

Report to the Finance and Performance Management Cabinet Committee



**Epping Forest
District Council**

Date of meeting: 28 January 2008.

Portfolio: Finance, Performance Management & Corporate Support Services.

Subject: National Fraud Initiative (NFI) - Supply of Electoral Register.

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Recommendations:

- (1) To note the initial response of the Corporate Governance Group, the Electoral Registration Officer and the Monitoring Officer to the NFI data matching initiative of the Audit Commission;**
- (2) To note the position following a further review by a report from the Corporate Governance Group at its meeting on 16 January 2008; and**
- (3) To await further developments before a final position is taken by this Council.**

Report:

1. The Audit Commission contacted all District Councils with a request that an electronic copy of the electoral register for each District be supplied to them for the purposes of the NFI. The proposal was that the names and addresses on the register would be used to match against the names and addresses of those claiming Council Tax discounts or housing benefits in order to help in identifying any cases of fraud. An important element of this cross-matching of data is checking of single person Council Tax discounts.
2. The request was presented to Councils as relating to information to which the Commission is entitled by statute. The statutory authority quoted was the Audit Commission Act 1998 (Section 6(1)). This section refers to the Commission being able to request information relating to a body subject to Audit under that Act. It was argued that the cross-matching exercise under NFI was akin to an audit and related to bodies (i.e. District Councils) which are within the remit of the Commission.
3. This request provoked considerable controversy in local government circles, particularly among Electoral Registration Officers. Although many District Councils complied with the Commission's request, a number did not. The latter were supported in their stance by the Association of Electoral Administrators and legal opinions given by Monitoring Officers around the country.
4. These objections revolved around the Representation of the People Regulations 2001 which were argued as not giving the authority to supply the register to a third party. Regulation 94(3) enables a Registration Officer to disclose the full register only "in accordance with enactment", which would, in this case be the 1998 Act quoted above. The 2001 Regulations authorise the release of personal information on the register for law enforcement and crime prevention purposes. It was argued that this could only relate to specific cases not the whole register as there was no authority for wholesale supply of the register (a practice which has been termed "a fishing trip").

5. Arguments about the statutory powers abounded and a number of other issues arose, including:

- (a) the need to give notice to Council Tax payers under the fair processing rules;
- (b) possible conflicts with the Data Protection and Human Rights Acts;
- (c) difficulty over electors who had specified that their personal data should not appear in the published register; and
- (d) the position of the Council as custodian of the register rather than the Electoral Registration Officer, to whom the Commission had addressed the request.

6. Eventually both the Information Commissioner, the Electoral Commission and the Ministry of Justice became involved in the debate. At the time of writing, the Ministry of Justice appears to be conducting a review of the position, working with the two Commissions to resolve the issue.

7. The Corporate Governance Group (CGG) considered this issue at its meeting on 3 October 2007. This is an officer group comprising the statutory officers of the Council and, where appropriate their deputies, plus the Chief Internal Auditor. Both the Electoral Registration Officer and the Monitoring Officer expressed reservations about the legal basis under which the register was to be supplied to the Audit Commission. It was the decision of the CGG to refuse the request for the reasons given in the Chief Internal Auditor's letter dated 15 October 2007 attached at Appendix 1.

8. It was also agreed that the action taken should be reported to the Audit and Governance and Finance and Performance Management Cabinet Committee.

9. Members should be reassured that the Council remains committed to anti fraud measures and is fully participating in all other aspects of the National Fraud Initiative. However, if the register is to be used for this purpose without clear statutory backing, any reasonable risk assessment would identify the high probability that an aggrieved elector would challenge that action. One benefit of this episode is the Government may now clarify the statutory requirements.

Further Developments:

10. An earlier version of this report was submitted to the Finance and Performance Management Cabinet Committee on 10 December 2007, which noted the position at that time and asked to be kept informed about developments. Since this report was submitted, the Council has received a letter dated 14 December 2007 (set out at Appendix 2) from the Audit Commission. The Council has not, however, received a reply to the letter set out in Appendix 1.

11. Enclosed with the latest Audit Commission letter was a copy of Leading Counsel's opinion (Clive Lewis Q.C.). The Audit Commission issued the instructions to Leading Counsel. Appendix 3 to this report sets out an extract of Leading Counsel's conclusions.

