



**IN THE FIRST-TIER TRIBUNAL
INFORMATION RIGHTS
GENERAL REGULATORY CHAMBER**

Case No. EA/2017/0147

**Heard at Norwich,
On 14th. December, 2017**

Before

**Judge
David Farrer Q.C.**

Between

Frances Gaskin

and

The Information Commissioner (“The ICO”)

Appellant

Respondent

Date of Decision: 8 January 2018

Date of Promulgation: 10 January 2018

Ms. Gaskin appeared in person.

The ICO did not appear but made written submissions.

Decision and Reasons

I find that Historic England did not hold any requested information beyond that which it disclosed. This appeal is, therefore, dismissed. Historic England is not required to take any further step.

1. The Historic Buildings and Monuments Commission for England (“the Commission”) was created by The National Heritage Act, 1983 (“The NHA”). It was, until recently, generally known as “English Heritage”. Now it is “Historic England”.
2. Section 33 of the NHA imposes upon it duties (so far as practicable) –

”(1) to secure the preservation of ancient monuments and historic buildings in England.

(2) to promote the preservation and enhancement of the character and appearance of conservation areas situated in England, and

(3) to promote the public’s enjoyment of, and advance their knowledge of ancient monuments and historic buildings situated in England and their preservation.”

Section 33(8) includes the following definitions in relation to s.33(1) and (2) –

“ancient monument” means any structure, work, site (including any site comprising, or comprising the remains of any vehicle, vessel, aircraft or other movable structure or part thereof), garden or area which in the Commission's opinion is of historic, architectural, traditional, artistic or archaeological interest;

“conservation area” means an area designated as a conservation area under section 67 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

3. The definition of “monument” clearly envisages a function which extends to the immediate area in which a historic building or other structure is located but the focus is evidently on the building or structure, having regard to the nature of the interests to which the Commission will have regard.
4. The listing of buildings for conservation is a matter for the Secretary of State for the Environment, who is empowered to delegate that function to the Commission (See s.1 of the Planning (Listed Buildings and Conservation Areas) Act 1990.(“the PLBCAA”))
5. The duty of determining whether a site should be designated a “Conservation Area” is assigned to the local planning authority, subject to a residual power of designation granted to the Secretary of State (s.69 of the PLBCAA).
6. Trees within a Conservation Area are protected in the same way as individual trees subject to a Tree Preservation Order. (see Town and Country Planning Act, 1990, s.198 and s.211).
7. Browne’s Meadow is part of the Close of Norwich Cathedral. Within it are both listed buildings and trees. It was identified as site M003 in the Norwich Site Allocations Plan, the Local Development Framework (“the LDF”), which was adopted by Norwich City Council (“Norwich”) in 2014. Its section on M0003 included the word “trees”.
8. On 2nd. March, 2016 Ms. Gaskin requested from HE -

“ . . . all the information held as EH reported on Site M003(and others) tosay October 2011 with reference to mature trees (at Browne’s Meadow) inhibiting any development via the city council Conservation Development plan. However

this site from 1989 was further extended then and apparently that's when the trees were planted.

Therefore please provide any historical and all information about the trees and the site despite the trees being known to be "mature" by Oct 2011 M003 update to Norwich City Plan. This was only a summary. The summary relies on a site visit, knowledge etc.

The managers of the land have to update EH on any work that affects the setting of the cathedral, the seat of a Bishop and as a place of worship. EH should have lots of information about this site and trees as "it was progressively developed from 1989".

9. Ms. Gaskin stated on 16th. March, 2016 that she was specifically interested in poplar and alder tree history on the site.
10. I quote the request and elaboration in full because an issue arose as to the its scope.
11. HE responded by stating that it held no file on site M003 and enclosed letters from 2009 and 2011, which spoke of invoking FOIA s.14, if Ms. Gaskin made further requests similar to those she had then made. It is not submitted, however, that this request is vexatious.
12. In the course of the investigation subsequent to Ms. Gaskin's complaint to the ICO, HE referred to its provision to Ms. Gaskin in 2011 of its responses to the LDF, which contain nothing about trees. This is recorded in the ICO's Decision Notice ("DN") dated 11th. May, 2011.
13. Ms. Gaskin complained to the ICO on 13th. September, 2016.
14. The ICO's DN of 13th. June, 2017 upheld HE's denial that it held undisclosed responsive information.

