

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 January 2014

**Public Authority:** Scarborough Borough Council  
**Address:** Town Hall  
St Nicholas Street  
Scarborough  
North Yorkshire  
YO11 2HG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to Scarborough Spa and Whitby Pavilion. Scarborough Borough Council refused to provide the information, citing section 12 of the FOIA and confirming that the request was being refused on cost grounds.
2. The Commissioner's decision is that Scarborough Borough Council:
  - Correctly applied section 12(2) to refuse the request;
  - failed to comply with the duty to provide advice and assistance under section 16(1) of the FOIA at the time of the request.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 23 April 2013, the complainant wrote to Scarborough Borough Council (the "council") and requested information in the following terms:

*"1) All information held by the council regarding the running costs of Scarborough Spa and Whitby Pavilion.*

*2) All correspondence between councillors and council officers and Sheffield International Venues, SIV Events Ltd and Sheffield City Trust.*

*For all of the above information please provide information for the last three years. If this falls outside costs limits, please provide information for the last 2 years. If this still falls outside cost limits, please provide only data relating to 2) for the longest possible period."*

5. The council responded on 10 June 2013. It provided information in response to part 1) of the request. In relation to part 2), it stated that the cost of complying with the request would exceed the appropriate limit and confirmed that, in refusing to provide the information, it was relying on section 12 of the FOIA. The council also stated that it was likely that the requested information was also subject to the exemptions for information provided in confidence (section 41), legal professional privilege (section 42) and prejudice to commercial interests (section 43(2)).

6. On 11 June 2013 the complainant submitted a refined version of their request which asked for:

*"Please restrict your response to electronic communication between SIV, SIV Events Ltd and Sheffield City Trust."*

7. On 22 July 2013 the council issued a further response which confirmed that it was still relying on section 12 and the exemptions cited in its initial response.

8. Following an internal review the council wrote to the complainant on 9 August 2013. It stated that it was upholding its handling of the request.

## Scope of the case

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9. On 24 July 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the information requested at part 2) of the request.
11. At the outset of his investigation it appeared to the Commissioner that, in refusing the request, the council might have withdrawn its reliance on section 12. It was not apparent in the council's responses to the complainant's refined request and internal review that section 12 was still being applied.
12. The council confirmed to the Commissioner that it was indeed still primarily relying on section 12 of the FOIA to refuse the request. At the Commissioner's direction it wrote to the complainant to confirm this and offered to provide information which it had located, retrieved and extracted up to the threshold of the appropriate limit.
13. The Commissioner has considered whether the council has correctly applied section 12 to the complainant's refined request.

## Reasons for decision

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### Section 12 – cost of compliance exceeds the appropriate limit

14. Section 12 of the FOIA states that:

*"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."*

15. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations') sets the appropriate limit at £450 for the public authority in question. Under these Regulations, a public authority can charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work.
16. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
  - (a) determining whether it holds the information,

- (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
17. The council confirmed that, in attempting to comply with the refined request, its ICT department spent 2 hours locating and retrieving all relevant communications which fell within the scope. It explained that it was then necessary to go through each individual communication to extract the relevant information. The council clarified that this was due to a percentage of the retrieved emails being unrelated to council business. The council confirmed that these emails related to "purely private matters".
18. The Commissioner's guidance sets out the relevant conditions which need to be satisfied in order for information to be held by a public authority. In relation to the "private" matters identified by the council, the guidance states:
- "In most circumstances private emails sent or received by staff in the workplace would not be held by the authority as it has no interest in them. It will be a question of fact and degree whether a public authority does hold them, dependent on the level of access and control it has over the e mail system and on the computer use policies. It is likely to be the exception rather than the rule that the public authority does hold them."*<sup>1</sup>
19. Having considered the categories of information identified by the council as constituting "private" matters, the Commissioner is satisfied that this information is not held by the council for the purposes of the FOIA.
20. The Commissioner's guidance clarifies that public authorities are not obliged to search for, or partially compile requested information before refusing a request that it estimates will exceed the appropriate limit. Instead, it can rely on having cogent arguments and/or evidence in support of the reasonableness of its estimate. In cases where an

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_12\\_INFO\\_CAUGHT\\_BY\\_FOI\\_ACT.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_12_INFO_CAUGHT_BY_FOI_ACT.ashx)

authority does carry out searches it is entitled to stop searching as soon as it realises that it would exceed the appropriate limit to fully comply with the request<sup>2</sup>.

21. In this instance, the council has confirmed that it has actually conducted an extraction exercise up to (and beyond) the point at which the appropriate limit was reached.
22. The council confirmed that it had spent in excess of 18 hours attempting to extract information held and in scope of the request from the communications retrieved by its ICT department. It confirmed that, at the point the appropriate limit was reached, it had still not completed the process of extracting of relevant information from over half of the emails retrieved.
23. In their submissions, the complainant suggested that the council had factored the time spent redacting exempt information into its calculation of the appropriate limit. It is the case that such activities cannot be considered when evaluating the cost of complying with a request. However, the Commissioner considers that the council has not stated that it has included the cost of redaction in its appropriate limit calculations. Instead, it has confirmed that it is the time needed to extract information relevant to the request from information located and retrieved which has resulted in the appropriate limit being surpassed.
24. In view of the explanations provided by the council the Commissioner is satisfied that, in this case, the cost of complying with the request would exceed the appropriate limit. He has, therefore, concluded that the council correctly applied section 12(1) to refuse the request. As he has determined that the council was entitled to refuse the request under section 12(1), the Commissioner has not gone on to consider the other exemptions cited in this case.

## **Section 16 – advice and assistance**

25. Section 16 places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made requests for information to it.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.pdf)

26. Under section 16(2) a public authority is considered to have met that duty if it follows the section 45 code of practice (the "code"). The code sets out what is expected from a public authority in terms of advice and assistance when a request is refused under section 12.
27. Paragraph 14 of the code states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:  
  
*"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."*<sup>3</sup>
28. In its initial response, the council advised the complainant that the cost of complying with the request would exceed the appropriate limit "...regardless of whether the information covered a period of 3 years or some shorter period". The council stated that, ordinarily, it would provide advice as to how the requester might bring their request within the appropriate limit but that, in this case, this would be unlikely to be of assistance.
29. Following the complainant's submission of a refined version of their request, the council confirmed that this "reduced the burden", however, it did not confirm that it was still relying on section 12, only making reference to other exemptions cited in its initial response. Neither did it provide this confirmation in its internal review response.
30. During the Commissioner's investigation the council confirmed that it was still relying on section 12 to refuse the request. It contacted the complainant and advised of the categories of information it had been able to locate, retrieve and extract within the confines of the appropriate limit. The council directed the complainant to confirm whether they would be interested in receiving this information.
31. The Commissioner's guidance confirms that, where an authority considers that the cost of compliance would exceed the appropriate limit it should either indicate if it is not able to provide any information at all

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<sup>3</sup> <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

within the appropriate limit or provide an indication of what information could be provided within the appropriate limit<sup>4</sup>.

32. The Commissioner has concluded that, at the time of the request, the council failed to take the actions identified that it, therefore, breached section 16(1) of the FOIA. As the council has now remedied this, the Commissioner does not require it to take any steps.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.pdf)

## Right of appeal

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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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**