DSCC.
- There are free text fields within the cases and text may be added by the DSCC operator after each call. These are not electronically searchable and each entry within each case would need to be read to ascertain whether there is any information which may provide some indication as to the outcome of a solicitor's involvement.
- The Commissioner selected, and was provided with, a sample of ten DSCC cases from a list of cases he was given as evidence. In no case was there any free text which in any way equated to the term 'NFA', nor did he find a description which might fall in line with the public authority's understanding of the phrase 'NFA'. In any case, as the DSCC are not familiar with the phrase 'NFA' then the Commissioner is satisfied that it is extremely unlikely that this will be recorded.

43. The public authority has also advised the Commissioner:

*"There would be no information from Ventura on NFA as their sole responsibility is to deploy the case. They have no involvement in what happens next."*

44. During his investigation, the complainant also made the Commissioner aware of a different request which he had made to the public authority. This request sought: *"the rates of 'No Further Actions' for all firms and all individual solicitors employed under the Duty Solicitor scheme in England and Wales"*. As a result of this request, the public authority had provided him with a list of NFAs for all solicitor firms in the previous six years. It had advised him that:

*"I can confirm that the LSC hold information in relation to the number of cases which resulted in "No further action" for all firms in England & Wales.*

*A copy of the information is enclosed. In relation to this information please note the following:*

- *No further actions has been defined by using the new outcome code CN04 and the old outcome code D1. Both of these refer to No further action taken*

- *We have also only used cases with an INV new claim code or a 1 old claim code, indicating they are Criminal Investigation cases*
- *We do not have data on which firms are part of the duty solicitor scheme, so we have given the data for all firms*
- *We cannot identify individual solicitors, so all data is at solicitor office level*
- *CN04 No further action. This code should only be used when the client(s) has been released without a reprimand, warning, summons or charge”.*

45. The Commissioner therefore considered whether or not the requested information may be held via this route. He raised various queries about the source of this information to ascertain what was recorded and under what circumstances. He was advised as follows.

- Solicitors may make claims from the public authority for any legal aid work. This is not always via the DSCC as an individual may ask for a particular firm to represent them. Therefore, the claim may or may not be in relation to the attendance of a Duty Solicitor.
- Claims are made on a specific form, CDS6. This is available online<sup>9</sup>.
- Any references provided on the form in no way correlate with the DSCC system. Forms do include the firm's name, date of attendance and defendant. However, they do not include a solicitor's name.
- The public authority processes claims for over 3000 different offices (some firms may have more than one office). Claims are submitted on a monthly basis.
- The public authority could run reports for a specific firm for a specific type of claim. However, this would not provide details of the individual solicitor concerned.

46. The Commissioner is satisfied that the DSCC system and the claim system are not integrated.

47. The public authority has advised the Commissioner that:

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[http://www.legalservices.gov.uk/docs/forms/CDS6\\_Version\\_7\\_July\\_2008.pdf](http://www.legalservices.gov.uk/docs/forms/CDS6_Version_7_July_2008.pdf)

*"The external organisation dealing with DSCC management information are able to identify individual cases providing they have the [duty solicitor's] PIN number and are also able to identify this at police station level.*

*The finance team are able to identify the outcome of cases based on what is claimed by the firms i.e. in this case BBM, but cannot identify individual duty solicitors.*

*There is currently no "common identifier" between the two pieces of information to link them up. The DSCC assign a unique reference number to each case but this is not then recorded on any claim form submitted by the firm and is not therefore received by the finance team as part of the claim. Neither finance nor [Ventura] would be able to determine which claims related to which duty solicitors.*

*The only potential way of tallying these reports up would be for the finance team to manually review each claim and check it against information recorded by the DSCC, such as client name. This would not be a reliable method as there could be clients with the same name, or the names could be spelt differently on the two forms. It would also involve considerable effort ... There have been past exercises to compare the data and it has had a very low accuracy rate. In addition it is worth noting that finance would only have data once the case had been billed and this can sometimes take six months – therefore to successfully match up individual cases would involve manually comparing cases over that sort of time period, which would be a huge undertaking and even then the results would have a low level of accuracy.*

