

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 24 June 2015

Public Authority: Norwich City Council
Address: City Hall
St. Peters Street
Norwich
NR2 1NH

Decision (including any steps ordered)

1. The complainant has requested information related to trees in a specific area. The Commissioner's decision is that, on the balance of probabilities, Norwich City Council does not the requested information. He does not require the council to take any steps to ensure compliance with the legislation.

Request and response

2. On 11 December 2014, the complainant wrote to Norwich City Council ('the council') and requested information in the following terms:

"Head of planning Brownes Meadow Poplar trees missing paperwork

TO FOI NCC

Further to the email of 23.04.14 of the head of planning offering assistance to me if Application papers on the web ncc provides are not found please access TWO sets of documents as to The Close NR14DN Brownes meadow car park although I don't have to give reasons... those papers [name redacted] Head Arboriculturist NCC showed me 2005.2006 by which the Owner's Application to fell the group of poplar trees was refused then ... these are not on the Planning Portal. Plus those that must also be on the Portal because the group of poplar trees was felled some years later (and near or by autumn 2012)

The purpose the owner said was merely to reconfigure the car park. I note that other specimen trees such as [name redacted] has discussed eg beech tree Hook Walk are listed as to Applications for works, felling on the portal. The poplar tree group is missing as to two sets of records, different Application dates. [Name redacted] as you know has been disallowed contact to clarify or provide the hard copy Schedule he retains, of Works to Protected Trees. See sections 197 - 204 Town and Country Planning Act Mandating this."

3. Having received no reply, the complainant wrote to the council again on 8 January 2015 requesting a review of the refusal to respond and made a complaint to the Commissioner on 29 January 2015.
4. Following correspondence from the Commissioner on 30 January 2015, the council responded on 20 February 2015 as follows:

"You have been provided with a full response concerning the matter of trees which you have included in the title of your email, but not in the text of the email. This was sent to you on 21 October 2014 and I have attached a copy.

The matters raised in your email do not constitute a freedom of information request."

5. The Commissioner is aware that there has been a considerable amount of correspondence between the complainant and the council. However, for clarity, only correspondence which is most relevant to this particular complaint is detailed above.

Scope of the case

6. The complainant contacted the Commissioner on 29 January 2015 to complain about the way her request for information had been handled.
7. The Commissioner telephoned the council on 18 March 2015 and was informed that the council has spent a lot of time dealing with this complainant and that matters always seem to be complicated with historical issues but that the information requested had already been provided. The use of the repeated request exemption at section 14(2) of the FOIA was discussed.
8. The council then wrote to the complainant on 2 April 2015 stating the following:

"This is a repeated request and is therefore being refused under section 14 (2) of the Freedom of information Act.

You requested this information on 29 August 2014 and you have received a reply on 21 October 2014."

9. The complainant contacted the Commissioner on the same day. She said that what she received from the council on 21 October 2014 (the Norwich Cathedral Tree Planting Strategy) was not what she had requested on 11 December 2014. She clarified that her request is for a hard copy of particular sections of the 'Schedule of Works to Protected Trees' - i.e. the sections she saw in 2005 that relate to Brownes Meadow Poplar trees.
10. On 15 April 2015 the Commissioner telephoned the council to clarify the information requested as described in the above paragraph. After several more telephone calls to the council, the Commissioner then wrote to the council on 7 May 2015. He commented that although the request does not clearly identify the information the complainant is seeking, there are references to the information in both the title and body of the email and he has not been made aware that the council sought clarification of the request. The Commissioner informed the council that he considers the requested information to be environmental information by virtue of Regulation 2(1)(c) because a schedule of works to trees is likely to constitute a measure affecting the state of the elements of the environment, such as land and landscape. The council was asked to reconsider the request and to provide full arguments if it considered that an exception applied to the information.
11. The council informed the Commissioner that it does not hold a copy of the document the complainant is requesting; the schedule of works to protected trees in Brownes Meadow.
12. The Commissioner has therefore considered whether the council holds the schedule of works to protected trees in Brownes Meadow.

