

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2010

Public Authority: Audit Commission
Address: Nicholson House
Lime Kiln Close
Stoke Gifford
Bristol
BS34 8SU

Summary

The complainant requested information from the Audit Commission concerning the recording of discussions held or not held between the Audit Commission and the following public bodies:

- i. Huntingdon District Council
- ii. Cambridgeshire County Council
- iii. Cambridgeshire Constabulary
- iv. Ramsey Town Council
- v. The Commission for Local Administration.

The Audit Commission initially failed to respond within the required 20 working days and as such failed to meet the requirements set out in section 10 of the Freedom of Information Act 2000. With regards the information requested, the Audit Commission stated that it does not hold any information that falls within the terms of the request. The Commissioner has investigated the complaint and is satisfied that the Audit Commission does not hold information covered by the scope of the request and therefore that it complied with its obligations under section 1(1) of the Act.

The Commissioner's Role

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

2. This complaint concerns requests made to the Audit Commission about its communication with the various named bodies. The Commissioner therefore feels the role of the Audit Commission should be explained in some detail. The Audit Commission describes its role as follows¹:

“Our work spans four main areas:

- Audit: we are the primary auditor of local public services. We appoint auditors to provide assurance and promote value for taxpayers’ money across local government, health, housing, community safety, fire and rescue and other public services. Some of these auditors work for private audit firms, but the majority work for our own audit practice.
- Assessment: we carry out performance assessments for councils, fire and rescue services, and housing organisations. We also lead a team of six inspectorates that have developed a new way of assessing public services, Comprehensive Area Assessment (CAA). CAA focuses on how all local services work together to deliver better outcomes for the communities they serve.
- Research: we carry out research and provide independent, authoritative analysis to give insights into complex social problems and best practice in tackling them. We make practical recommendations for policymakers and for people delivering public services.
- Data-matching: we help public bodies detect fraud and error by comparing sets of data, such as payroll or benefits records. Our National Fraud Initiative (NFI) has identified around £450 million of fraud and overpayments since it was established.”

The Request

3. The initial request for information was received by the Audit Commission on 14 September 2007. The complainant asked for information regarding the interaction between the Audit Commission and:

“Huntingdonshire District Council – Monitoring Officer, Peter Watkins
Cambridgeshire County Council - Monitoring Officer, Mark Baker
Cambridgeshire Constabulary - Monitoring Officer, Bob Toland
Ramsey Town Council - Proper Officer, Lorraine Russell
The Commission for Local Administration - Deputy Ombudsman, Neville Jones”

Specifically the complainant requested (the following is a direct quotation):

¹ www.audit-commission.gov.uk

- i. As part of your work what discussions have you had with the Chief Executive Officers of the above named public bodies, in relation to the Freedom of Information Act 2000; and what research have you conducted in relation to their handling of requests under this Act?
 - ii. As part of your work what discussions have you had with the Monitoring Officers/Proper Officers to remind them of their statutory duties and personal responsibilities to ensure, lawfulness, fairness and transparency in the public bodies decisions under the provisions of Section 5, in particular Section 5 (7), of the Local Government and Housing Act 1989 and Section 36 of the Freedom of Information Act 2000?
 - iii. As part of your work what discussions have you had with Chief Financial Officers of these public bodies in tackling suspected dishonest conduct in relation to indirect taxes (Section 106 Agreements, Planning Fees, Enforcement Action, VAT etc)? This new penalty regime has been put forward in Clause 96; Schedule 24 of the Finance Bill 2007 where neither criminal investigations nor Civil Investigations of Fraud procedure outlined in Code of Practice 9 (2005) is appropriate.
 - iv. As part of your work what investigations have the past and present Audit Commission Inspectors and Auditors conducted to contain and root out the contagion of fraud, dishonest conduct and unacceptable behaviour in Huntingdonshire District Council which has now spread to the other four public bodies?
 - v. As part of your work what discussions have you had with the elected members of these four public bodies in particular Huntingdonshire District Council's Cabinet, Corporate Governance Panel, and Standards Committee in relation to the Council's Constitution and in particular to the Codes of Conduct of Officers and Members?"
4. The Audit Commission contacted the complainant on 25 October 2007 advising that a full reply would be issued to him within 2 weeks.
 5. On 1 November 2007 the complainant was advised that his request had been recognised as a Freedom of Information request and it would be dealt with as such.
 6. The complainant was advised by the public authority on 23 November 2007 that it held no recorded information covered by the scope of the request.
 7. The complainant requested an internal review of the handling of his request and a full response was issued on 21 December 2007 acknowledging that the public authority had failed to respond within the 20 working days stipulated in the Act but upholding the position that it did not hold the information requested.

