

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 December 2013

**Public Authority:** Audit Commission  
**Address:** 3<sup>rd</sup> Floor, Fry Building  
2 Marsham Street  
London  
SW1P 4DF

### Decision (including any steps ordered)

---

1. The complainant has requested from the Audit Commission copies of all statistical data provided by local authorities in their latest annual return of the Fraud and Corruption Survey. The Audit Commission considered that the requested information was exempt from disclosure under section 31(1)(a) (prevention or detection of crime) of FOIA. The Commissioner's decision is that the exemption is engaged and that, in all the circumstances, the public interest arguments in favour of withholding the requested information outweigh the arguments in favour of disclosure. He does not therefore require the Audit Commission to take any steps as a result of this notice.

### Request and response

---

2. On 27 November 2012 the complainant wrote to the Audit Commission and requested information in the following terms:
  1. *Please provide copies of all statistical data from each local authority in their latest annual return of the Fraud and Corruption Survey to the Audit Commission, in the form of an Excel spreadsheet or csv table.*

*Please send me this information by e-mail or if only available in a hard copy format by post.*

3. The Audit Commission responded to the complainant on 6 December 2012. They explained that the requested information comprises detailed figures of the number and value of different types of frauds identified as being committed against English local authorities in the current financial year. The Audit Commissioner further advised that this information was exempt information under section 31(1)(a) of FOIA; finding that disclosure would be likely to prejudice the prevention or detection of crime and that, flowing from this, the public interest favoured the withholding of the requested information. In considering the balance of the public interest, the Audit Commission noted that they already published some information from the range of information provided by local authorities, which in their view went some way towards satisfying the public interest in disclosure.
4. The complainant wrote to the Audit Commission again on 7 December 2012 and challenged their decision to withhold the requested information. The Audit Commission subsequently carried out an internal review, the outcome of which was provided to the complainant on 24 December 2012. This upheld the Audit Commission's original position.

### **Scope of the case**

---

5. The complainant contacted the Commissioner on 3 January 2013 to complain about the Audit Commission's decision to withhold the requested information.

### **Reasons for decision**

---

#### **Section 31(1)(a)**

6. The Audit Commission are claiming that the requested information is exempt information under section 31(1)(a) of FOIA. This states:
  - (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –
    - (a) the prevention or detection of crime
7. As a prejudice-based exemption, certain conditions must be met for section 31(1) to be engaged. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interests

described in the exemption. Second, there must be a causal relationship between the potential disclosure of the disputed information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure. Specifically, the public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

8. The Audit Commission have argued in this case that placing the requested information into the public domain risks allowing potential fraudsters to target their activities in order to best avoid detection. There is no doubt that such an effect falls within the ambit of the exemption set out at section 31(1)(a). The Commissioner is therefore next required to consider the second condition described above, namely whether there is a causal relationship between disclosure and the prejudice cited.
9. The Audit Commission's website<sup>1</sup> explains that they conduct an annual survey on detected fraud and corruption and counter fraud arrangements in local government. Local government's external auditors also need to report to the Commission all fraud of £10,000 and over and all incidents of corruption. Each year the Audit Commission publishes a corresponding Protecting the Public Purse report, which as they have informed the complainant 'summarises and analyses the data collected in the annual fraud survey, setting it into context with national and local development and trends over time.'
10. In terms of the prejudice that could come about through the release of the requested information, the Audit Commission have argued the following:

*The dataset from the 2012 fraud survey shows the levels and values of certain types of fraud identified at each local authority. Used effectively, they can show where authorities are currently weak and need to improve. Used inappropriately, they can identify opportunities for fraud and also highlight where action is unlikely to be taken by an authority against a fraudster.*

11. Building on this point, the Audit Commission have described a scenario where an authority will not have recorded any incidents of a particular category of fraud, or only a limited number. The Audit Commission

---

<sup>1</sup> <http://www.audit-commission.gov.uk/counter-fraud/>

considers that this is unlikely to reflect the true picture of fraudulent activity in an area but rather that a local authority has poor systems and controls in place to prevent and detect fraud. This would, in turn, encourage the targeting of fraud to areas that have potential weaknesses.

