

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2014

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the refurbishment of the Futurist theatre in Scarborough. The Commissioner's decision is that, on the balance of probabilities, Scarborough Borough Council does not hold the requested information. He has also decided that Scarborough Borough Council breached the statutory time for compliance at section 10(1) of the FOIA. He does not require the council to take any steps to ensure compliance with the legislation.

Request and response

2. On 11 March 2013 the complainant wrote to the council and requested information in the following terms:

"I am writing to you on behalf of the people of Scarborough who are very concerned about the fate of the Futurist and the astronomical figures which are being made public related to your estimates on costs of immediate refurbishment required to keep the theatre open and fit for purpose.

In April 2012 these were £2.2m, (see attached CIPFA estimates) by the end of 2012 £5m was being banded about, and at the end of February 2013 £7m was the figure being made public by you. Therefore we require precise figures to demonstrate how this £7m is arrived at, and why this figure has escalated so much in less than one year...

We ourselves have derived open-market cost estimates on a "What must be done now", "What should be done" (to improve and enhance the ability to accommodate larger touring shows) and "What could be done" (to improve and enhance the whole area as a year-round cultural and leisure zone). Perhaps you could give us your own open-market costs under these headings so we can all compare and relate to each other's thinking."

3. A complaint was subsequently made to the Information Commissioner resulting in a decision notice being issued on 18 December 2013 (reference number FS50506374) requiring the council to respond to the request in accordance with the FOIA or issue a valid refusal notice under section 17(1).
4. The council provided its response on 22 January 2014. It detailed the request as follows:

"Background to question. In April 2012 the Council issued a Report showing in detail that the costs of essential repair and refurbishing of the Futurist theatre to bring it up to acceptable standard would be £2.2m.

In December 2012 a Report states "significant backlog maintenance and upgrade costs mean that £7M of funding would be required to spend on the retained theatre."

This information was made public by N. Edwards in February.

Question 1

Could you please let me have precise details of how the £7M would be spent and what level of upgrade would be achieved as a result.

Question 2.

Has a Cost-Benefit analysis been undertaken?

Question 3

Why there has been a £4.8M escalation in costs in one year."

5. In relation to questions 1 and 2, it said that the information is contained within the following reports on the council's website:

<http://democracy.scarborough.gov.uk/documents/s19566/App%201a-Rothery%20Report%20-%20June%202010.redacted.pdf>

<http://democracy.scarborough.gov.uk/mgAi.aspx?ID=19521#mgDocuments>

In relation to question 3, it said that 'the figures of £2.2m and £7m are not comparable – as per the more detailed information in the reports above, they are for different levels of works.'

6. The complainant requested an internal review on 7 February 2014 stating that the detail she has requested is not anywhere in the reports referred to.
7. On 27 March 2014, the complainant informed the Commissioner that she had not had a response to the internal review.
8. Following the Commissioner's letter of enquiry dated 1 May 2014, the council informed the Commissioner that it issued an internal review response on 4 March 2014. This was initially sent to the complainant's previous email address and was resent to the correct email address on 2 May 2014.
9. The internal review response maintained the council's original position. It said that the council does not hold any further, more detailed information.

Scope of the case

10. As stated above, the complainant wrote to the Commissioner on 27 March 2014 to complain about the lack of response to her internal review request. The Commissioner understands that the complainant believes there is further information which should be in the public domain.
11. The Commissioner questioned why the council's response detailed the request as that quoted in paragraph 5 rather than the original request made on 11 March 2013. The council explained that the complainant's sent an email dated 17 April 2013 as a follow up to the original request and it is the wording of that email that the council used to provide a response. It confirmed that it considers, whilst there may be some differences in terminology used, the requests seek the same information. The complainant has also told the Commissioner that the request of 17 April 2013 was for the same information as that requested on 11 March 2013.
12. The Commissioner has therefore considered whether further information is held in response to the request dated 17 April 2014 (as detailed in paragraph 5).

Reasons for decision

13. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it

holds the information and if so, to have that information communicated to him.

14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
15. The complainant alleges that the figure of £7m is grossly overstated. She has said that the council constantly reiterate the £7m quoted by consultants but nowhere do those consultants define what it refers to. She informed the Commissioner that a decision, based on the figure of £7m, has been made by the council to close the theatre with immediate effect with a permanent decision following at the end of 2014.
16. In relation to question 1, the council said that the figure of £7m is taken from the 2010 Rothery Report which has been provided to the complainant. It said that the key paragraphs state the following:

"Since the Interim Report issued in September 2008 the costs have been reassessed. The reassessment based on Building Cost Information Service Tender Price Index (BCIS TPI) figures (Appendix 1) indicates that costs have overall deflated by 15% since September 2008.

