

## RE COUNCIL TAX AND ELECTORAL REGISTER DATA

### FURTHER ADVICE

#### GENERAL

- 1 I am asked to advise the Audit Commission on certain questions arising in connection with the powers of an appointed auditor to require an electoral registration officer or a local authority to provide the appointed auditor with a copy of the full electoral register. I have advised previously on these and related issues on 26 November 2007 and this advice should be read with that earlier advice.

#### BACKGROUND

- 2 By way of background, local authorities are required to have their accounts audited: see section 2 of the Audit Commission Act 1998 (“the Act”). Auditors are appointed for this purpose by the Audit Commission: see section 3 of the Act. Those appointed auditors have certain powers to require that they be provided with documents relating to the local authority whose accounts they are auditing: see section 6 of the Act.
- 3 Questions have arisen as to the power of an appointed auditor to require officers of a local authority, or the electoral registration officer, to provide a copy of the

full electoral register. In addition, the appointed auditor is seeking documents containing council tax information for the local authority.

- 4 This information is being sought in the context of the National Fraud Initiative. In brief, pilot schemes in London have demonstrated that a large amount of revenue (in the region of £50-100 million pounds annually) is being lost by local authorities. In particular, persons are claiming to be a single occupant of a property and so eligible for a 25% discount on the council tax for which they are liable. Frequently, there are other persons living at the property and the person is not in fact eligible to receive the single occupant discount. Consequently, the local authority is losing revenue.
  
- 5 The provision of the electoral roll and council tax records for a particular local authority will enable the appointed auditor for that authority to match or compare the two sources of data. The electoral register may indicate, for example, that there is more than one person living in a particular property but the council tax records may show that the person liable for paying council tax is claiming the single occupant discount. That may indicate, amongst other things, that fraudulent claims for single person discounts are being made. Where potential problems arise, those matters are referred back to the local authority concerned to investigate further,

6 In my opinion of 26 November 2007, I advised, in summary, that an appointed auditor could require the production from local authority officers, or from the electoral registration officer, of a copy of the full electoral register for that particular local authority pursuant to section 6 of the Act. An appointed auditor could legitimately conclude that the production of the full electoral register and the council tax, and a comparison of the data contained in each set of records, was necessary for the discharge of his statutory functions, in particular those under section 5 of the Act. I considered that the disclosure of a copy of the full electoral register to an appointed auditor would not involve a contravention of regulations 94 or 107 of the Representation of the People (England and Wales) Regulations 2001 (“the Regulations”).

7 A local authority, Cannock Chase District Council (acting for itself and others) had obtained an opinion from Mr Timothy Pitt-Payne on 7 November 2007 (“the Cannock Chase Opinion”). He expressed the view that councillors and employees of the local authority could not provide the appointed auditor with a copy of the full electoral register as that was prohibited by regulation 107 of the Regulations. He considered that regulation 107(4)(a) of the Regulations, which would have permitted disclosure to the appointed auditor, did not apply for, essentially two reasons:

- (1) the disclosure would not be for a statutory function of the local authority; it would be for a function of the Audit Commission;

(2) it would not be for a function relating to security law enforcement and crime prevention but rather for a function relating to the economy, efficiency and effectiveness with which resources are used by public authorities.

8 The Cannock Chase opinion also expressed the view that disclosure by the electoral registration officer would not involve a contravention of regulation 94 of the Regulations. However, the Cannock Chase Opinion considered regulation 107 of the Regulations also applied to the electoral registration officer as he was an employee of the local authority. It considered that the requirements of regulation 107 were not satisfied.

9 Paragraph 57 of the Cannock Chase opinion notes that the Audit Commission may provide further explanation or analysis as to why regulation 107 does not have the effect described. The Cannock Chase opinion was, of course, written before my opinion of 26 November 2007.

10 The Association of Electoral Administrators (“AEA”) has also issued a statement expressing views on the correctness of certain aspects of my earlier opinion.

