

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 December 2010

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

Summary

The complainant requested information about an appointed auditor and his audit of Basildon Council. The public authority provided the complainant with contact details for the appointed auditor and stated that it did not hold any information that fell within the scope of the request. This was because all the information was held by the auditor for their own statutory purposes and was not held by the Audit Commission. The Commissioner has investigated the complaint and is satisfied that the public authority 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. However, the public authority breached section 10(1) for failing to comply with section 1(1)(a) within 20 working days. He requires no remedial steps to be taken in this case.

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 a named appointed auditor and his audit of Basildon Council. 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. On 20 November 2009 the complainant requested the following information:
- *'.....information showing Basildon Council's appointed auditor to have notified Basildon Council of a date under section 13 of the Accounts and Audit Regulations 2003 as detailed above for the 2003/2004, 2004/2005 and 2005/2006 accounts and if so to provide details of those dates, or for the 2008/2009 accounts, under*

¹ www.audit-commission.gov.uk

the above legislation, or any other legislation which may supersede the above regulations, and if so the date the notification is to take effect. That is to say the date that I am able to exercise my right to question the auditor about the 2008/09 accounts.

- *.....I have made it quite clear that the council will not respond to my enquiries and have therefore requested the Audit Commission to confirm or deny whether **you** hold any recorded information showing the council to have published the statutory Public Notice concerning the 2008/09 audit, and if so the date and name of the publication. Whatever the council may or may not hold is not what I am requesting, and I would be obliged if you would now properly respond to this request without further delay.....*
- **Regus House 1010 Cambourne Business Park.** *You have confirmed that you do in fact still have an office at this address which begs the question as to why my letter was returned instead of being passed to Paul King at his new address. I am therefore now requesting the Audit Commission to confirm or deny whether you hold any records showing the date that Paul King left Regus House or any records showing why my letter dated 17 July 2009 sent to him at Regus House was returned instead of being passed to Paul King at his new address.*

In the same correspondence the complainant also made a subject access request under the Data Protection Act 1998.

4. In a letter dated 26 February 2010 the public authority provided a response to complainant. The public authority stated that it did not hold information in relation to points one and two; the public authority confirmed the address it held for Paul King and stated that it could not provide information about why the letter to Paul King was returned as it did not hold this information.
5. There was then a chain of correspondence between the complainant and the public authority, on 19 April 2010 the complainant requested an internal review. On 30 April 2010 the public authority communicated the results of its internal review. It upheld its position and explained:

'.....that appointed auditors hold information and act independently of the Commission.'

The Investigation

Scope of the case

6. On 8 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The Audit Commission must hold the information he had requested
 - The information which was provided at point 3 of his request was misleading and the complainant believed he had deliberately been provided with false information to prevent his requests for information reaching the appointed auditor.
7. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

8. On 19 July 2010 the Commissioner telephoned the public authority to notify it that he had received this complaint, the Commissioner emailed the Audit Commission to confirm the scope of the case. The public authority acknowledged the Commissioner's email that same day explaining that it did not hold the information requested and providing supporting documents.
9. On 30 July 2010 the Commissioner addressed detailed enquiries to the public authority. These enquiries were to establish whether it held further recorded information that had not yet been identified.
10. In a letter dated 5 August the complainant stated that he accepted that the public authority probably did not hold the information he had requested at points one and two of his request, however he felt that he had been deliberately misled over the contact address for Paul King. The reason for believing this was because the Audit Commission had provided two different contact addresses for Paul King as a result of the complainant's FOIA requests and stating that letters which he had sent to the appointed auditor had been returned to him marked "Gone Away". The Commissioner contacted the public authority to query the above allegation.
11. On 12 August 2010 the Commissioner received detailed answers from the public authority along with documentary evidence in the form of an

intranet screenshot to show the various addresses for its regional offices and an explanation that the auditor in question worked between two offices and therefore should be contactable at both addresses provided to the complaint. The public authority could not provide an explanation regarding mail not reaching the appointed auditor, this information was not recorded because the appointed auditor was not a public authority for the purposes of FOI and therefore correspondence addressed to him was not subject to the Act. The Commissioner asked the public authority if the screen shot containing the two addresses could be provided to the complainant, the public authority agreed.

