



ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50569418**

Dated: 24th. June, 2015

Appeal No. EA/2015/0156

Appellant: Frances Catherine Gaskin

First Respondent: The Information Commissioner ("the ICO")

Second Respondent Norwich City Council ("the Council")

**Before
David Farrer Q.C.
Judge**

Date of Decision: 5th. April, 2016,

Date of Promulgation 6th April 2016

The Appellant appeared in person.

The ICO did not appear but made written submissions.

Nigel Brims, Solicitor, appeared for the Council

Subject matter:

EIR Reg. 12(4)(a)

Whether the public authority held the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that Norwich City Council held some of the requested information, as specified in §§23 and 24 below but no more. To the extent of that finding, the appeal is allowed. The Tribunal substitutes for the Decision Notice a Notice stating that the information specified in §§23 and 24 of this Decision was held by Norwich City Council at the date of the request. Since the specified information has been communicated to Ms. Gaskin, the Tribunal does not require Norwich City Council to take any further steps.

Dated this 5th. Day of April, 2016

Tribunal; Judge

Abbreviations

In addition to those indicated above, the following abbreviations are used in this ruling -

The EIR **The Environmental Information Regulations, 2004
(SI 2004/3391).**

The DN **The Decision Notice of the ICO**

The TCPA **The Town and Country Planning Act,1990**

TPO **Tree Preservation Order**

The 2012 Regulations **The Town and Country Planning (Tree Pres-
ervation) (England) Regulations 2012**

REASONS FOR DECISION

The Background

1. Browne's Meadow is part of the Norwich Cathedral Close. It is a conservation area as defined in the TCPA. Accordingly, trees in Browne's Meadow are protected from felling (and other prohibited acts) in the same way as trees subject to TPOs. A person wishing to fell them must serve notice on the planning authority, pursuant to s.211 of TCPA and obtain development consent. TCPA s.214 requires the planning authority to maintain a register of such notices open to public inspection, just like the register of TPOs (s.202F and Regulation 12 of the 2012 Regulations).

2. Given the enactment of that general right of free access to both registers, a dispassionate observer might reasonably ask why FOIA or (more properly) the EIR has come into play at all. He might wonder how the costs to the public of

- (i) two days of hearing,
- (ii) the production and service of a mass of documentation and
- (iii) on the part of Ms. Gaskin, a remorseless email stream of demands, instructions and denunciations, often breaching Tribunal directions and consuming, to a possibly unprecedented extent, the time and energy of the staffs of the Tribunal and, at an earlier stage, of the ICO-

can be justified. There is no satisfactory answer. Muddled, unhelpful and pointless communications from Ms. Gaskin, failures, by the Council and later by the ICO, to identify precisely the object of the request and, on the part of the Council, certain acknowledged and not fully acknowledged shortcomings in record keeping and retrieving relevant documents; all played their part.

3. A particular tree or group of trees within a conservation area may be subject to a TPO. If so, it is protected by the TPO provisions and not by s.211. How this situation might arise has no bearing on this appeal. The evidence from the Council, which I accept on this point, was that there were no TPOs in force in respect of trees within Browne's Meadow at any material time.

4. Dead and/or dangerous trees are exempt from the provisions of s.211 by virtue of Regulation 14(1) of the 2012 Regulations. However, notice to the planning authority, commensurate with the urgency of the need to act, is required by Regulation 14(2).

5. Six¹ poplar trees grew for many years in Browne's meadow. They were felled in 2011.

The Council says that these fellings were exempt under Regulation 14(1), since the roots of the poplars were a hazard to users of the Browne's Meadow car park and that it authorised felling, whether or not such authority was necessary. There is some suggestion that only two were dangerous and that the others were dead, which would also attract exemption from the prohibitions in s.211. I think that this is wrong, that the author of the suggestion misread contemporary emails and that the trees to which he referred were not the poplars anyway. It matters not. Whether dead or dangerous, notice of the felling should have been recorded in a s.214 register. I am satisfied that the DN is incorrect in suggesting otherwise.