*In future it is planned that the claim forms will show the unique identifiers used by the DSCC so it would be possible to gather this data in future. However we would consider any future requests in the context of s40".*

48. The Commissioner has ascertained that, at the time of the request, the solicitor who is the focus of the request had been registered as a duty solicitor with the firm BBM since June 2009, i.e. approximately six months. He has also ascertained that there were approximately 5,500 solicitors enrolled on the duty solicitor scheme when the request was made. The Commissioner notes that the complainant requires each of these 5,500 solicitors to be compared against one named solicitor. Therefore, searches would be needed for each individual solicitor in order to gather this data. The searches involve manual checking because there are two disparate systems which would provide the

source data, i.e. the DSCC system and the finance claim system. On making further enquiries the public authority advised the Commissioner:

*"I have received the following from an LSC colleague in relation to a previous analysis carried out on whether this kind of data could be obtained and her wording is below in italic [further quotation marks] ...*

*'It's worth noting that there are not just issues of time required to manipulate the data here. It's also a question of whether we actually hold or can derive the information in any meaningful way.*

*The aim of previous analysis was to understand whether it is possible to uniquely match calls made to the DSCC with completed case outcomes reported through CWA<sup>10</sup> [Contracted Work & Administration system], using data items currently held in the 2 separate databases (LSC and DSCC). As there is no common unique denominator (e.g. unique client number, DSCC number), it was a case of seeing whether using other available data fields (e.g. client surname/initial, provider A/C [account] number, police station ID number) would achieve the same aim accurately.*

*There were significant obstacles in cleansing/making compatible the data from the 2 sources, before any actual analysis was undertaken. For example; the client name is reported as a full name on the DSCC but is separated into surname and initial on the claim form. So pre any analysis, I first had to separate the full name out. Also the police station is recorded as a code by the LSC but as a name on the DSCC, meaning that the codes/names had to be matched first. These issues alone took an entire working day to resolve.*

*This issue holds true even if someone were to attempt a manual match-back of records from CWA for a single provider/fee-earner. We would estimate a time of 30 mins for each case, but the real problem is that there would be some instances where multiple completed cases could be*

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[http://www.legalservices.gov.uk/docs/forms/Guidance\\_For\\_Reporting\\_Controlled\\_Work\\_Version\\_7\\_October\\_2010.pdf](http://www.legalservices.gov.uk/docs/forms/Guidance_For_Reporting_Controlled_Work_Version_7_October_2010.pdf)

*traced back to a single entry in the DSCC database (or vice versa), thus preventing a proper answering of the FoI...*

*With such uncertainty we have to say that we are not currently able to derive the outcomes of DSCC matters; this will, we believe, change from April 2011 when we'll have access to DSCC numbers through CWA''.*

49. In order to try and gauge a more accurate estimate for dealing with the request the Commissioner asked the public authority to provide a clearer estimate of the time it would take to respond to the request.
50. The public authority provided the following response; the time period referred to is the length of time the solicitor has been a registered duty solicitor with BBM:

" ...

1. *Commission Ventura to provide a full list of [name removed]'s cases, including police station identifier, for the specified time period (1 hour)*
2. *Have Ventura provide a further dataset containing all calls allocated to every other duty solicitor, for the specified period (2 hours)*
3. *LSC to pull off full police station dataset from CWA, using Oracle Discoverer – this is in the order of millions of lines of data (5.5 hours)*
4. *LSC cleanses DSCC data to make it compatible with the output from CWA. This would include such activity as translating police station names in the DSCC data into the four digit codes used in CWA, as well as making client surname entries conform to certain formatting protocols (10.5 hours)*
5. *Design Excel/Access formulae to link DSCC inputs (case-by-case) to CWA outcomes. As there is no common unique identifier between the 2 sets of data, this would involve concatenation of numerous available data items (client surname, provider account number, police station ID) and the use of 'Vlookups'. Imposing formulae on large datasets puts pressure on Excel functionality; consequently, there is a significant processing time involved (3.5 hours)*
6. *Calculate rates of 'No Further Action' for each duty solicitor (4 hours)*
7. *In summary, total LSC/Ventura time commitment would be around 26.5 hours. The same timescales hold true if you carry out the matching exercise 'in reverse'".*



The public authority also commented that:

*"This analysis does not consider questions of accuracy".*

### *Conclusion*

51. It is the Commissioner's view that the public authority has provided adequate explanations to support its position that it would exceed the appropriate limit to locate and retrieve the requested information. As the Commissioner finds that the costs can be aggregated, he therefore concludes that to comply with parts (1) and (2) of the request would exceed the appropriate limit.

