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Dear Ms Gordon

Local Authority (Charges for Property Searches) Regulations

The Council of Property Search Organisations (CoPSO) welcomes the opportunity to comment on the Government's draft proposals to implement arrangements to provide a clear legal basis for local authority charging structures for property search services. As the leading national trade body representing the interests of personal search companies (PSC's) carrying out the majority of personal searches in the market, we are well equipped to do so. Our members have extensive experience and expertise to draw upon in commenting both on the workability of the draft legislation and its practical impact once introduced.

By way of background, CoPSO is the major trade association for the property search industry. Members provide a broad range of property search reports, not just personal searches but also local, environmental, mining, chancel repair, drainage and water data. Members include water companies, environmental search providers, organizations offering local searches and the NLIS channels.

Because of this diversity of membership, views and opinion on this issue are not homogenous across the industry. Indeed, many broadly based property search companies with interests outside the personal search sector are supportive of the government's proposals, believing them to be a welcome structure which has the potential to move the debate forward – providing, that is, that they do unlock access to data. Equally, some individual operators are viscerally opposed to charging in any form. We understand that a number of members will be writing separately to the Government as part of the consultation process.

The comments set out below should therefore be seen as representing the views and interests of the majority of personal companies within CoPSO membership.



Overview

Whilst we recognize that this consultation is limited to considering the impact of the proposed regulations as currently drafted, we wish to restate the concerns of CoPSO's personal search members about the principle behind them. Whilst it is true that many personal search companies reluctantly accept the principle of charging as a precursor to securing access, the vast majority are united in opposition to the use of cost recovery as the basis of that charge.

We believe that cost recovery will do nothing to address the current post-code lottery in charging for local search services. In fact, we believe that it will perpetuate it, resulting in consumers in one part of the country potentially paying considerably more for their searches and HIPs than those in other local authority districts. As far as business is concerned, locally determined fees are inimical to the interests of companies operating in more than one local authority area as they introduce an element of variance into their business model which is unpredictable. The fact these fees may vary on an annual basis causes further problems.

If the Government is to legislate to allow local authorities to charge for access to unrefined data, then we would strongly urge it to re-consider the method by which the fee is calculated. A nationally approved and set fee level is the only way to ensure certainty for business, fairness and transparency for consumers and a level playing field for a nationally competitive market place. These are precisely the arguments deployed by Government in introducing national fees for alcohol and entertainment licences. We feel that the decision to move away from this is in part due to the legislating department also being the effective sponsoring department for local authorities.

The Government's second objective in introducing legislation of this nature is to secure open access to unrefined data. Indeed, the entire Regulatory Impact Assessment is predicated on the assumption that full and open access will immediately follow the introduction of a nationally agreed charging mechanism. We believe this to be an overly optimistic assumption.

There is nothing in these proposals to prevent Local Authorities continuing to obstruct access or indeed deny it completely. At best, there will be a considerable time lag between charging being introduced and full and open access of the type envisaged in the Beardsell Report achieved. At worst, local authorities will simply continue to ignore the access guidance – either refusing outright or imposing non-monetary restrictions on it – secure in the knowledge that nothing in these draft proposals requires them to do otherwise.

In the absence of insurance, this would leave PSCs unable to compete and would wipe out those businesses overnight. This has severe implications for what is essentially a local small business market, but also on the ability of the industry to deliver the Government's flagship HIP policy. PSCs now deliver the vast majority of searches in HIPs (over 80%) and a contraction in their capacity following the ending of the insurance provisions would see severe delays being imposed on the system. Even in the current low level market, local authorities could not deliver the volume of searchers required.



We believe that proposals to implement a charging regime will leave the current situation with regard to access to unrefined data unchanged. The only way to achieve the Government's state objective would be to amend the draft regulations to preventing local authorities restricting access if they choose to take advantage of the new charging regime.

In summary, we believe that the Government's twin objectives of fair, open and transparent charging and open access to unrefined data can only be achieved if the draft regulations are amended to mandate local authorities to provide access and if fees are nationally set. We also believe that a strong mechanism of truly independent monitoring needs to be put in place by Government to ensure that the cost recovery model being proposed by the regulations is being equally and correctly applied around the country. It will take too long for challenges to be mounted by our members should they suspect that a particular local authority is not complying fully with the regulations.