Reasons for decision

Regulation 5(1) – duty to make environmental information available on request

13. Regulation 5(1) of the EIR states that:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

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 information must exist for the following summarised reasons:
 1. There is a legal requirement under the Town and Country Planning Act (she has suggested sections 197-204) to hold the requested information.
 2. The requested information was shown to her in 2005/2006 by the council employee referenced in the request.
 3. The council stated that the trees would never be felled but around 2011/2012 they were felled in order to reconfigure a car park.
 4. There is a £20,000 fine for felling a tree on an unauthorised basis and therefore the council do not want transparency under the EIR.
16. The Commissioner asked the council to consider the complainants assertions as detailed above.
17. In response to point 1, the council said that there is a requirement to maintain a public register of tree preservation orders under section 202F but explained there is no tree preservation order on the site, nor is it aware that the council has ever promoted one. It said that the only other potentially relevant requirement elsewhere in the Town and Country Planning Act would be about the retention of information relating to planning applications that could in theory have included a schedule of works to protected trees. It said that it appears to be being suggested that the council refused an application of some sort in relation to works to trees in Brownes Meadow but it has no record of having done so. It said that there was a planning application approved in December 2005 (ref 05/01175/F) for replacement of the rising arm traffic barrier with sliding gate and pedestrian access; however the application raised no arboricultural issues and therefore did not have a schedule of works to protected trees attached to it.
18. With regards to point 2, the council explained that the employee referred to has recently died but shortly before he left the council due to ill-health at Easter he was asked about this matter and could not recall

the document that was sought, although he did acknowledge that it is perfectly possible that at some point he had held paper copies of further information produced by the Dean and Chapter about their approach to managing trees. He also said that it was likely that any such document would have been disposed of when the planning service moved within City Hall a couple of years ago.

19. In relation to point 3, the council said that it is not credible to suggest that any council officer would say that a tree would never be felled as the condition of trees may change over time and felling may be required for safety purposes. It explained that the removal of two poplar trees in Brownes Meadow had been agreed in 2010 without the need for a notice being submitted under section 211 of the Town and Country Planning Act 1990 because they were a severe trip hazard endangering car park users. It said that under section 14 of The Town and Country Planning (Tree Preservation) (England) Regulations 2012 dead or dangerous trees are exempt from the need to submit a section 211 notice.
20. Regarding point 4, the council said that the level of fine that can be imposed in the courts is unlimited and that if the assertion that a tree had been felled on an unauthorised basis were true, which it is not, the site owner would be liable and not the council. It said that therefore the council would have no incentive to withhold information.
21. The Commissioner also enquired as to whether the information has ever been held, whether it would be held as a manual or electronic record, 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.
22. The council said that the information, if it existed, could be either or both manual or electronic. It explained that if it was a document associated with a planning application it would have been held in both paper and electronic formats since 2005. Applications or notices for works to protected trees were held exclusively as paper records until 2012 when parts of case management became electronic. In January 2014 this was completely electronic. It said that the search term "Brownes Meadow" was used to uncover the planning history and that paper Tree Preservation Order records were checked to confirm that no Tree Preservation Order has ever been proposed. It said that Planning records for Brownes Meadow were also checked and that the council's policy does not allow for documents to be shared outside of its shared network of folders.
23. In relation to whether the information was ever held, the council said that it is quite possible that further documents relevant to the approach

to trees in the Cathedral Precinct were held. It explained that, if held, they would have been held in paper form and it is most likely that they would have been disposed of in an office move two years ago as there was no requirement or purpose to hold them. However, no record was kept of the information disposed of at this time.

24. 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. It said that there is no legal requirement to retain information relating to the processing of notices to do works to trees in conservation areas. It explained that if a schedule of works to protected trees existed this might be useful background information to demonstrate a site owners approach to tree management of their estate that would set the context for any applications or notices for works to trees.
25. The Commissioner also considered whether the council had any reason or motive to conceal the requested information. He understands that the complainant believes that the trees were felled unlawfully but accepts the council's explanation in paragraph 20 as to why it has no incentive to withhold the information.
26. 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 the requested information. 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 regulation 5(1) of the EIR.

Right of appeal

27. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

28. 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.
29. 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