### **Section 16 – advice and assistance**

52. The Commissioner has considered whether the public authority has complied with section 16(1) of the Act.

53. Section 16(1) provides that –

*"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".*

54. The Commissioner considers that where a public authority complies with Part II of the Code of Practice issued under section 45 of the Act, it will be taken to have complied with section 16(1).

55. Section 16(1) provides that public authorities are under a duty to give advice and assistance to individuals making information requests. Where section 12(1) is cited, the Commissioner considers it essential that advice is provided to the applicant as to how their request could be refined so that it may be possible to supply some information without exceeding the cost limit. The Commissioner also considers it good practice for the public authority to inform the applicant of their total cost estimate and to provide a breakdown of how this estimate was formed. As section 12(1) was not cited prior to the Commissioner's investigation, clearly the public authority did not provide to the complainant advice and assistance on these issues and, therefore, it breached section 16(1). The Commissioner also believes that it should have clarified with him what he meant by the term 'NFA' and it could have assisted him further by providing him with a list of the event outcome codes, as appended to this Notice, in order to explain what types of information it did record about the cases. This may have allowed him to reword his request in order to obtain some information.

56. As details of how the information requested is held are now provided within the body of this Notice, the Commissioner does not require any further steps to be taken by the public authority in this regard.

## **Exemptions**

### **Section 43 – commercial interests**

#### ***Opening part of request – peer review of BBM***

57. This exemption has been applied to the opening part of the request concerning peer reviews. The Commissioner notes that the wording of the request itself alludes to being a request for a peer review about the named solicitor. However, in its refusal the public authority has made reference to a peer review of the firm of solicitors rather than an individual. It has explained to the Commissioner that it had included this information within the scope of the request because:

*“... peer reviews are carried out on firms rather than individual solicitors”.*

58. The Commissioner also clarified with the complainant that he wanted to have the results of any peer review of BBM considered. Therefore, as no review of an individual is undertaken and both parties are happy with this interpretation of the request, the Commissioner will make a decision based on any peer review of the firm of solicitors.
59. The public authority has confirmed to the Commissioner that it only holds one peer review of BBM. This was undertaken in December 2007, i.e. prior to the named solicitor registering as a duty solicitor with that firm.
60. Section 43(2) 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).
61. 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. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Board* (EA/2005/0030) (*'Hogan'*) the Tribunal stated that:

*“The application of the ‘prejudice test’ should be considered as involving a number of steps. First, there is a need to identify the*

*applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."*

62. When considering the nature of the prejudice, the tribunal stated in the hearing of *Hogan* that:

*"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."*

63. The third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; *"would be likely to prejudice"* and *"would prejudice"*. The first limb of the test places a lesser evidential burden on the public authority to discharge. *"Would be likely to prejudice"* was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005). The Tribunal stated that:

*"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."*

64. The second limb of the test *"would prejudice"* places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not to demonstrate this level of prejudice.
65. In this case, the public authority has applied the lower level of prejudice, that disclosure would be likely to produce the relevant prejudice.
66. If the prejudice test is satisfied and the exemption is engaged, then the public authority would need to assess the public interest weighing up the arguments for, and against, disclosure.

