

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 March 2010

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

Summary

The complainant requested information about an investigation an auditor had conducted into the money spent in removing a specified individual from their post. The public authority stated that it does not hold any information that falls within the terms of the request. This is 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. 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 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. On 30 December 2008 the complainant requested the following information in accordance with section 1(1) of the Act:

'I am interested in the case of [Named case redacted] (training and employment manager of [public authority redacted]).

[Named individual A redacted] was discriminated because [contents redacted].

I am aware that you investigated regarding the money spent on this case by [public authority redacted].

I would appreciate if you could disclose all relevant information regarding this case...'

¹ www.audit-commission.gov.uk

For clarity, this request concerns the information considered by an auditor in considering an issue raised by an elector in a specified case.

4. On 22 January 2009 the public authority issued a response to the complainant. It explained:

'Auditors are appointed by the Audit Commission under Section 3 of the Audit Commission Act 1998 (ACA) and operate under their own statutory powers, separate from those of the Audit Commission. Unlike the Audit Commission, appointed auditors are not "public authorities" for the purposes of the Freedom of Information Act 2000 (FOIA). This means that the information they hold is not subject to that Act.'

It then considered its position under section 49 of the ACA, which allows auditors to disclose information and concluded that it could not disclose the information under that legislation either. The Commissioner does not regulate this access regime and can make no comment about this aspect of the case.

5. On 25 April 2009 the complainant requested an internal review. On 29 April 2009 the public authority communicated the results of its internal review. It upheld its position and explained:

'As I explained in my response to you on 22 January 2009, appointed auditors are not "public authorities" for the purposes of the Freedom of Information Act 2000 (FOIA). This means that the information they hold is not subject to that Act. There has been no change in this matter since last writing to you.'

In your e-mail you say that [Named individual B] works for [Public authority B]. She is the appointed auditor for the [Public authority B] as well as [public authority redacted]. (associated with your original request). As an appointed auditor, by the Audit Commission, she works independently of both Councils.'

The Investigation

Scope of the case

6. On 31 July 2009 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:
- It is important that the information is provided as it will shed light on [Public authority redacted]'s procedures.

- The Audit Commission has not published its findings in this matter.
 - Public money has in his view been wasted in this matter.
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. As explained above, the Commissioner cannot adjudicate on the decision to also withhold the relevant information under section 49 of ACA.

Chronology

8. On 20 August 2009 the Commissioner wrote to the public authority to notify it that he had received this complaint. On 28 August 2009 the public authority acknowledged the Commissioner's letter and explained its understanding of the case.
9. On 6 October 2009 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. On 2 November 2009 the Commissioner received detailed answers.
10. On 6 November 2009 the Commissioner spoke to the public authority on the telephone and received confirmation that he could provide a copy of the response to the complainant.
11. Also on 6 November 2009 the Commissioner communicated his preliminary verdict to the complainant. He explained his view of the difference between the public authority and the Auditors themselves. He explained the questions that he has asked and provided a copy of response he had received. He asked given the information above whether he wished for the case to proceed.
12. On 9 November 2009 the complainant addressed a number of questions to the Commissioner. On 11 November 2009 the Commissioner responded to those questions.
13. On 11 November 2009 the complainant confirmed to the Commissioner that he wished for the case to proceed to Decision Notice. The Commissioner acknowledged this email on 13 November 2009.

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 30 December 2008. The complainant has commented that he believes that information may have been held before his request by the public authority. The Commissioner is unable to consider what information is held before the date of the request where it is not held on the date of the request itself.

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:

(1) He will consider the statutory position of the Audit Commission and its function and role. In particular the control it exercises over the Auditors.

(2) He will consider the statutory position of the Auditor as contained in the Audit Commission Act 1998.

(3) He will consider whether the Auditors hold the information on the Audit Commission's behalf [in line with section 3(2)(b)].

1. The statutory position of the public authority

17. In broad terms the public authority does two things:

1. 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).

2. 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 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 Act).
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 Act. 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.

2. *The statutory position of the Auditors*

29. The public authority has advised the Commissioner that Auditors, appointed by the Audit Commission under Section 3 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 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 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 Act. 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 Act 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 ACA has not materially changed the position of the auditor, particularly in relation to the responsibilities they have personally in relation to the audits.

3. *Is the information held by the 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 Commissioner directly. He accepts that each have separate roles.

39. However, section 3(2)(b) of the 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 Commissioner has considered the contractual relationship between external individuals appointed by the public authority and the public authority. He notes that this does provide the public authority with the right to terminate those contracts in the event that there is a serious and material failure of compliance with the ACA or its Code of Practice or where there is a consistent and material failure to carry out work of a standard that is acceptable to the public authority. This clearly represents a degree of control. The Commissioner believes that there is still a distinction between the statutory duty imposed on the auditor themselves and this contract. The auditor is unable to contract out of his statutory responsibilities and while the public authority does have a degree of control over overall conduct, it has no control over the discretions and powers vested in the auditor personally.
45. 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. For completeness in this case, the public authority has confirmed to the Commissioner that it holds no relevant information in respect of complaints about the individual auditor in this case.
46. Overall, the Commissioner has considered this position and accepts that appointed auditors in person are not subject to the Act and do not hold information on behalf of the public authority in this case for the reasons outlined above.
47. 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.
48. 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.

49. 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.
50. 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.
51. There are only two eventualities that can lead to information held by the auditors being held by the public authority:
 - (1) When the public authority is investigating a complaint against a specified auditor or is conducting a quality control of their work.
 - (2) 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.
52. 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.
53. The Commissioner has considered the request and believes that it is connected only to an auditor's investigation at a specified public authority in relation to a specific event of expenditure. He therefore believes that the information by definition falls within the information that is held by the auditor on its own behalf.
54. The Commissioner has addressed further enquiries to the public authority to ensure that there are no other locations where relevant information might be found. He has been provided with an explanation

of the searches conducted. The public authority explained that the request was passed to its regional assessor, the wording clearly fell within the role of the auditor and further verbal enquiries were made to the relevant auditor to determine whether there was any involvement of the public authority and whether it would have been involved. These searches showed that the public authority had not been involved. The Commissioner has considered these searches and believes that they were reasonable in the circumstances particularly considering the wording of the request.

55. The Commissioner has considered how the files and documentation are kept. He notes that the information held by Commission employed auditors are held in either paper files maintained by the auditor or stored electronically in a database attributable to the audit of a particular authority. The information held by appointed auditors is maintained by them, albeit on Commission facilities. The Commissioner has considered this system and believes that the files are easily differentiated between those held for audit purposes and those held by the public authority for its own purposes. The relevant information in this case is held for audit purposes only.
56. The Commissioner also made further enquiries about whether the public authority has any records of communicating separately with the relevant public body in this case. It explained that it had no reason to and there was no record of its doing so in this case.
57. 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

58. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

59. The Commissioner requires no steps to be taken.

Other matters

60. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner notes that the refusal notice and the internal review both lacked clarity and were conducted by the same person. The Commissioner believes that both of these things do not accord with his section 45 Code of Practice. He has already written to the public authority and has received an undertaking that this will be improved for the future. He has also been told that the difference between the public authority and the auditors themselves will be communicated more clearly too.

Right of Appeal

61. 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 23rd day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

**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.