12. By way of an example, the Audit Commission have referred to the operation of the single person council tax discount<sup>2</sup>. The Audit Commission have suggested that the release of the requested information could be a signal to residents of some local authorities that there were not rigorous checks in place to identify fraudulent claims of the discount.
13. The Audit Commission have also directed the Commissioner to incidents of tenancy fraud in local authority housing; an issue that has recently attracted wider media attention. Making the dataset available would, according to the Audit Commission, enable fraudsters to compare the performance of different authorities in preventing and detecting this type of fraud and target their activities accordingly.
14. In his guidance<sup>3</sup> on the exemption, the Commissioner sets out at paragraph 19 the circumstances in which section 31(1)(a) will apply:

*The exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could be used by a public authority to withhold copies of information it had provided to a law enforcement agency as part of an investigation. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime for example, by disclosing its own security procedures, such as alarm codes.*

15. The question in this case is whether disclosure would make local authorities, as the organisations that provide the data to the Audit Commission, more *vulnerable to crime*.

---

<sup>2</sup> Protecting the Public Purse 2012 states that to qualify for a single person discount, residents must be 18 or over and be the only member of a household. However, residents can also apply for this discount if anyone else living at the address falls into certain categories that allow them not to be counted as 'other occupiers'.

<sup>3</sup>[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/law-enforcement-foi-section-31.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx)

16. It should be pointed out that the Commissioner has not been provided with any specific evidence demonstrating a link between disclosure of information of this nature and the prejudice described. Further, he is aware of, and considers some weight could potentially be stored by, a selection of arguments previously made by a complainant in a separate but related case. This was in the context of an application made to the Audit Commission in 2011 for the fraud figures compiled for the Protecting Public Purse report in connection with one local authority. The case itself was not required to be resolved by way of a decision notice.
17. Firstly, the complainant pointed out that low detection levels by a local authority could be indicative of poor controls or low levels of fraud. This uncertainty means that the information would not be of any particular assistance to potential fraudsters. Secondly, for comparison purposes, the complainant made reference to the publishing of crime statistics by the police, which suggested that the prejudice claimed by the Audit Commission was overplayed. Thirdly, the complainant considered that the fact the Audit Commission had released some figures relating to a previous year (2010) indicated that the risk posed by disclosure was not serious.
18. The Audit Commission replied by outlining the response of the Head of Counter Fraud:

*He has explained that the police crime statistics relate to information on crimes "committed" and thus generally reflect environmental, social and geographical issues in relation to an area. At best this only reflects, to a small degree, the crime prevention and detection activities of the police in that area. In addition, criminologists accept that much crime has specific geographic aspects, for example, certain disorder crimes are commonly committed in city centre areas at weekends, regardless of police activity. This, however, is not the case in relation to fraud.*

*Fraud is different from most crimes in that it is not normally "visible". Thus unlike burglary or vandalism, it is usually not found unless specifically looked for. Fraud is also generally viewed by criminologists as not having the same geographic/social element as many other crimes. The Audit Commission collects information on detected fraud, which the Protecting the Public Purse (PPP) 2011 report (page 7) makes clear is a combination of a number of factors:*

- *the actual level of fraud;*
- *resources applied to identify and investigate such fraud;*

- *success of detection; and*
- *improved methods of recording frauds.*

*As such, the information collected can be said to reflect, to a significant extent, the capacity and capability of councils to effectively deal with fraud, not the social/geographic issues that published police data represents.*

*The Audit Commission is working with national and regional bodies to provide anonymised local and regional analysis of data. This to help individual councils identify weakness in their counter fraud arrangements and to strengthen those defences but without making the data available in such a way that fraudsters could potentially misuse it [...].*

19. The Audit Commission continued by saying that the decision to release the 2009/10 data was based both on the recognition that it represented 'older' data and the fact that the 2010/11 information reflected the local authority's new risk and counter fraud capacity environment.
20. The Commissioner is satisfied that the wider principles underpinning the Audit Commissioner's arguments in the separate case carry over to the considerations featured here, albeit focusing on information provided by all local authorities rather than just one. From an analysis of the Audit Commission's submissions, he is satisfied that they demonstrate a link between disclosure and the harm described by the exemption. This is because he believes they cogently explain how the information could be used that would make local authorities more vulnerable to crime. The next question for the Commissioner to consider is therefore whether there is a real and significant risk of the prejudice arising through disclosure.
21. In this case, the Audit Commission have not clearly specified the likelihood of prejudice occurring – that is, 'would' or 'would be likely'. In the absence of its designation, the Commissioner will consider the exemption as if the lower threshold of prejudice has been applied. Although this places a lower evidential burden on a public authority than the 'would' limb of the exemption, it nevertheless connotes that the risk of prejudice is substantially more than remote.
22. In practice, the Commissioner considers that to find the specified threshold of prejudice has been met it must be judged, one, that there is a real possibility that the circumstances giving rise to the prejudice would occur and, two, that the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote. It is the Commissioner's view that both of these conditions are satisfied here.