11 Against that background, I am asked to advise on the points raised in the Cannock Chase Opinion, referred to above, and on the points made by the AEA.

## LEGISLATIVE FRAMEWORK

12 The statutory provisions governing the powers of appointed auditors to require the provision of information are contained in section 6 of the Act which provides, so far as material, that:

“(1) An auditor has a right of access at all reasonable times to every document relating to a body subject to audit which appears to him necessary for the purposes of his functions under this Act.

“(2) An auditor may –

- (a) require a person holding or accountable for any such document to give such information as he thinks necessary for the purpose of his functions under this Act; and
- (b) if he thinks it necessary, to require the person to attend before him in person to give the information or explanation or to produce the document.

.....

“(4) Without prejudice to subsection (2), the auditor may –

- (a) require any officer or member of a body subject to audit to give him such information or explanation as is necessary for the purposes of his functions under this Act; and
- (b) if he thinks it necessary, require the officer or the member to attend before him in person to give the information or explanation.

“(5) Without prejudice to subsections (1) to 4), every body subject to audit shall provide the auditor with every facility and all information which he may reasonably require for the purposes of his functions under this Act.

“(6) A person who without reasonable excuse fails to comply with any requirement of an auditor under subsection (1), (2) or (4) is guilty of an offence.....”

13 In addition, there are specific provisions governing the electoral registration officer and the electoral register. Section 8 of the Representation of the People Act 1983 (“the 1983 Act”) provides that “there shall be electoral registration

officers”. In England, the district council or London Borough must appoint an officer of the council as the electoral registration officer. Although appointed by the local authority, and although also holding a post as an officer of that authority, the electoral registration officer is, in my opinion, an independent statutory officer with specific statutory duties placed upon him so far as electoral matters are concerned.

14 Section 9(1)(b) of the 1983 Act provides for each electoral registration officer to maintain registers of local government electors. Part VI of the Regulations deals with the supply of the register to other persons. Restrictions are imposed on the persons to whom, and the purposes for which, copies of the electoral register may be disclosed.

15 Regulation 94 of the Regulations provides, so far as material, that:

“94 (1) This regulation applies to –  
    (a) the registration officer;  
    (b) any deputy registration officer  
    (c) any person appointed to assist any such officer or who in the course of his employment is assigned to assist any such officer in his registration duties.  
    .....  
(2) No person to whom this regulation applies may –  
    (a) supply to any person a copy of the full register  
    (b) disclose information contained in it (and not contained in the edited register), or  
    (c) make any use of such information  
otherwise than in accordance with an enactment, including these Regulations.”

- 16 Regulation 102(1) of the Regulations provides that persons falling within regulations 103 to 109 of the Regulations may request a copy of the electoral register. The electoral registration officer shall supply the register in accordance with a request: see regulation 102(4) of the Regulations. A person who is provided with that information under regulation 102(4) must comply with any restrictions which apply under whichever of regulations 103 to 109 of the Regulations entitles that person to obtain the document: see regulation 102(6) of the Regulations.
- 17 Local authorities obtain the electoral register by virtue of falling within regulation 107 of the Regulations and are subject to the restrictions imposed by that regulation. Regulation 107 provides, so far as material, that:

“107(1) Paragraphs (2) to (5) of this regulation apply to –

- (a) the local authority by which the registration officer was appointed; and
- (b) a local authority whose area falls wholly or partly within the registration area of that local authority, other than a parish council or community council...

.....

“(3) Subject to paragraph (4) below, no councillor or employee of the local authority may –

- (a) supply a copy of the full register other than to another councillor or employee of the same local authority;
- (b) disclose any information contained in it that is not included in the edited register; or
- (c) make use of any such information .

“(4) A councillor or employee of the local authority may supply a copy of the register or disclose or make use of information contained in it that is not contained in the edited register –

(a) where necessary for the discharge of a statutory function of the local authority or any other local authority relating to security, law enforcement and crime prevention.....”.