12. The Commissioner wrote to the complainant on 26 August 2010 providing him with a copy of the screenshot showing the addresses provided by the public authority, the Commissioner also communicated his preliminary verdict to the complainant. In various letters throughout the course of the investigation the Commissioner explained his view of the difference between the public authority and the Auditors themselves. He explained the questions that he had asked and response he had received. He asked the complainant if, given the information above, he wished for the case to proceed.
13. On 31 August 2010 the complainant confirmed to the Commissioner that he wished for the case to proceed to Decision Notice. The Commissioner acknowledged this letter on 10 September 2010.

Analysis

Substantive Procedural Matters

Is relevant recorded information held?

14. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information exists at the date of the request for information. This is the only information that a public authority is obliged to provide. This is made clear in section 1(4) of the Act. The date of the request in this case is 20 November 2009. The complainant has commented that he believes that information should be held as the appointed auditor is an employee of the Audit Commission.
15. In this case the public authority's main argument is that all the information held relating to this investigation was held by the relevant auditor on their own behalf to fulfil their own statutory functions and that this information was not held by it. The complainant argues that this approach cannot be correct as the Auditor has an employment

relationship with the public authority and the information was used to help discharge their public role on its behalf.

16. The Commissioner believes that this point is in need of being further developed. He will consider this position in three parts:
- He will consider the statutory position of the Audit Commission and its function and role. In particular the control it exercises over the Auditors.
 - He will consider the statutory position of the Auditor as contained in the Audit Commission Act 1998.
 - He will consider whether the Auditors hold the information on the Audit Commission's behalf [in line with section 3(2)(b)].

The statutory position of the public authority

17. In broad terms the public authority does two things:
- It appoints auditors to conduct the annual audits of Local, Police and Fire Authorities and NHS bodies. The appointment of auditors and the powers and duties of those auditors are set out in Part 2 of the Audit Commission Act 1998 (the ACA).
 - It may itself carry out studies into performance and other matters, either because it considers that this would be useful, or at the invitation of an auditable body, or, in some cases, at the request of the Secretary of State. These matters are dealt with in Part 3 of the ACA.
18. When dealing with complaints under the Freedom of Information Act, the key thing to establish is whether an audit has been carried out under Part 2 of the ACA, in which case it is not held, or Part 3, in which case it is held by the Commission.
19. The ACA provides a detailed framework about how auditors are appointed by the public authority and imposes particular obligations on the auditor. The Commissioner notes that the legislation clearly distinguishes between powers that are held by the public authority and powers that are held by the auditors themselves. This language is clear, consistent and unambiguous.
20. The Commissioner considers it is useful to explore the provisions of ACA further to explain his approach about the distinction between investigations carried out under Part 3 and those carried out under Part

2 and to illustrate that the Audit Commission and the Auditors have distinct statutory functions.

21. Section 2 provides an obligation for specified public bodies to have their accounts audited by auditors appointed by the public authority.
22. Section 3 provides the public authority with the obligation to appoint auditors to fulfil the audit functions. It must consult with the relevant body to be audited and can choose its own staff, another individual or a firm that does not comprise any of its own staff. These individuals must be recognised by the appropriate professional body. This means that the public authority has a role in appointing auditors. This power stems from a different statutory source than that to appoint staff (this power to appoint staff is contained in paragraph 7 of Schedule 1 of the ACA).
23. Section 4 provides the public authority with an obligation to draft a Code of Practice that prescribes the way in which auditors are to carry out their functions under the ACA. This must be complied with by the auditors – Section 5(2). This means that the public authority has a regulatory role.
24. Section 25 allows the public authority to appoint auditors for extraordinary audits in specified circumstances. These include when it is directed to do so by the relevant Secretary of State.
25. Section 33 allows the public authority to undertake certain studies to generally improve the efficacy in provision of local services and management of financial matters. It can also be instructed by a public authority to undertake a study and make recommendations on a bespoke basis (section 35).
26. Section 44 allows the public authority to give directions to relevant bodies to publish annual information to enable comparisons between bodies and imposes an obligation on those bodies to arrange to collate that information.
27. Section 48 provides the public authority with the power to requisition information and documents to enable it to conduct the functions above. The failure to provide this information is a criminal offence.
28. Finally, section 51 allows the public authority to publish relevant information in the event that a body is not complying with some of the obligations specified above. This provision would seem to be a provision to name and shame those who do not assist it.

