

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 October 2017

Public Authority: **Wimbledon and Putney Commons Conservators**

Address: **Manor Cottage
Windmill Road
Wimbledon
London.
SW19 5NR**

Decision (including any steps ordered)

1. The complainant has requested from Wimbledon and Putney Commons Conservators a copy of the instructions sent to Daniel Watney LLP and the resulting retrospective valuation report.
2. Wimbledon and Putney Commons Conservators responded by stating that it was not a public authority for the purposes of the EIR and furthermore the requested information was not 'environmental'.
3. The Commissioner's decision is that Wimbledon and Putney Commons Conservators is a public authority for the purposes of the EIR and in this case the information requested is 'environmental'.
4. The Commissioner requires Wimbledon and Putney Commons Conservators to take the following steps to ensure compliance with the legislation.
 - Issue a new response under the EIR.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 26 or 27 January 2017 the complainant wrote to Wimbledon and Putney Commons Conservators (WPCC) and requested information in the following terms:

'Copies of the work instructions issued to Daniel Watney LLP and the resulting retrospective valuation report (RVR).'

7. WPCC responded on 15 February 2017. It stated that it was not a public body for the purposes of the Freedom of Information Act 2000 (the FOIA). However, it recognised that it might be a public authority for the purposes of the EIR but added that the position was not certain. WPCC went on to comment that although the granting of an easement might be deemed 'environmental' within the scope of the EIR it did not believe that the information requested was. It said this was because it related to the separate issue of whether it obtained appropriate value for the easement.
8. The complainant requested an internal review on 16 February 2017.
9. Following an internal review WPCC responded on 11 April 2017. It stated that it was upholding its original decision that the information requested was outside the scope of the EIR as it was not 'environmental'. However, it added that even if it was deemed to be environmental, it would be exempt from disclosure under Regulation 12(5)(b) of the EIR.

Scope of the case

10. The complainant contacted the Commissioner in April 2017 to complain about the way his request for information had been handled. In particular, he was unhappy that WPCC had not categorically confirmed it was a public authority for the purposes of the EIR, argued that the requested information was not environmental and indicated that even if it was it would withhold it under Regulation 12(5)(b) of the EIR.
 11. The scope of the Commissioner's investigation and this Decision Notice will be to firstly determine whether WPCC is a public authority for the purposes of the EIR and secondly, whether the information requested is 'environmental' within the meaning of Regulation 2(1).
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Background

12. Wimbledon and Putney Commons is a charity managed by the Wimbledon and Putney Commons Conservators (WPCC). It was established under

the Wimbledon and Putney Common Act 1871 (the Act)¹. The Commons comprise some 1,140 acres across Wimbledon Common, Putney Heath and Putney Lower Common.

13. Under the Act it is the duty of the WPCC Conservators (five elected and three appointed) to keep the Commons open, unenclosed, unbuilt on and their natural aspect preserved.
14. Wimbledon and Putney Commons is largely funded by a levy on local residents which is administered through the Council Tax collected by three Councils, namely, Wandsworth, Merton and Kingston².
15. In February 2012 an agreement was reached between WPCC and Wandsworth Borough Council to grant an easement across the Common to the Putney Hospital site to facilitate a new development.
16. The easement was completed in August 2014 when Wandsworth Borough Council paid WPCC £350,000 plus other benefits for the access rights³.
17. At a Board meeting on 11 May 2015 to discuss the easement, WPCC agreed to instruct surveyors to obtain an independent open market valuation of the easement and also instruct solicitors to review whether it had complied with the Charities Act 2011 regarding its sale^{4, 5}.
18. In July 2015 the Audit and Risk Committee of WPCC's Board decided to instruct Montague Evans to provide a retrospective qualified surveyors report on the value of the easement in February 2012.
19. In September 2015 Montague Evans LLP issued a report placing a value on the easement of £1,900,000 as at February 2012⁶.