#### SUPPLY OF THE REGISTER BY LOCAL AUTHORITY EMPLOYEES

18 Local authorities will generally have obtained a copy of the full electoral register by making a request to the electoral registration officer under regulation 102 of the Regulations. A councillor or employee of the authority concerned may not supply a copy of the full register to any person (including the appointed auditor) other than a councillor or employee of that authority unless such disclosure is permitted by regulation 107(4) of the Regulations. The two points raised in the Cannock Chase Opinion are first that the disclosure is not for a statutory function of the authority but for a function of the Audit Commission (more accurately, a function of the appointed auditor who is an independent officer holder separate from, although appointed by, the Audit Commission). The second point raised is that the disclosure would not be for a function relating to security, law enforcement and crime prevention within the meaning of regulation 107(4) of the Regulations.

19 On the first point, the position in my opinion is that the disclosure is for “a function” of the local authority. The background is that local authorities must make up their accounts annually and have those accounts audited. Furthermore, the responsible financial officer for a local authority is required to determine its

accounting records and accounting control systems. Those systems must, among other things, include measures to “enable the prevention and detection of inaccuracies and fraud”: see regulation 5(4) of the Accounts and Audit Regulations 2003 made pursuant to section 27 of the Act. The appointed auditor is required by an examination of the accounts and otherwise to satisfy himself of a number of matters including that the body whose accounts are being audited “has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources”: see section 5 of the Act. The general functions of the auditor are described in *Asher v Secretary of State* [1974] Ch. 208 at 219 and *West Wiltshire District Council v Garland* [1995] Ch. 279 at page 308 (both summarised in my earlier opinion). Essentially, the aim is to ensure that the money of the audited body has been properly spent and accounted for.

- 20 Against that background, appointed auditors have a specific power to require persons, which will include officers and members of the authority, to produce documents (see section 6(2) of the Act). Failure to comply is a criminal offence: section 6(5) of the Act. As a minimum, in my opinion, officers and members of the authority have an implied statutory power to provide such documents.
- 21 Consequently, in my opinion, the provision of information to an appointed auditor pursuant to a request under section 6(2) of the Act is done in the discharge of a function of a local authority. It is done in the exercise of a power to provide such information. As was expressed by the House of Lords, albeit in a different

context, the “word “functions” embraces all the duties and powers of the local authority; the sum total of the activities that Parliament has entrusted to it”: see *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 A.C. 1 at p. 29

22 More broadly, in my opinion, a local authority has statutory obligations to have its accounts audited. As part of that process, the auditor has power to request, and the local authority to provide that information. There is also a specific obligation on the local authority to “provide the auditor with every facility and all information that he may reasonably require for the purposes of his functions under this Act”: see section 6(4) of the Act. In my opinion, steps taken by the local authority to facilitate the audit of its accounts, by the provision of information pursuant to a request or in the discharge of its section 6(4) duty, are acts done in the discharge of “a function of the local authority”.

23 Furthermore, in my opinion, the disclosure of the information does relate to the prevention of crime. The functions under section 5 of the Act require the appointed auditor to satisfy himself that there are proper arrangements for ensuring economy, efficiency and effectiveness in the use of resources. Those arrangements are to include arrangements for ensuring that the local authority’s affairs are managed in accordance with proper standards of conduct and to prevent and detect fraud and corruption: see paragraphs 19 and 21 of the current Code of Practice issued under section 4 of the Act. Furthermore, potential cases of

fraud which are identified when the electoral register is compared with council tax records are referred back to the local authority for investigation. In my opinion, therefore, the disclosure of information to the auditor for the purposes of ensuring that there are adequate mechanisms in place for detecting and preventing fraud is for a function of a local authority “relating to” crime prevention.

24 For those reasons, in my opinion, the provision by an officer or member of a local authority of the full electoral register following a request by the appointed auditor would be permitted by regulation 107(4) of the Regulations.