The statutory position of the Auditors

29. The public authority has advised the Commissioner that Auditors, appointed by the Audit Commission under Section 2 of the Audit Commission Act 1998 (ACA) operate under separate statutory legal provisions. They discharge their functions independently of the Audit Commission. Their behaviour and conduct is governed by the ACA. It should be noted at this point that the auditors are not themselves covered by the Freedom of Information Act.
30. Section 5 explained that the appointed auditor must 'satisfy himself' of certain matters in relation to the accounts. It also as stated above explains that he must be certain of complying with the public authority's Code of Practice. In Section 6 he is given specific individual powers to request the provision of documentation and information. Section 8 presents him with the power to issue a report in the public interest about anything that has come to his attention during the audit.
31. Section 16 of ACA allows individual electors to object to the auditor about the lawfulness of an item of expenditure. Section 17 says that where an auditor upholds this complaint, he can apply to court for a declaration that the item is contrary to law. Section 24 presents the auditor with an additional power to apply for judicial review in specified circumstances. These powers are given to the auditor and cannot be exercised by the public authority.
32. Section 49 places an obligation on both the public authority and the auditor separately not to disclose any information that it has acquired unless specified circumstances are present. The disclosure of such information is a criminal offence. It states:

'No information relating to a particular body or other person and obtained by the Commission or an auditor, or by a person acting on behalf of the Commission or an auditor'
33. Within the provision above it clearly distinguishes information held on behalf of the auditor on one hand and the information held on behalf of the public authority on the other.
34. It is clear that these sections place specific statutory responsibilities on the auditor to conduct his duties independently. The Audit Commissioner endorses the argument that he is discharging a distinct, substantive office with its own statutory responsibilities. As such the information required by the auditor in the course of their audit is information that he holds to enable him to discharge his own statutory duties under the ACA. He does not hold that information for the Audit Commission directly.

35. This outcome is also consistent with the legislative history. The fact that the auditor holds a separate position has been recognised in case law for many years (i.e. *R (Bridgeman) v Drury 1 I.R. 489 at 509*). The Local Government Finance Act 1984 created the public authority. The purpose of that Act was to remove the anomaly that public bodies could appoint their own auditor and therefore created a body to make those appointments. The legislation was not designed to change the substantive work of the auditor and they had statutory responsibilities before the Local Government Finance Act 1984 and continued to have them after. The Audit Commission was intended to ensure independence in appointment and a degree of oversight.
36. This interpretation of the auditor's role and the legislative history can be found in the obiter dicta of the leading judgment of Lord Hope in the House of Lords case *Porter v Magill [2002] 2 A.C. 337* (at paragraph 91) [emphasis added].

'In my opinion, the conduct of the auditor requires to be looked at as a whole and in the context of the procedure which is laid down in the statute. Part iii of the 1982 Act starts, as one would expect, by placing the responsibility for auditing the accounts **on the auditor**. It seeks to ensure his independence from the body whose accounts he is auditing by requiring... that his appointment is to be by the Audit Commissioner and not by the body itself. His responsibilities include making reports on any matter coming to his notice in the course of the audit and dealing with objections made by any local government elector... where objections are made, it is his duty to consider... whether they relate to any matter in respect of which he could make a report...The Act does not enable him to pass this responsibility to someone else. It is **his duty**, as the person in charge of the audit within the context of which objections are made, to deal with them himself and, if they are well founded, to take such action as he is required to take on them by statute. The auditing process, which is in his hands, **is not complete** until this has been done.'