#### *Applicable interests*

67. In this case the public authority advised the complainant that:

*“Not all Providers have been peer reviewed. Therefore we have concluded that the release of this information in relation to BBM is likely to prejudice their commercial interests in relation to other Providers who have not been peer reviewed and do not have a current peer review rating. They would be at risk of being compared unfavourably with Providers who have not been peer reviewed. The likely prejudice includes damage to the reputation of BBM, and the undermining of the confidence of clients or potential clients. This may not only relate to BBM’s publicly funded work but could also include any private work”.*

68. In its internal review, the public authority stated that:

*“We have concluded that publication of results relating to specific organisations is likely to prejudice the commercial interests of a significant number of contracted organisations, specifically those organisations who have not been peer reviewed. At the present time over 50% of all contracted organisations have not had a peer review assessment.*

*The likely prejudice includes damage to the reputation of the organisation and the undermining of the confidence of clients or potential clients. This may not only relate to the organisations publicly funded work but could also include private work”.*

(As addressed later in this Notice, the complainant has expressed his view that there is a contradiction between the public authority’s argument that the information should be withheld in order to protect the interests of a firm which has been reviewed, and at the same time to protect firms which have not been reviewed).

69. To summarise, the Commissioner understands that the public authority believes that the following harm would be likely to occur were the requested peer review released:

- BBM may be unfairly viewed against other Providers who have not been peer reviewed;
- BBM may suffer damage to its reputation thereby losing business.

*Does the information relate to, or could it impact on, a commercial activity?*

70. The term 'commercial interests' is not defined in the Act. However, the Commissioner has considered his Guidance regarding the application of section 43<sup>11</sup>. This 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".*

71. However, the guidance also expands commercial interests to the following:

*"While the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling."*

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".*

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<sup>11</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_v3_07_03_08.pdf)

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.

*Nature of the prejudice*

75. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the section 43 exemption. It implies not just that the disclosure of information must have some effect on the application of the interest, but that this effect must be detrimental and/or damaging in some way.
76. In this case, the public authority believes that disclosure of the requested information would be likely to prejudice BBM's position in being selected to provide its services. In its initial refusal notice the public authority has stated that it was *"at risk of being compared unfavourably with Providers who have not been peer reviewed"*, and that the likely prejudice includes *"damage to the reputation of BBM, and the undermining of the confidence of clients or potential clients"*.
77. When requesting an internal review, the complainant stated to the public authority that its reason for refusing to release the peer review contradicted earlier requests for this type of information. He said:
- "... previous requests have been turned down to protect the interests of firms who have not been so reviewed – you say that in my case it is to protect the interests of a firm which has been reviewed"*.
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.

80. In reviewing the information requested, and the arguments put forward, the Commissioner has considered the nature of any prejudice to the interests of BBM likely to result from releasing the reports. The Commissioner has seen no evidence that the prejudice would be *'real, actual or of substance'*, and he does not consider there to be a clear causal link between disclosure of the information and the prejudice identified by the public authority.
81. It is the Commissioner's view that the public authority has not submitted any convincing arguments to demonstrate how disclosure of the requested information in this case would be likely to prejudice the commercial interests of BBM. In particular, he considers that the public authority has failed to provide any evidence from BBM itself that demonstrates that such prejudice would be likely to ensue, or even confirmed that BBM itself believes that such prejudice is in fact likely.
82. For this reason, the Commissioner has concluded that section 43(2) is not engaged. As the Commissioner has concluded that section 43(2) is not engaged in this case, there is no need to go on and consider the public interest test.

## **Section 40 – personal information**

### ***Opening part of request - peer review of BBM***

83. The public authority did not originally cite this exemption, having exempted the peer review under section 43(2). However, as shown above, the Commissioner has found that section 43(2) is not engaged. As the peer review contains details of the individual cases which were reviewed the Commissioner has gone on to consider whether or not the entire peer review is suitable for disclosure. He believes that this is in line with his duties as regulator of the Data Protection Act 1998 (the "DPA").
84. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
85. The first principle of the DPA requires that the processing of personal data is fair and lawful and,
- at least one of the conditions in schedule 2 is met, and

- in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

*Is the requested information personal data?*

86. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:

- from that data,
- or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

87. The relevant information consists of the names of 15 named parties who have been dealt with by BBM in connection with a crime; there are no BBM staff details in the report. It also includes further information about some of their cases. The Commissioner therefore believes that this is clearly their *'personal data'*.