#### PROVISION BY THE ELECTORAL REGISTRATION OFFICER

25 In my opinion, the question of whether or not an appointed auditor may require an electoral registration officer to provide him with a copy of the full electoral register depends on two questions, first, whether the powers of the appointed auditor to require the production of information extends to electoral registration officers and secondly, whether the supply of a copy of the full electoral register consequent upon such a requirement is permitted by the Regulations.

26 On the first point, in my opinion, the power in section 6(2) of the Act to require “any person” to provide information or produce a document applies to the electoral registration officer. That phrase includes persons who are employed by the local authority. It includes persons who contract with the local authority (see *R v Hurle-Hobbs* [1945] 1 KB 165). There is no reason at all, in my opinion, why

the phrase “any person” cannot encompass an electoral registration officer, i.e. a person holding an independent statutory office.

- 27 On the second point, regulation 94 of the Regulations provides that an electoral registration officer cannot supply to any other person a copy of the full register “otherwise than in accordance with an enactment including these Regulations.”
- 28 In my opinion, producing a copy of the full electoral register pursuant to a request by the appointed auditor under section 6(2) of the Act would be to supply it “in accordance with an enactment” –i.e., in accordance with the provisions of section 6(2) of the Act. In my opinion, therefore, supply of a copy of the full electoral register by the electoral registration officer to the appointed auditor pursuant to a request under section 6(2) of the Act would not involve a contravention of regulation 94 of the Regulations. I note that the Cannock Chase opinion agrees with that analysis: see paragraph 50 of that opinion.
- 29 The reason why the Cannock Chase opinion considered that electoral registration officers could not supply the appointed auditor with a copy of the full electoral register proceeds, essentially, in a two-stage argument. First, it was considered that regulation 107 applied to the electoral registration officer as well as regulation 94 of the Regulations and secondly, that the requirements of regulation 107(4) were not satisfied.

- 30 On the first point, in my opinion, regulation 107(4) of the Regulations does not apply to the actions of the electoral registration officer. Supply by the electoral registration officer is governed by regulation 94 not regulation 107. I reach that conclusion for the following reasons.
- 31 First, regulation 107(1) of the Regulations identifies the persons who may request the electoral registration officer to provide a copy of the register pursuant to regulation 102: in the case of regulation 107 it is the local authority. Secondly, a person - here the local authority - who obtains a copy from the electoral registration is bound by the restrictions in regulation 107 (see the wording of regulation 102(6) of the Regulations). In other words, as a matter of literal construction of regulations 102 and 107, the restrictions in regulation 107 attach to the members and officers of the local authority which receives a copy of the register. Regulation 107 does not apply to the electoral registration officer who supplies the register to the local authority.
- 32 Secondly, that interpretation accords with the structure of the Regulations. That is why the electoral registration officer is dealt within in regulation 94 of the Regulations. That is necessary because he is not otherwise caught by regulation 107 and there needs to be provisions in the Regulations authorising him to disclose the register. Similarly, when an electoral register supplies a copy of the register to one of the other persons falling within the description in regulations 103 to 106 or 108 to 109, the electoral registration officer does not also have to

satisfy the requirements of regulation 107 of the Regulations because he also happens to be employee of the local authority to whom the register relates. It is sufficient if the person falls within the relevant regulations and a request is made in accordance with regulation 102 of the Regulations. If those requirements are satisfied, the provision of a copy of the register by the electoral registration officer is done in accordance with the Regulations and is authorized by regulation 94 of the Regulations.

33 Thirdly, that is also consistent with the language of regulation 107(3) which refers to councillors and employees. The electoral registration officer is an independent statutory officer holder. It is correct that he is also an officer and hence an employee of the local authority who appointed him. But the provisions of regulation 107(3) of the Regulations are, in my opinion, applicable to members and employees of the authority other than the electoral registration officer when he is acting in his capacity as registration officer.

34 In those circumstances, the second point, whether the restrictions in regulation 107(4) of the Regulations are satisfied, does not arise as that regulation does not apply to disclosure by an electoral registration officer. For completeness, if regulation 107(4) had been applicable, then, in my opinion, its requirements would have been satisfied for the reasons given above.