Option 1 Refurbishment of existing Futurist and Mermaid buildings:-

2008 Cost: £9,063,926 Profit (Loss): (£9,063,926) = Subsidy Required

2010 Cost: £7,704,337 Profit (Loss): (£7,704,337) = Subsidy Required

This is based on Gleeds Scope of Works identified in Sept 2008 and does not take into account any additional building stabilisation or structural works required."

17. The council then explained that the figure of £7m is derived from an earlier figure of £9m, less 15% deflation and that the 15% deflation has been applied to the overall total. It said that no calculations have been undertaken as to the makeup of the £9 million or reduction of the various costs which make up this total figure and there is therefore no

breakdown recorded and available for the £7m to which the complainant refers. The council concluded that it is therefore unable to provide precise details of how the money would be spent and what level of upgrade would be achieved, other than as set out in the Rothery report provided.

18. In relation to question 2, the council said that the Rothery report 'effectively forms the Cost-Benefit analysis'. Having seen the Rothery report, the Commissioner notes that it contains a detailed 'Cost and Feasibility Assessment'.
19. In relation to question 3, the council clarified that the complainant refers to the differences between the two amounts of £7m and £2.2m, stating that there has been a £4.8m escalation in costs in one year. It explained that the difference between the figures relates to the levels of work which would be undertaken. The report produced in April 2012 (Futurist theatre building condition survey), which the complainant refers to in her email of 17 April 2013, included a detailed breakdown of the £2.2 million which the author of the report, the council's Property Asset Manager determined would be required solely for the refurbishment and reinstatement of the Futurist Building only;

"With the exception of the required ventilation system the above costs are for refurbishment and reinstatement only and contain no allocations for improvements to the general facilities.'

The figure of £7m is for procurement of a refurbished and improved theatre and the associated Mermaid buildings, works which are in excess of those in the April 2012 report (Futurist theatre building condition survey), which is made clear in the 2010 Rothery and the 2008 Gleeds report.

20. In addition to the above, the council also said that all of the documents and reports from consultants have been published by the council on its website (to which the complainant has been referred), and can be accessed from the following link:

<http://democracy.scarborough.gov.uk/ieListDocuments.aspx?CIId=501&MId=2935&Ver=4>

21. It also said that there are a wide range of Committee papers and supplementary documents which can also be accessed on the Council's website. It reiterated that all of the information requested which the council holds was provided in the 2010 Rothery and the 2008 Gleeds reports and that its aim in providing the full reports to the complainant, due to the complexity of the issues involved, was to ensure that she

would be clear as to the differences between the two figures, and that a cost-benefit analysis had been undertaken.

22. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations. The council said that despite its explanation as to why there is no breakdown recorded (as detailed above), in order to try to provide the complainant with some more detailed information, the document referred to as the Gleeds Scope of Work September 2008 was examined and whilst this report quotes a figure of £9m (from which the figure of £7m was derived), no detailed breakdown is held. It also said that since 1996, the council has sought advice from a number of different consultants and specialists in relation to the Futurist Theatre and options for its future, and there are a number of reports which have been considered and the council has undertaken further research and considered the information contained within these documents. It said that whilst a number of these reports provide details of estimated costs for different options for the future of the site, it can find no breakdown of the £7m/£9m costs. It said that both manual searches of hard copy documents in its filing systems and electronic searches have been undertaken in order to try and assist the complainant and provide some further information. The electronic searches were carried out on all available computers, networked resources and laptops using the search terms 'Futurist' and 'Gleeds'.
23. In reaching a decision as to whether the requested information is held, the Commissioner also enquired whether there was any legal requirement or business need for the council to hold the information. The council said that there is no statutory requirement to hold the information, and in relation to any business purpose, it said that the costs of refurbishing the theatre are estimates only and it would not have required detailed breakdowns as an overall cost would be sufficient to inform the decision making process.
24. The Commissioner also considered whether the council had any reason or motive to conceal the requested information but he has not seen any evidence of this. Therefore he has not identified any reason or motive to conceal the requested information.
25. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any information relevant to this request, particularly as the recorded costs are estimates provided to inform the decision making process and the figures of £7 million and £2.2 million are for different levels of work and so not comparable. The

Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.

Section 10 – Time for compliance

26. Section 10(1) states:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

27. The request was made on the 11 March 2013 and responded on 22 January 2014, some 10 months later. Therefore, the council did not respond to the request within the statutory time limit in breach of section 10(1).

Right of appeal

28. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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
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