6. Ms. Gaskin conducted a protracted course of correspondence with the Council regarding these trees (and possibly others) for a substantial period before making the request which gives rise to this appeal. It seems that the Council supplied information as to a survey of trees in the Close. It is apparent that the Council had difficulty in understanding some of her communications due to their rather disjunctive style. It is a difficulty which I share as regards her written submissions, though a reading of the relevant provisions of TCPA and the 2012 Regulations, backed up by her then solicitor's helpful letter (see below), enabled me to grasp more clearly the subject matter of her request.

The Request

7. On 11th. December, 2014, she made the following somewhat opaque request –

"Head of Planning Browne's Meadow Poplar trees missing paperwork

To FOI NCC

¹ Ms. Gaskin's former solicitors referred to sixteen poplars but I find only repeated references to six. Nothing hinges on the difference.

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 NR1 4DN Browne's meadow car park

Although I don't have to give reasons. . . .those papers Mr. Volp Head Arboriculturist NCC showed me 2005.2006 by which the Owner's Application to fell the group of poplar trees was refused thenthese 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 Mr. Volp 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. Mr. Volp 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 Act Mandating this.

Yours F.Gaskin

Sent from my Windows PhoneRE : Head of planning Browne's Meadow poplar trees missing paperwork ?"

It is significant, given the problems surrounding the scope of the request, that ss. 197 – 204 of the TCPA relate, not to trees in conservation areas, but to the protection provided by TPOs.

8. The request clearly justified, indeed demanded a request by the Council for further particulars or information, pursuant to FOIA s.1(3) (which the Council wrongly believed, it seems, to be the applicable statute) or Reg. 9(1) and (2) of the EIR, which was, in fact, the governing legislation, enabling it to identify and locate the requested information. It should have been apparent to the relevant council officers that Ms. Gaskin might be barking up the wrong tree. When speaking of the Schedule of work, she apparently re-

ferred to the schedule of TPOs on the Planning Portal on the Council's website. The 2005 application which she identified would not be entered in the TPO register in any circumstances, since the trees were not subject to TPOs. Such a request or such assistance should have saved a great deal of time and expenditure later.

9. Probably as a result of the volume of earlier exchanges, the Council failed initially to respond at all so that Ms. Gaskin complained to the ICO on 29th. January, 2015. The ICO wrote to the Council which told him that it had already supplied the requested information. It finally responded to Ms. Gaskin on 20th. February, 2015, well outside the prescribed time, identifying the object of the request as "2 entries of hard copy of Statutory Schedule Works to Protected Trees plus missing web details." It stated that she had received a full response to this request on 21st. October, 2014 and that the matters raised did not constitute a freedom of information request. If that meant that access to such information was already provided by s. 214 of TCPA, then it was an accurate statement of Ms. Gaskin's rights. Regrettably, the issue was not resolved by reference to that statutory provision.
10. In subsequent correspondence the Council asserted that this was a vexatious request for the purposes of FOIA s.14. And informed Ms. Gaskin that it refused her request in reliance on s.14 (2), since she had received the information on 21st. October, 2014. Whether the request was vexatious is, however, not an issue which the Tribunal is asked to determine. She informed the ICO that what the Council had then provided was the Norwich Cathedral Tree Planting Strategy, a quite different document. What she had requested was hard copies of the "Schedule of Works to Protected Trees" in so far as it referred to trees in Browne's Meadow. She had seen such material in 2005 and therefore knew that it was held by the Council.
11. Following searches of its records, the Council told the ICO that it held no such document.

The DN

12. The ICO indicated that the relevant information regime was the EIR and that Regulation 5(1) imposed on the Council the duty to make available on request environmental information which it held. Regulation 12(4)(a) permits a refusal where the requested information is not held when the request is received.

13. He reviewed Ms. Gaskin's reasons for asserting that the Council must hold the relevant sections of the Schedule, namely the statutory requirement under TCPA ss. 197 – 204 relating to TPOs, her claim that she saw such documentation in 2005, the fact that trees were felled in Browne's Close around 2011 – 12 and the supposed motive of the Council to conceal any unauthorized felling of trees in order to avoid a heavy fine.