The Investigation

Scope of the case

8. On 23 December 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant argued that his request had been edited and that the public authority had been dishonest in its denial of holding the requested information.
9. The complainant made reference to the fact that his request had, on more than one occasion, been edited. The Commissioner has investigated this and can see no reason to agree with this allegation. The complainant prepared a one page document headed "Transparency is Fundamental to Probity" which he sent to the Audit Commission. This contained a series of five questions which were quoted in full by the Audit Commission in its response to the request. The complainant's document also contained two paragraphs which were not requests for recorded information; rather they were statements made by the complainant and as such did not form part of the Fol request. The Commissioner therefore concentrated his investigation on the five requests for information made by the complainant.

Chronology

10. Due to a backlog of complaints about public authorities' compliance with the Act, the Commissioner was not able to begin his investigation of this complaint immediately. Therefore the Commissioner did not write to the Audit Commission until 29 October 2008 when he sought confirmation as to whether it held information falling within the scope the complainant's requests. The Commissioner also asked for more details concerning the relationship between the Audit Commission and the public bodies mentioned in the request.
11. The Audit Commission responded on 26 November 2008 confirming that it did not hold the information requested and gave information concerning its relationship with the public bodies named.

Analysis

Section 1

12. Section 1(1) of the Act states that:

 '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'.
13. The complainant has argued that the Audit Commission has failed to comply with the requirements of section 1(1) of the Act by not providing him with the

information he requested. The Audit Commission's position is that it does not hold any information falling within scope of the complainant's requests.

14. In circumstances like this, the standard of proof which the Commissioner applies in determining whether a public authority does hold any requested information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will adhere to the guidance stated by the Information Tribunal in its hearing of the Linda Bromley and others v ICO and the Environment Agency (EA/2006/0072) decision that it "will take into account the scope, quality, thoroughness and results of the searches" carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
15. On this basis the Commissioner has considered the likelihood of the Audit Commission holding information in relation to each of the complainant's requests in turn:

Request (i)

16. The complainant asked what discussions had taken place between the Audit Commission and the chief executives of the five named public bodies in relation to freedom of information requests and what research had been carried out into the handling of these requests. The Audit Commission advised the Commissioner that under Schedule 2A of the Audit Commission Act 1998 the Audit Commission may "provide advice or assistance to another public authority for the purpose of the exercise by that authority of its functions". In theory therefore it 'could' engage in a dialogue with these public bodies regarding the execution of freedom of information requests. However, the Audit Commission has stated that it has not been asked to do so.
17. The Audit Commission further commented that the handling of freedom of information requests by an audited body is merely one of many aspects of local authority performance that an appointed auditor could investigate but this investigation would purely be upon the systems in place for managing performance and would not extend to the investigation of individual requests or complaints. The Commissioner has noted the comments made and can find no evidence to dispute these claims.
18. The Commissioner is of the belief that if any of the named public bodies required advice and guidance regarding any freedom of information requests it is more likely that they would contact the Information Commissioner's Office (ICO) as the regulator of the Act rather than the Audit Commission. It is also a matter for the ICO to undertake any action if it was found that public bodies were not fulfilling freedom of information requests appropriately. The Commissioner finds that the Audit Commission does not have a business need to hold the information requested. The Commissioner therefore believes that on the balance of probabilities the Audit Commission did not hold this information.