The Commissioner considers that the Audit Commission's explanation about how the information would entrench or spread fraudulent activity is conceivable and realistic based on the contents of the requested information.

23. The consequence of this is that the Commissioner has found that disclosure would be likely to result in the prejudicial effect referred to by the Audit Commission and thus section 31(1)(a) of FOIA is engaged. As section 31 is a qualified exemption, it is left for the Commissioner to consider the balance of the public interest test.

### **Public interest arguments in favour of disclosure**

24. The Audit Commission have acknowledged in their correspondence with the complainant that there is a strong public interest in transparency and knowing how much fraud is committed against a local authority. On the one hand, this should give confidence to the public that issues relating to fraud are being dealt with appropriately. On the other hand, there is a strong public interest in disclosure where it demonstrates that insufficient attention is being given by an authority to the prevention and detection of fraud.
25. In making her complaint to the Commissioner, the complainant has also submitted arguments that she considers reinforce the case for disclosure:
- *Councils should be held accountable publicly for the amount of effort they devote to tackling fraud and to protecting public money. This requires public scrutiny.*
  - *Disclosure would assist both with focusing attention on areas where further action is needed and with promoting public reassurance where appropriate.*
  - *Furthermore releasing this material could help alert law-abiding members of the public to problems and discrepancies, and this could result in a flow of useful flow of information and tip-offs that would assist the detection and prevention of fraud.*
  - *We believe by publishing this information it would force those weaker councils to strengthen their defences against fraud. Putting this information in the public domain will mean those councils will improve their procedures in order to prevent fraud from happening in the first place.*

### **Public interest arguments in favour of maintaining the exemption**

26. The Audit Commission considers that any weight the arguments for disclosure possess is trumped by the public interest in protecting local authorities from fraud and the effects that fraudulent activities will have on public revenues.
27. In advancing this claim, the Audit Commission has accepted the complainant's argument that a local authority's counter-fraud measures should be scrutinised so as to ensure their effectiveness. However, unlike the complainant who considers this would be achieved through public attention, the Audit Commission has pointed out that it already works with national and regional bodies to help strengthen defences against fraud.

### **Balance of the public interest arguments**

28. Returning to his guidance on section 31, the Commissioner says at paragraph 92 that there "is a clear public interest in protecting society from the impact of crime. The greater the potential for a disclosure to result in crime, the greater the public interest in maintaining the exemption." The Tribunal has also previously placed great importance on the protection afforded by the exemption, finding that there must be powerful justification for ordering disclosure where there is a risk of criminality. Along these lines, the Tribunal in *Bowditch v Information Commissioner & The British Broadcasting Corporation* (EA/2012/0168)<sup>4</sup> commented, albeit in a different context, that "uncertainty itself encourages compliance" (paragraph 29) – a point the Commissioner considers has some relevance here.
29. It naturally follows that the case for withholding information will be considerably strengthened simply by virtue of the acceptance that the exemption is engaged. However, the Commissioner recognises that there will be occasions when the case for disclosure should prevail because either the circumstances mean that the specific arguments for disclosure are particularly strong, or the severity of the prejudice is not

---

<sup>4</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i906/EA20120168\\_Decision\\_20121130.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i906/EA20120168_Decision_20121130.pdf)



especially acute, or both. In the Commissioner's view, this is not one of those occasions.

30. The Commissioner observes that, according to the Audit Commission, an important function of collating the requested information is to allow weaknesses in a public authority's checks and controls to be identified. As a regime already exists by which public authorities performance is scrutinised, this would weaken to some extent the wider argument for disclosure. Furthermore, the Commissioner considers that it would be self-defeating to release information that could actually be used in a way that would be harmful to a local authority and equally the local population; any incidents of fraud costing the authority not only in revenue streams but also in relation to the resources needed to combat any fraudulent activity.
31. The Commissioner is aware that fraud is a real, and significant, threat to the efficient and effective working of local authorities. A local authority must therefore remain vigilant in the face of this activity and, in the Commissioner's view, it would be unhelpful to do anything that could risk further weakening a local authority's ability to fight fraud unless there are entirely reasonable grounds to do so. In this context, the Commissioner has not found compelling the case for disclosure when placed alongside the powerful arguments in favour of withholding the requested information.
32. The Commissioner has therefore decided that, in all the circumstances, the public interest in maintaining section 31(1)(a) of FOIA outweighs the public interest in disclosure.

## Right of appeal

---

33. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Rachael Cragg**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**