*Is the information sensitive personal data?*

88. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA, i.e. in this particular case personal data consisting of information as to:

*"g) the commission or alleged commission by him of any offence".*

89. The names clearly identify 15 individuals who have been alleged to have committed a crime and are therefore being 'represented' by one of BBM's solicitors. The Commissioner is therefore satisfied that the related information satisfies the definition of sensitive personal data under section 2(g).

90. Having accepted that the information requested constitutes the *'sensitive personal data'* of living individuals the Commissioner must next consider whether disclosure would breach one of the data protection principles.

*Would disclosure breach one of the Data Protection principles?*

91. The Commissioner considers the first data protection principle to be the relevant principle in this case. This provides that:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met, and*



- (b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met*".

*Would it be fair to disclose the requested information?*

92. With respect to the *sensitive personal data* contained within the withheld information, the Commissioner notes that all of it falls under section 2(g) of the Data Protection Act 1998 as it relates to named individuals' commissions or alleged commissions of offences.
93. In the Commissioner's view, in most cases the very nature of *sensitive personal data* means it is more likely that disclosing it will be unfair. He believes that the reasonable expectation of data subjects is that such information will not be disclosed to the general public and that the consequences of any disclosure could be damaging or distressing to them. Although the parties obviously expect that such data is made available as part of the administration of justice process, i.e. during criminal proceedings, this is not the same as it being made available after these have ended. The Commissioner understands that the processing of *sensitive personal data* is a necessary part of the justice process; however, once completed, the processing is no longer necessary and he believes that further disclosure is therefore very likely to be unfair, unnecessary and unwarranted.
94. Having considered all the circumstances of the case, the Commissioner has concluded that it would be unfair to the individuals concerned to disclose their *sensitive personal data* to the world at large and that to do so would contravene the first principle of the DPA. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether any Schedule 2 and 3 conditions of the DPA are met. This information is therefore exempt under section 40(2).
95. The Commissioner has provided the public authority with a confidential annex to indicate the information which he believes is exempt under section 40(2).

## **Procedural requirements**

### ***Section 1 – general right of access to information*** ***Section 10 - time for compliance***

96. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. Section 10 of the Act states that a public authority must comply with section 1(1)

promptly and, in any event, not later than 20 working days after the request has been received.

97. For the reasons set out above the Commissioner is of the view that the peer review, other than any third party data, ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act. By failing to supply this information within 20 working days the Commissioner finds that the public authority also failed to comply with section 10(1) of the Act.

### ***Section 17 – refusal of request***

98. Section 17(5) of the Act provides that-

*“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact”.*

99. In failing to advise the complainant of its reliance on section 12 within the statutory time limit the public authority breached this requirement.

### **The Decision**

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100. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act.

- It correctly concluded that to comply with parts (1) and (2) of the request would exceed the appropriate limit under section 12.

101. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act.

- In failing to properly explain how section 12 applied to parts (1) and (2) of the request it breached section 16(1).
- It incorrectly cited section 43(2) in respect of the peer review.
- The names of the parties within the peer review were exempt under section 40(2).
- In failing to disclose an anonymised version of the peer review it breached sections 1(1)(b) and 10(1).
- In its late citing of section 12(1) it breached section 17(5).

## **Steps required**

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102. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- it should release the peer review with the personal data of any third parties redacted.
103. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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104. Failure to comply with the steps described above 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.

## Right of Appeal

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105. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

**Dated the 17<sup>th</sup> day of March 2011**

**Signed .....**

**Steve Wood  
Head of Policy Delivery  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal annex

### General Right of Access

#### **Section 1(1) provides that -**

"Any person making a request for information to a public authority is entitled –

- (c) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (d) if that is the case, to have that information communicated to him."

### Time for Compliance

#### **Section 10(1) provides that –**

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

### Duty to provide Advice and Assistance

#### **Section 16(1) provides that -**

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

### Personal information

#### **Section 40(2) provides that –**

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

#### **Section 40(3) provides that –**

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

## **Commercial interests**

### **Section 43(2) provides that –**

"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)."