14. He accepted the Council's response that there were no TPOs relating to Browne's Meadow trees, hence no requirement that notices for the felling of such trees be recorded in the s.202F register. He recited uncritically its assertion that "there is no legal requirement to retain information relating to the processing of notices to do works to trees in conservation areas." He quoted its explanation that Mr. Volp, its relevant officer, had recently died but had stated that he recalled no such document as Ms. Gaskin recalled seeing in 2005, although he may have held information from the Dean and Chapter regarding their tree management policy. Any such document would probably have been destroyed when the planning department moved offices.

15. He recorded the Council's statement that it had agreed to the removal of the two poplar trees from Browne's Meadow in 2010, hence that no notice under TCPA s.211 was required.

16. His conclusion was that there was no evidence that would justify rejection of the Council's denial that it held the requested information. That may not express the burden and standard of proof entirely accurately.
17. It appears that neither the ICO nor the Council consulted or, at any rate adequately consulted the TCPA when considering where to look for a "Schedule of Works to Protected Trees" in a conservation area.

The Appeal

18. Ms. Gaskin appealed to the Tribunal by notice dated 17th. July, 2015. Her initial grounds are, with respect, not easy to grasp but involved the general proposition that the Council could not control the treatment of protected trees without appropriate paperwork. Her criticisms of the service provided by the ICO's office are not a matter for the Tribunal.

19. The ICO's response adds little to the DN. It included this statement -

"Whether or not a schedule of works to protected trees, or other paperwork regarding protected trees, should be held in accordance with the TCPA is not a matter which the Commissioner is able to address".

This is surprising since the signatory to the ICO response is an admitted solicitor.

20. Not content with appealing the ICO's decision, Ms. Gaskin peremptorily demanded that he amend it. She proceeded to launch upon the ICO a barrage of confused, vituperative and often insulting emails, usually copied to the Tribunal, in the course of which she accused members of his staff of bias in favour of the Council (e.g., 19th. August and 3rd. September, 2015) of wilfully suppressing evidence (29th. September and 6th. October) and

of self – interested “obfuscation”(e.g., 2nd. October). She described comments of the ICO’s solicitor as “specious” (e.g., 14th. October). Her references to the Council involved charges of being disingenuous (19th. August, 19.13) and deliberately misleading the Commissioner (e.g., 18th. August, 23rd. August). She plainly proceeded on the basis that she was being wrongfully excluded from seeing entries relating to Browne’s Meadow in the statutory register of TPOs, in it a readily comprehensible error but one which led her to inexcusable slurs.

21. Presumably, this material was intended to form part of her case since much of it was copied to the Tribunal and all was included in the agreed bundle. If this is so, my only observation is that much of it is deeply offensive, some is defamatory, almost none of it is relevant and everything save her emails of 18th. August, 2015 is in clear breach of the Registrar’s direction of that date as to service of a Reply by 3rd. September, 2015 (my emphasis).

The Appeal

22. At Ms. Gaskin’s request, this appeal was set down for an oral hearing. Before that took place, two significant developments occurred.

23. First, a further search of the Council’s records revealed two exchanges, one of emails in July, 2010 and the other of letters in November/ December, 2010, between the Cathedral Estates manager and Mr. Volp relating to the felling of poplars and other trees in 2010 –

11. The Council's Response, served on 11th. January, 2016 following joinder and pursuant to directions, further exhibited an exchange between them in the course of the Council's first search in March/April 2015. It demonstrated that the July 2010 email thread was disclosed by Mr. Volp to the Council's Design, Conservation and Landscape manager by email of 24th. April, 2015, copied to the Head of Planning. Mr. Volp refers to the trees as poplars and links them to the trip hazard but, to judge by their identification numbers, the Browne's Meadow trees, in respect of which the Cathedral Estate sought permission, were not poplars but alders. Mr. Volp annotated his email with the comment that permission was not needed as it transpired, as the trees were "*dead/dying dangerous*". Consequently no further documents/notices were created.