Request (ii)

19. The complainant asked what discussions had taken place with the appropriate individual within the named bodies with regards to their statutory duties in relation to “section 5(7) of the Local Government and Housing Act 1989 and section 36 of the Freedom of Information Act 2000”. The former legislative reference relates to the duties of a “relevant authority’s monitoring officer” being carried out by him/her personally or their deputy if required. The second reference refers to a specific exemption in Part II of the Act. With regards to section 36 of the Act, the Commissioner notes that this section does not actually place any statutory duty on a public body. The Audit Commission have advised, “it is not the role of the Audit Commission or its appointed auditors to advise individuals or public bodies on their legal obligations”. The Commissioner once again considers that the more appropriate body for the individual authorities to have consulted regarding specific exemptions within the Act to be the ICO. The Commissioner has considered this assertion together with the published role of the Audit Commission, as stated above. The Commissioner therefore finds that the Audit Commission has no reason to hold this information and that on the balance of probabilities it did not hold the information requested.

Request (iii)

20. The complainant asked what discussions had taken place between the Audit Commission and the Chief Financial Officers, of the public bodies, in respect of “tackling suspected dishonest conduct in relation to indirect taxes”. The Audit Commission stated that it “has not corresponded with any of the financial officers in question over suspected dishonest conduct in relation to indirect taxes”. The Audit Commission has also advised that the Statement of Responsibilities in respect of the Audit Commission and its appointed auditors states at paragraph 30:

“Nor is it auditors’ responsibility to prevent or detect breaches of proper standards of financial conduct, or fraud and corruption..”.

21. The investigation of fraud by the Audit Commission arises from the comparison of data rather than from the investigation of conduct. In view of this, and again with reference to the Audit Commission’s published role, the Commissioner accepts that there is no need for the Audit Commission to hold the information and that therefore on the balance of probabilities the Audit Commission did not hold the information requested.

Request (iv)

22. The complainant asked what investigations had been carried out by the Audit Commission with regards to possible dishonest conduct, unacceptable behaviour and fraud carried out within the named public bodies. The Audit Commission has advised that it does not undertake investigations on the issues detailed in this request and thus has no business need to hold this information. The Commissioner has considered this comment and reviewed the published role of the Audit Commission. The Commissioner therefore believes there is no business

need for the Audit Commission to hold this information and that on the balance of probabilities it did not hold the information requested.

Request (v)

23. The complainant asked what discussions had been carried out between the Audit Commission and the elected members of the named public bodies “in relation to the Council’s Constitution and in particular to the Codes of Conduct of Officers and Members”. The Audit Commission stated that neither it nor its appointed auditors had engaged in any correspondence with the elected officials in relation to the matters covered by the scope of the request. Once again the Audit Commission state that such discussions would not form part of its remit. The Commissioner considers that there is no business need for the Audit Commission to hold this information and that on the balance of probabilities it did not hold the information requested.

Information held by external auditors

24. The public authority also advised the complainant that “Auditors, appointed by the Audit Commission under Section 3 of the Audit Commission Act 1998 (ACA) operate under separate statutory legal provision. They discharge their functions independently of the Audit Commission and their work is not subject to the Freedom of Information Act (FOIA) at the present time”. The behaviour and conduct of the auditors is governed by the ACA. This position has been considered by the Commissioner in previous investigations
25. The Commissioner has considered this position and accepts that appointed auditors in person are not subject to the Act. The Commissioner has therefore concentrated his investigation on information held by the Audit Commission itself rather than information held by its appointed auditors. Auditors are appointed by the Audit Commission and are subject to a degree of oversight by it, however, the information acquired by the auditor in the course of an audit is information he holds to enable him to discharge his own statutory duties. The Commissioner accepts that appointed auditors do not hold the information on behalf of the Audit Commission.
26. Despite the above, in an effort to assist the complainant, the Audit Commission has asked the relevant auditors if they hold any information pertinent to the request made. The independent auditors have advised that they hold no recorded information fitting the request made.