15. In its reply to the ICO's inquiries, dated 3rd. February, 2017, HE clearly set out its case, which formed the basis of the ICO's findings in her DN. It may be summarised as follows –

- (i) If it held information responsive to the request, it had been supplied earlier and was available to the public anyway as part of the LDF documentation;
- (ii) HE was not consulted as to tree works because such matters were outside its statutory remit;
- (iii) Its responses to Norwich contained no comments on trees;
- (iv) No information as to trees had been deleted from its records;
- (v) It had, nevertheless, conducted searches for responsive information, which it described and to which reference is made in this Decision. Nothing within the scope of the request emerged

16. Ms. Gaskin's case, as set out in her Grounds of Appeal, so far as material to this appeal, seems to amount to the contention that HE must hold further information within the scope of the request because of its engagement with continuing development issues from 1986 onwards, including those involving the removal of trees. Norwich had been required to consult HE in relation to the LDF and there must be more material within HE's responses and correspondence with Norwich than had been disclosed.

17. In oral submissions Ms. Gaskin expanded her case to a significant degree, stating that there was within HE Eastern Region a planning and development department which held undisclosed material relating to M003 and, specifically, to the trees within it. She stated that she received a letter from Mr. Luton of HE which confirmed that HE had continuously monitored site M003 since 1986. So it must hold further documents, in particular, documents relating to trees in Browne's Meadow.

18. The letter was not produced. An attempt by Ms. Gaskin to introduce additional material after the conclusion of the hearing¹ did not include such a letter. So far as I am aware, these oral submissions were not served on the ICO in written form at any stage.

19. I do not accept that such a letter was sent to Ms. Gaskin.

20. At the hearing, Ms. Gaskin sought to give lengthy and wide – ranging evidence as to her dealings with HE, Norwich and the ICO but much, if not most, of what she said did nothing to further her case.

The Reasons for my Decision

21.. The requested information is “environmental information” by virtue of reg. (2)(1)(a`) of the Environmental Information Regulations, 2004 (“the EIR”) but its classification is of no practical consequence. EIR reg.12 (4)(a), like the condition attaching to FOIA s.1(1)(b), relieves a public authority of the obligation to provide information, which it does not hold at the date of the request.

22. A question arises as to the scope of the request. At the hearing Ms. Gaskin insisted that it covered all information held by HE relative to Browne’s Meadow, not simply information relating to trees. I reject that interpretation, which was, I conclude, an afterthought.

23. The test for interpreting a request is the meaning which the public authority should reasonably attribute to it when replying to it, having regard to all the circumstances, including past history and ancillary exchanges.

¹ Neither further evidence nor further argument can be admitted after the conclusion of the hearing without the Judge’s permission. Such permission will be given only in quite exceptional circumstances and subject to provision for other parties to challenge such admission and to serve rebutting evidence or contrary submissions. Ms. Gaskin’s proposed additions took her case no further forward and did nothing to undermine the case for the ICO..I give no direction in respect of them because any direction would be valueless.

24. Here the wording of the request clearly focusses on trees and that finding is reinforced by the later communication referred to in §9. Later exchanges demonstrate a specific interest in trees, whether mature or of more recent origin. I find that the request was for information relating to trees in Browne's Meadow, M003.
25. If that is too narrow a construction of the request, my findings at §§ 27 and 28 below render the question of scope academic anyway.
26. A common starting point where the issue is whether a public authority held information is whether its functions required it to do so or, at least, made it likely that it would. In my opinion, HE's assertion that it did not do so because tree conservation lay beyond its functions is entirely convincing. Its statutory duties are clear, as are those of a local planning authority. It would be most surprising if a body charged with the care of historic buildings and monuments, as defined in the NHA, offered unsolicited advice to a local planning authority on the retention or destruction of trees within a conservation area designated by that authority. Their respective functions are clearly defined in the NHA and the PLBCAA.
27. The LDF was a general development plan prepared by Norwich. It contained a very brief section on M003, which it did not propose to allocate for development due to its sensitive location in relation to listed buildings and trees and to flood risks. It was served on HE in compliance with the Council's statutory duty to consult the body responsible for monuments and listed buildings. As noted above, the word "trees" appears in the M003 section in the context indicated.
28. HE told the ICO that it made no comments on M003 and holds no information as to trees or any other feature of Browne's meadow, save a copy of the LDF. That is hardly surprising since Norwich was proposing no development on M003. There is no apparent reason why HE should make any observation on M003, let alone an observation as to its trees.

29. Nevertheless, HE reported to the ICO – and I accept – that it conducted searches of its records to check whether it held any element of the requested information. That involved a search of paper files, seventy – five electronic documents and a trawl of its East of England database of 30,000 records using the search terms “trees”, “Norwich” and “M003”. That search produced nothing. I accept that that was the result and that such a search was reasonable, given the inherent improbability that HE held any information as to trees in M003.

30. It follows from these findings that this appeal would fail even if, contrary to my finding, the scope of the request embraced all information relating to Browne’s Meadow. The only references to Browne’s Meadow were in the LDF, which was created by Norwich. Everything relating to Browne’s Meadow is already accessible to the public.

31. This appeal is therefore dismissed.

David Farrer QC,
Tribunal Judge
8th. January, 2018