24. More significant are three letters dated respectively 19th. and 29th. November, 2010 from the Estates manager and a reply from Mr. Volp on behalf of the Council dated 1st. December, 2010. So far as material to this appeal, they include a notice to remove and replace six poplars (T0190 – T0195) which the Council authorised. The justification for removal was that the shallow roots tore up the car park surface and created a trip hazard.

25. The Council's response also dealt with the failure to find these documents in the course of the ICO's investigation. It stated that a further electronic search of the "section 214 register" under "The Close" had revealed them. It will be recalled that the section 214 register is a register of notices served pursuant to TCPA s.211. This, a previous reference in the same Response to Mr. Volp's mistaken recollection that there were "no formal notices on the register" and the preceding answer to one of my direction questions were the first indications in the extensive documentation provoked by this appeal that the Council was aware of the statutory requirement for a register of notices regarding trees in conservation areas, let alone that it maintained one. Oral argument at the hearing, to which I re-

fer below, led me to doubt whether the Council did, in fact, maintain a s.214 register in the sense that I understand the term. I deal with this matter briefly in § 25 below.

26. The second development, which evidently took place at the end of October or beginning of November, 2015, was the instruction by Ms. Gaskin of solicitors to seek a review of the rejection by the Registrar on 27th. October, 2015 of an application under Regulation 16 that a representative of the Dean and Chapter of Norwich Cathedral, the owners and occupiers of the Close, attend the Tribunal to produce all applications and notices relating to the felling of the poplars in Browne's Meadow. In the event, I adjourned this application on the first hearing day after very full argument from Ms. Gaskin (who was no longer represented) because the prescribed notice had not been given. I issued various directions in relation to it. It was not pursued to its conclusion in accordance with those directions. As it transpires, that is of little consequence since, in my judgment, the truth as to the circumstances of the poplars' demise emerged from the disclosed letters and the Dean and Chapter could not have assisted in establishing that the Council held still further undisclosed information within the scope of the request.

27. However, the solicitors' letter of 10th. November, 2015 contained the first accurate and helpful analysis submitted to the Tribunal of the TCPA provisions and the 2012 regulations pertinent to this appeal and their relevance to the identification of the information that Ms. Gaskin was requesting. The "schedule of works" that Ms. Gaskin requested was the section 214 register of s.211 notices relating to trees in conservation areas which were not protected by a TPO.

28. That letter was written before the production by the Council of the letters referred to in § §22 – 24 and therefore without knowledge of the documents that then emerged.

29. The Tribunal was also unaware of the impending service of the 2010 letters and emails on the first day of the hearing.
30. By the date of the resumed hearing those letters and emails had been served on the Tribunal and Ms. Gaskin and the Council was represented by its solicitor.
31. Evidence was given on behalf of the Council by Mr. Webster, its Design, Conservation and Landscape manager since 2010. He stated that in April, 2014, the Council had instituted a public access system for s.211 notices, beginning with those served in 2012 – 2014, which were being transferred from folders to the website. Before that time notices would be kept in “shared folders”. Whatever the meaning of the quoted passages in the Council’s Response, I construed this evidence as an implicit acknowledgement that, before April 2014, the Council was not maintaining a single integral record, hard – copy or electronic, of s.211 notices and the related information specified by the Planning Practice Guidance.
32. Ms. Gaskin gave evidence. Its relevance to the question whether the Council held the requested information was often hard to discern. She said nothing about the documents belatedly retrieved and disclosed by the Council, She dwelt on the notice given to the Dean and Chapter and the claim that the Council should obtain information from them. She reiterated her accusation that the Council was deliberately suppressing information as to Browne’s Meadow, though she did not adequately explain why it should choose to do so or how its disclosure of the 2010 letters squared with that claim.
33. In final oral submissions the Council added little to its Response. Mr. Brims appeared to submit that “a register” could comprise a collection of original or copy documents held in a series of files rather than a single hard – copy or electronic record. He did not deal with the question whether the public could be said to have reasonable access to such a series of

folders which apparently defeated the efforts of Mr. Volp, the officer in charge of tree preservation matters, to locate relevant documents.