35 I turn next to specific points made by the AEA in its statement. First, the AEA points out, correctly, that the Regulations set a statutory framework by which the register is managed and set out the persons to whom the register may be supplied and for what it may be used. Neither the Audit Commission nor appointed auditors are specifically mentioned as persons who have a right *under the Regulations* to be supplied with a copy of the full register. However, an appointed auditor does have a right under section 6 of the Act to require production of documents relating to a local authority which include, in my opinion, the electoral register. The appointed auditor does not need a specific right under the Regulations to require the information – he has it under another enactment. Nor do the Regulations prohibit the supply by the electoral registration officer of a copy of the full register. Regulation 94 of the Regulations provides that the electoral registration officer is not prohibited from supplying the register if he does so in accordance with an enactment. He would be supplying it in accordance with an enactment, i.e. section 6 of the Act, if he were requested to produce it by an appointed auditor.

36 Secondly, the statement refers to the fact that the register is owned by the electoral registration officer and is only supplied to the local authority for specific purposes laid out in the Regulations. In that regard, as already explained, the Regulations contemplate and permit supply by the electoral registration officer of the register in accordance with an enactment (including, but not limited to the Regulations). Production of the information can be required under the provisions

of an enactment, i.e. under section 6 of the Act. So far as supply by the local authority is concerned, it is correct that councillors and employees may only supply it where that is necessary for the discharge of a function of the authority relating, amongst other things, to crime prevention. Supply in the exercise of a power to provide information to an appointed auditor in the course of an audit of the local authority accounts as part of the machinery of ensuring that adequate arrangements are in place to prevent and detect fraud is, in my opinion, supply for the discharge of a statutory function of the authority relating to crime prevention for the reasons given above.

37 Thirdly, the statement states that no power is cited in the earlier opinion as supporting the fact that copies of the full register may be requested from the electoral registration officer. In fact, the power is cited at paragraph 22 of my earlier opinion. It is section 6(2) of the Act. The statement notes that the electoral registration officer is an independent statutory officer holder and he is not an auditable body. That is, of course, correct. But the power under section 6(2) of the Act (unlike that in section 6(4) of the Act) applies to “any person” holding a document relating to a body subject to audit. “Any person” includes, in my opinion, independent statutory office holders if they are holding documents relating to a body subject to audit. I accept that the Regulations set out rights to obtain copies of the register and impose prohibitions on the supply and use of information and provides criminal sanctions for unlawful disclosure. However, for the reasons given, the production of the register to an appointed auditor would

be made in accordance with an enactment, section 6(2) of the Act, it would be compatible with Regulation 94 of the Regulations (which specifically contemplates disclosure in accordance with enactments) and would not involve a contravention of the Regulations and would not give rise to any criminal sanctions.

38 Finally, the two regimes – the regime governing audits contained in the Act and the regime governing the register in the Regulations – are not contradictory, they are complementary. Regulation 94 contemplates that the register may be supplied in accordance with an enactment. That is what the Act provides for.

39 For those reasons, in my opinion, the production of a copy of the full electoral register by the electoral registration officer to the appointed auditor pursuant to a request under section 6(2) of the Act would not involve a contravention of regulation 94 and would not involve the commission of an offence contrary to regulation 115 of the Regulations.

## CONCLUSIONS

40 For the reasons set out above, in my opinion, the production of the full electoral register by an officer of a local authority to an appointed auditor pursuant to a request under section 6(2) of the Act would not involve a contravention of regulation 107 of the Regulations and would not involve the commission of an offence contrary to regulation 115 of the Regulations. Further the production of

the full electoral register by an electoral registration officer may be required by the appointed auditor under section 6(2) of the Act. The production of the full electoral register in response to such a request is authorised by Regulation 94 of the Regulations and would not involve the commission of an offence by the electoral registration officer contrary to regulation 115 of the Regulations.

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