Summary of consultation and proposed way forward

Whilst CoPSO does not support the principle of locally set fees, we nevertheless accept that it is important for the legal basis of charging to be clarified to avoid the abuses of the system we have witnessed over the past decade which have resulted in an uncompetitive and inefficient market for local search services.

We are concerned, however, that the consultation document and draft regulations are silent on a number of important issues which we believe are crucial to the delivery of greater competition and efficiency in the sector. The first relates to the calculation of fees, and in particular the exclusion of local authority searches from the scope of VAT. This immediately creates an uneven playing field with the private sector. For example, one of our members reports that the cost of a local search provided by his company would be £68 if VAT was excluded (including a cost of £5 for insurance and £11 fees), but with VAT the final cost to the consumer of the search is £77.10. The different VAT treatment applied to local authority and PSC products creates differential pricing.

We note that the OFT recommendation on charging specifically recommended that if locally set fees were to be adopted, then they should be "set in a way as to avoid distorting competition in the market". The absence of VAT has precisely that effect and we are seeking legal advice on this aspect of the proposals.

Secondly, the OFT, in welcoming the Government's proposed charging regime, stressed that the proposals would lead to greater competition and efficiency in the sector "provided they are effectively implemented and monitored". The consultation document is as silent on how this is to be effected as it is on how compliance with access guidance is to be achieved. We believe that it is imperative that these issues are addressed when final legislation is brought forward – either in the draft regulations themselves or, more appropriately, in national guidance to local authorities on their implementation – akin to the statutory guidance provided to local licensing authorities.



5) There does not seem to be much about open and transparent price setting? Who will oversee it? E.g. I attach a letter from East Staffordshire council setting out their fees. They are proposing cutting the cost of the official search from £90 to £75 and increasing the costs of data (for a personal search) from £11 to £61 (this includes proposing to charge for free statutory information) from 1st October 2008. Again, if this were to happen en masse from January 2009 all PSCs would be driven out of business.

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We do not believe that “access” is adequately defined in the regulations. The legislation must make clear that “access” involves all data sets being made available electronically or available for inspection within 24 hours. Data which is only available by post would not constitute full access. Regulation 2 (1) as currently drafted could result in non-monetary restrictions being maintained, placing PSCs at a competitive disadvantage.

We welcome and support the clear statement that local authorities cannot charge for “free statutory information”. We are aware that legal opinions from highly respected advisors consulted by some of our members do tend to reflect that what comes under the ‘free statutory information’ definition does need to be specified/clarified by any regulations.

We note that clause 5(3) clearly states that nothing in the Regulations imposes a duty on a local authority to provide access to data. Whilst we acknowledge the sentiment behind this, we nevertheless believe it to be an unhelpful statement and open to misinterpretation. We believe it will be seized on by many authorities as justification for their continued denial of full or partial access to data sets or imposition of non-monetary restrictions to access. We believe that 5(3) should be amended to state that adoption of the charging regime does impose a duty to provide full and open access. Alternatively it should be deleted.

If 5(3) is retained, then we would welcome a clear statement of Ministerial intent in statutory national guidance to the effect that whilst local authorities are not obliged by law to provide access, if they choose to introduce the charging regime set out in the regulations, then they must provide full and fair access to all data. It would be intolerable for a local authority to adopt a charging model for some data sets but continue to restrict access to other data.

The Regulations state that they will take effect the day after the day on which they are made. Even assuming that the final regulations are tabled immediately upon Parliament’s return, the earliest they could be implemented would be the beginning of December. As local authority budgets tend to operate on a financial year basis, the introduction of a new charging regime would be unlikely to have a meaningful impact on local authority practice with regard to access. For this reason alone, we believe that the 5(3) of the regulations should be amended to mandate local authorities to provide access at the same time as the charging regime is introduced.

If that is not done, then we believe it is imperative that the existing transitional provisions are rolled over for a further 6 months to allow the new charging and hopefully access arrangements to bed down and have a demonstrable effect. This should only be short



term solution. Insurance is not a substitute for access to full information and is not in the interests of PSCs or consumers.

Regulatory Impact Assessment

The cost benefit analysis set out in the Regulatory Impact Assessment is predicated on two principle assumptions – that the introduction of a new charging regime will immediately unlock problems of access, allowing PSCs to obtain a complete data set and thereby completely removing the need for insurance. We believe both of these assumptions to be false.

As has already been noted above, there is nothing in the regulations to require local authorities to provide access. It would still be perfectly possible for a local authority to restrict access. The proposals will only deliver a better service to consumers if at the same time PSCs are given full and open access to the complete data set.