34. Ms. Gaskin made increasingly diffuse final submissions which eventually caused me to impose but then modestly extend a time – limit. Despite my advising her that criticisms of the DN or the ICO's procedures would not assist me in reaching a decision, she persisted in such a line of argument. Her undoubtedly sincere concern for the trees at the heart of this appeal was, unfortunately, not helped by her desire to criticise the other parties in respect of matters, which, even if her complaints were made good, could have no bearing on my decision.

The reasons for my decision

35. As already indicated, the core of, indeed the key to this appeal as of the original request and the complaint to the ICO was the identification of the object of the request. It was a task which was not fully or usefully completed until a late stage in the appeal process. Unhelpful as was the wording of the letter of 14th. December, 2014, neither the Council nor the ICO got to grips with this central issue. By early January, 2015, Ms. Gaskin was framing her request in terms of a "Statutory Schedule of Protected Trees." She related this, understandably, given that she is not a planning lawyer, to the register of TPOs provided for in TCPA s. 202F. She persisted in references to TPOs throughout the appeal process, including the hearing.

36. The Council could easily have confirmed that there were no TPOs affecting Browne's Meadow trees. Further, it knew that Browne's Meadow was within a conservation area so that its trees were protected by s.211. Its relevant officers should have known, but apparently did not, that s.211 notices were required, even where a tree was dead or dangerous, no doubt to ensure that there was a record as to why the tree had been lopped or

removed. Furthermore, it should have been aware of its duty to maintain a register.

Section 214 provides –

“ 214. Registers of s. 211 notices.

It shall be the duty of a local planning authority to compile and keep available for public inspection free of charge at all reasonable hours and at a convenient place a register containing such particulars as the Secretary of State may determine of notices under [section 211](#) affecting trees in their area.”

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37. For a qualified planning officer or solicitor working for a city council, these considerations left no room for doubt, in my opinion that the only schedule within the scope of Ms. Gaskin's request was the register of s.211 notices with stipulated particulars required by s.214. It was not enough to shrug off her request by saying that it related to TPOs and no TPOs affected Browne's Meadow trees.

38. A register is a continuous series of entries relating to the specified category of facts or events contained in a single paper or electronic book or folder. At the date of the request, I find that the Council did not maintain such a record. I rely on the evidence of Mr. Webster and the response of Mr. Brims when I raised the question of its existence. He submitted, as I understood it, that the piecemeal shared folders could constitute a register for the purposes of s.214. I do not accept that.

39. Once the nature of the request was clarified in the terms referred to in §24, the Council's correct response was that it did not hold such information because it had not begun to maintain such a register, in compliance with its statutory duty, until 2014.

40. It follows that, on a strict interpretation of the request, the emails and letters disclosed in January, 2016 were not within its scope. However, the letters contain the information that a register would provide and I have no doubt that the Council would have wished to disclose them to Ms. Gaskin anyway because they appear to answer the question at the root of her request and subsequent campaign. Accordingly, I propose to abandon forensic precision and treat them as within the scope of the request as the Council plainly did.

41. That said, I find, on a balance of probabilities, that the Council holds no further responsive information, since, before 2014, it failed to maintain the register which should have contained the requested information. I add, for the sake of completeness, my further finding that it held no further correspondence relating to the poplars. The exchanges are complete in themselves and do not suggest further related but undisclosed communications.

42. To the extent indicated and for the reasons set out above, I allow this appeal.

43. I regret to conclude this Decision by referring again to the conduct of Ms. Gaskin who, contrary to my clear directions of 23rd. November and 11th. December, 2015 and those of the Chambers President of 24th. January, 2016, continued to harass tribunal staff with telephone calls, sometimes abusive, and wordy emails, showing a complete disregard for such directions and the burden placed on the staff, which was wholly disproportionate to the value of her communications. By virtue of Rule 8(3)(a) the Tribunal has power to strike out an appeal where a party fails to comply with a direction. This appeal would, in my judgment, have been a clear candidate for such action, had I stipulated when giving directions that a breach might have that consequence.

44. Parties minded persistently to ignore tribunal directions should have regard to that rule.

Tribunal Judge

5th. April, 2016