37. The Commissioner agrees that the ACA has not materially changed the position of the auditor, particularly in relation to the responsibilities they have personally in relation to the audits.

Is the information held by the appointed auditor held on behalf of the public authority?

38. It is clear that the Commissioner does not consider that the information held by the auditors is held for the Audit Commission directly. He accepts that each have separate roles.

39. However, section 3(2)(b) of the Freedom of Information Act expands its reach beyond only that information held by the public authority itself. It states that information is held if:

'(b) it is held by another person on behalf of the public authority'

40. The Commissioner has considered carefully whether the information held by the auditor in this case is held on behalf of the public authority.
41. The Commissioner notes that the public authority does appoint the auditor and can ask for documents to prove that they have relevant qualifications. The Commissioner believes that the statutory structure provides this power and that it does not mean that the public authority maintains control over the auditors and how they exercise their specific audits. Instead it is the auditors' own responsibility for the work that they do.
42. The public authority can also prescribe the fee to be paid to the auditor. This does not amount to control of the audit. It is simply a regulatory mechanism to prescribe fees.
43. The Commissioner has particularly focussed on the oversight that the public authority has over the auditor. It is clear that it has regulatory oversight and must create a Code of Practice with which the auditors must comply. The Commissioner has examined the Code of Practice and notes that it accords with its description in section 4(3) as being 'best professional practice with respect to the standards, procedures and techniques adopted by auditors'. It functions as an operational framework. It does not provide the public authority with control over the audit.
44. The public authority has confirmed that it will hold information about individual audits where it is investigating a complaint about individual auditors or is conducting a quality control of their work. The Commissioner believes that the structure of this relationship will mean that information that is held by the public authority where it is investigating the conduct of the auditor in a specific audit will be held by it, but otherwise all the information where there is no such investigation will be held by the auditor on their own behalf.
45. Overall, the Commissioner has considered this position and accepts that appointed auditors in person are not subject to the Freedom of Information Act and do not hold information on behalf of the public authority in this case for the reasons outlined above.

46. The Commissioner has therefore focussed the remainder of his investigation on information held by the Audit Commission itself rather than information held by its appointed auditors.
47. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal (the 'Tribunal') in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The Commissioner will apply that standard of proof to this case.
48. He has also been assisted by the Tribunal's statement concerning the application of the 'balance of probabilities' test in the same case. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It will also require considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
49. The complainant has argued that there may be an issue of distinguishing which information is held by the auditor in their own capacity and what is held by the public authority on its own behalf. The Commissioner has considered this point and believes that the distinction is fairly clear. Information held by the Audit Commission to conduct the functions outlined in paragraphs 21-28 above is held by the public authority and information to conduct the functions outlined in paragraphs 30-31 are held by the auditors themselves.
50. There are only two eventualities that can lead to information held by the auditors being held by the public authority:
 - When the public authority is investigating a complaint against a specified auditor or is conducting a quality control of their work.
 - When the public authority has required an auditor to provide information for the discharge of wider Commission functions such as making judgments on local authorities' use of resources.
51. The public authority has confirmed that in this case neither eventuality had occurred at the date of the request and therefore it does not hold any relevant information in this case. Information is therefore not held for the Part 3 purposes discussed in paragraph 17(2) above.

52. The Commissioner has considered the request and believes that it is connected only to an auditor's investigation at a specified public authority. He therefore believes that the information by definition falls within the information that is held by the auditor on its own behalf.
53. The Commissioner has considered the evidence above and is satisfied that on the balance of probabilities the public authority did not hold the relevant recorded information that was requested. It has therefore complied with section 1(1)(a) in correctly denying that it held the relevant information.

The Decision

54. The Audit Commission has breached section 10(1) of the Act in failing to comply with sections 1(1)(a) within twenty working days following receipt of the request.

Steps Required

55. The Commissioner requires no steps to be taken.

Right of Appeal

56. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 14th day of December 2010

Signed

**Andrew White
Group Manager**

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

Legal Annex

The Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

...

Section 3 - Public Authorities

(1) "in this Act "public authority" means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

(2) For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.