The RIA appears to dismiss the idea that local authorities will not abide by access guidance. It glibly states that failure to do so would result in the authority in question being subject to legal challenge. This is a very complicated and costly process. Given that the majority of PSCs are small companies or even one-man-bands, there will be a significant deterrent effect in taking legal action against a local authority with deep pockets and a vested interest in defending its position. Moreover many will be simply unaware of the legal obligations and rights involved in the case. Actions of this nature are time consuming, making the outcome often a hollow victory. We would anticipate that many companies and agents would simply be put out of business by a local authority's actions before a case was satisfactorily resolved.

Moreover, there is nothing in the proposals to prevent local authorities from continuing to obstruct access via non-monetary means. This in itself severely restricts a PSC's ability to complete. Unless the Government acts to mandate access at the same time as introducing a new charging regime, it will either have presided over the elimination of the private sector from the market altogether – driving PSCs out of business from January 2009 – or will have to extend the insurance provisions of the HIP regulations. Neither of these options are palatable to the industry itself nor, we would assume to Government.

A recent survey of CoPSO members revealed that 71.5% believe that the introduction of the proposals as currently drafted – absent any mandation of access – would still see their business needing to maintain some element of insurance cover to protect themselves against gaps in the information or problems with access. A further 14% believed that they would need to maintain insurance on a temporary or run-off basis after the new regime took effect. This suggests that the anticipated cost savings to the industry may have been considerably overstated.

The same survey found that the average cost of insurance was £4.50 per search. Even those believing that they would not need to maintain insurance on a permanent basis or could get away with run-off cover stated that the saving per search would only be in the region of £1-2.

Cost Assumptions



We believe that many of the cost assumptions in the RIA are flawed and should be urgently revisited, not least in light of current market conditions. It is now accepted by most industry commentators that the market is unlikely to recover in the short to medium term. It is therefore wholly unacceptable to base cost/benefit assumptions on 2006 market conditions and statistics.

The RIA assumes that 1.2 million searches are carried out each year. The Land Registry data for June 2008 reveals that the number of completed house sales fell to by 56% to 54,000 from 123,293 in June 2007. That suggests a total number of transactions of 600,000-700,000 over the course of the year. This will have an impact on the total number of searches commissioned. All completed transactions will have a search attached to them but searches will also be commissioned on newly marketed properties.

Research amongst CoPSO members suggests that PSC's now undertake 80-85% of all local searches. The average cost of a PSC search is £81, of which £11 relates to the local authority fee and £4.50 to insurance.

The RIA states that between 15 and 22% of PSC companies pay for unrefined data, 15-30% access it for free and 56-71% of PSCs use insurance. We tested these assumptions in a survey of CoPSO members providing local searches.

The survey returns cover a cross section of CoPSO members – from large national companies to small owner-operated businesses. Between them the sample worked with all local authorities in England and Wales and carried out just under 270,000 searches a year. We asked them how many of the local authorities they worked with restricted access, imposed non-monetary constraints on access and charged for data. The results indicate that 72% of local authorities will restrict access to some or all data sets, 46% impose access arrangements which hinder effective access and competition. A quarter of local authorities charge for unrefined data and 45% provide access free of charge – but not necessarily free of non-monetary restrictions.

These figures are at variance with those quoted in the RIA and suggest that the costs may be higher than anticipated. They also suggest that the challenge in ensuring full and open access may be more significant than the consultation document and RIA acknowledges.

Conclusion

The proposals as currently drafted will fail to deliver the Government's stated objectives outlined in the consultation paper. The introduction of a clear and fair mechanism for charging is only half a solution and will only deliver a better service to consumers if at the same time PSCs are given access to the full data set. The mechanism for ensuring that happens is entirely absent, and for that reason alone, CoPSO cannot support the Government's proposals as currently drafted.

In summary, we call upon the Government to reconsider its proposals by:

- Adopting a single national charge for unrefined data



- Amending the proposals to require local authorities choosing to make use of the new charging regime to provide full access
- Introducing statutory national guidance to local authorities to clarify this obligation
- Absent any mandation of access, extending the current transitional arrangements for the use of insurance.

Failure to do so will result in PSC's being unable to compete with local authorities and would have a devastating effect on the delivery of HIPs.

We should very much welcome the opportunity to discuss our concerns and proposals with you.

Yours sincerely

Mervyn Pilley
Chief Executive