12. It will be noted in 40(3) that it is "questionable" whether the Audit Commission could require the Electoral Registration Officer to provide the full electoral register to the Audit Commission. Leading Counsel goes on to say that in practice, it is the local authority which would be required to supply this.

13. Elsewhere in the opinion, Leading Counsel gives the opinion that both in relation to the electoral register and Council Tax records there is no requirement to serve "fair processing" notices on individual Council Tax payers or persons shown on the electoral register. This is because exemptions under the Data Protection Act are said to apply. This

opinion contradicts the previous view expressed by the Audit Commission and have not been supported by the Information Commissioner (see below).

14. The Corporate Governance Group (CGG) has been monitoring the developing debate on this subject. Appendix 4 shows a further e-mailed letter from the Audit Commission concerning the data matching initiative.

15. The Information Commissioner has issued advice to the Association of Electoral Administrators on the issue. An extract of the Commissioner's comments is set out below:

"In relation to the issue of lawfulness, our approach is to concentrate upon the DPA, the Freedom of Information Act 2000 and the associated legislation regulated by this office rather than to make judgments about aspects of any other legislation, especially if they are the subject of dispute by the parties involved in the issue. It is our view that it is for the organisations concerned to determine whether or not a lawful basis exists for their activities, within the legal framework that applies to them, or to consult an appropriate external body which may have specialist knowledge of the relevant aspect of law.

In practice this means that unless a public body is clearly acting beyond their legal powers, then we are unlikely to take action on the sole basis of lawfulness. However, if we can clearly identify either fair processing issues or detriment to individuals, these will be considered when determining whether or not the ICO will take any action relating to the First Principle in any particular case.

In spite of the above, we are aware that this issue is causing a great deal of concern and that many local authorities are looking to the ICO for guidance. Therefore, in light of the fact that access to the full electoral register is governed by the Representation of the People (England and Wales) Regulations 2001 (RoPR) we have sought advice from the Electoral Commission because of their specialist knowledge of, and responsibility for, electoral law".

16. Following the request from the Information Commissioner the Electoral Commissioner has given the following advice:

"The Audit Commission is requesting the register to assist with the discharge of its statutory functions and has quoted Section 6 Audit Commission Act 1998 as entitling it to this information. The Audit Commission is not a local authority for the purpose of Regulation 107 of the 2001 Representation of the People Regulations. Any local authority considering a request from the Audit Commission should consider whether disclosure of the register is necessary for the discharge of its own statutory functions, or those of another local authority. These may include consideration of an authority's functions in respect of Section 6 Audit Commission. The question of whether passing this information to the Audit Commission is necessary for the discharge of a local authority's functions is one for the authority. If it is, then the disclosure would be in accordance with Regulation 107(4).

A request might also be made to the registration officer directly. Regulation 94(3) provides that the registration officer shall not supply copies, disclose or make use of information contained in the register otherwise than in accordance with an enactment. That includes, but is not limited to, the Regulations themselves. The provision therefore allows the disclosure of the register by a registration officer to another body if provided for under another enactment.

It is therefore necessary for the registration officer to decide whether Section 6 Audit Commission Act applies where the registration officer is holding the register. The interpretation of Section 6 is a matter on which the registration officer must obtain legal advice. If that advice is that the provision operates to require the registration

officer to provide the information then the disclosure by the registration officer would be 'in accordance with an enactment' as required by Regulation 94(3)".

17. The conclusion of the Corporate Governance Group at present is that the statutory position is not clarified and gives no certainty that the Council could withstand challenge if the data requested were released.

Statement in Support of Recommended Action:

18. This report is designed to brief the Committee on a national issue regarding use of personal data.

Other Options for Action:

19. None at present.

Consultation Undertaken:

20. Corporate Governance Group.

Resource Implications:

Budget Provision: Existing resources.

Personnel: Existing resources.

Land: Nil.

Community Plan/BVPP reference: None.

Relevant statutory powers: Audit Commission Act 1998 and Representation of the Peoples Acts and Supporting Regulations.

Background Papers: Audit Commission letter dated June 2007. Review Paper - Association of Electoral Administrators dated 21 December 2007.

Environmental/Human Rights Act/Crime and Disorder Act Implications: Human Rights Act issues may arise, and are referred to in the report.

Key Decision Reference (if required): None.