Procedural matters

Section 10

27. The public authority has accepted and apologised for its tardiness in initially dealing with the request. The failure to issue a reply to the initial request within the required 20 days is clearly a breach of section 10(1) of the Act.

The Decision

28. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act with regards to the time taken to respond and it therefore breached the requirements at section 10(1) of the Act. However, the Commissioner is satisfied that the public authority does not hold any information falling within the scope of the complainant's requests.

Steps Required

29. The Commissioner requires no steps to be taken.

Right of Appeal

30. 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.
Website: 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 served.

Dated the 2nd day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

“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.”

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.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or

- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Local Government and Housing Act 1989

Section 5

Designation and reports of monitoring officer

Section 5(7) The duties of a relevant authority's monitoring officer under this section shall be performed by him personally or, where he is unable to act owing to absence or illness, personally by such member of his staff as he has for the time being nominated as his deputy for the purposes of this section.

The Audit Commission Act 1998

Schedule 2

Accounts subject to audit

1 Section 2 applies to all accounts of—

- (a) a local authority;

Section 3

Appointment of auditors

(1) An auditor appointed by the Commission to audit the accounts of a body whose accounts are required to be audited in accordance with this Act ("a body subject to audit") may be—

- (a) an officer of the Commission,
- (b) an individual who is not an officer of the Commission, or
- (c) a firm of individuals who are not officers of the Commission.

(2) Where two or more auditors are appointed in relation to the accounts of a body, some but not others may be officers of the Commission and they may be appointed—

- (a) to act jointly;
- (b) to act separately in relation to different parts of the accounts; or
- (c) to discharge different functions in relation to the audit.

(3) Before appointing an auditor or auditors to audit the accounts of a body other than a health service body the Commission shall consult that body.

(4) For the purpose of assisting the Commission in deciding on the appointment of an auditor or auditors in relation to the accounts of a body other than a health service body, the Commission may require the body to make available for inspection by or on behalf of

the Commission such documents relating to any accounts of the body as the Commission may reasonably require for that purpose.

(5) A person shall not be appointed by the Commission as an auditor unless—

- (a) he is a member of one or more of the bodies mentioned in subsection (7);
- (b) he has such other qualifications as may be approved for the purposes of this section by the Secretary of State; or
- (c) he was approved before 1st April 1996 by the Secretary of State under section 13(5) of the [1982 c. 32.] Local Government Finance Act 1982, and the approval has not been withdrawn.

(6) A firm shall not be appointed by the Commission as an auditor unless each of its members is a member of one or more of the bodies mentioned in subsection (7).

(7) The bodies referred to in subsections (5) and (6) are—

- (a) the Institute of Chartered Accountants in England and Wales;
- (b) the Institute of Chartered Accountants of Scotland;
- (c) the Association of Certified Accountants;
- (d) the Chartered Institute of Public Finance and Accountancy;
- (e) the Institute of Chartered Accountants in Ireland; and
- (f) any other body of accountants established in the United Kingdom and for the time being approved by the Secretary of State for the purposes of this section.

(8) The appointment by the Commission of an auditor who is not an officer of the Commission shall be on such terms and for such period as the Commission may determine.

(9) Arrangements may be approved by the Commission, either generally or in a particular case, for a person or persons to assist an auditor appointed by the Commission (whether the auditor is an officer of the Commission or not) by carrying out such of the auditor's functions under this Act as may be specified in the arrangements.

(10) Subsection (9) does not apply to functions under section 19.

(11) References in the following provisions of this Act to an auditor include, in relation to any function of an auditor, a reference to any person carrying out that function under arrangements approved under subsection (9).