¹ <https://www.wpcc.org.uk/downloads/publications/1871-act-amended2.pdf>

² <https://www.wpcc.org.uk/information-on-governance/the-commons-levy>

³ <https://www.wpcc.org.uk/downloads/conservator-minutes/annual-open-meeting-2015-signed.pdf>

⁴ <https://www.wpcc.org.uk/downloads/publications/media-release---review-of-putney-hospital-site-access-valuation.pdf>

⁵ <https://www.wpcc.org.uk/downloads/publications/media-release---putney-hospital-june-2015.pdf>

⁶ <https://drive.google.com/open?id=0B-dQyEqR1w8kUjNsQmVJZXZqRIE>

20. On 9 October 2015 the Charity Commission met with WPCC to discuss the 'serious issues arising' from the sale of the easement and difficulties with its governance.
21. As the independent regulator of charities, the Charity Commission wrote to WPCC on 22 October 2015⁷ with a formal action plan. This plan recommended that WPCC should consider obtaining a retrospective valuation report from an appropriate valuer to determine whether there had been a loss due to the sale of the easement. Furthermore, if the valuation revealed a significance loss, the Charity Commission recommended that WPCC should consider taking legal advice as to whether it was appropriate and feasible to recover the loss and if so, from whom. The Charity Commission added that if WPCC did not take the recommended action it would consider taking further regulatory action such as opening a Statutory Inquiry under Section 46 of the Charities Act 2011.
22. At a Board Meeting on 11 November 2015, WPCC agreed to adopt the action plan recommended by the Charity Commission.
23. On 8 February 2016 WPCC's Board agreed to appoint lawyers Charles Russell Speechlys LLP to provide advice and guidance on the implementation of the Charity Commission's formal action plan⁸.
24. Following the recommendation of Charles Russell Speechlys LLP in April 2016 specialist legal advice was obtained from leading Counsel regarding various issues surrounding the sale of the easement⁹.
25. On 18 August 2016 the Charity Commission opened a Statutory Inquiry.

<http://www.putneysw15.com/default.asp?section=info&page=issueputneyhospital062.htm>

http://www.epsomguardian.co.uk/news/14733746.Outrage_after_Putney_Common_land_sold_for_1_5m_less_than_its_valuation/

⁷ <https://www.wpcc.org.uk/downloads/publications/media-release---2nd-dec---open-meeting.pdf>

⁸ <https://www.wpcc.org.uk/downloads/wimbledon-and-putney-commons-conservators---media-release-february-2016.pdf>

⁹ <https://www.wpcc.org.uk/downloads/conservator-minutes/signed-minutes-of-the-conservators-2016-annual-open-meeting.pdf>

26. On 11 November 2016 WPCC received a retrospective valuation report from Daniel Watney LLP¹⁰. (Reference to the conclusion in this report was not revealed until June 2017 at WPCC's Annual Open Meeting)¹¹.
27. On 28 November 2016 at a Special Board meeting, WPCC agreed to take legal advice from its lawyers, Charles Russell Speechlys LLP, on the implications of the retrospective valuation report from Daniel Watney in accordance with the Charity Commission's action plan.
28. At a scheduled meeting on 13 February 2017 WPCC's Board considered the legal advice provided in relation to the retrospective valuation report and decided that, as the possibility of making claims against any of the parties concerned was low it would not take any further action. Accordingly, it concluded that it had completed the implementation of the Charity Commission's action plan of 22 October 2015¹².
29. On 31 May 2017 the Charity Commission advised WPCC that it had appointed an Interim Manager. His terms of reference were to consider the decision made by WPCC in February 2017 not to take any legal action from the loss suffered following the sale of the easement in August 2014 for a significant undervalue and consider whether further action was required.
30. At its Annual Open Meeting on 21 June 2017 WPCC summarised the actions it had taken following the intervention of the Charity Commission in October 2015 in relation to its governance and the sale of the easement. Although it did not disclose the full details of the report from Daniel Watney LLP it did mention that its conclusion was that there had been a loss to WPCC following the sale of the easement of around £325,000. With regard to the Charity Commission's appointment of an Interim Manager, WPCC said it would not be appropriate to disclose any of the information relevant to his investigation as this would have an adverse effect on the result.

Chronology

¹⁰ <https://www.wpcc.org.uk/downloads/media-release-wimbledon-and-putney-commons-conservators-retrospective-valuation.pdf>

¹¹ <https://www.wpcc.org.uk/downloads/chairman-annual-report-2017.pdf>

¹² <https://www.wpcc.org.uk/downloads/chairman-annual-report-2017.pdf>

31. On 25 April 2017 the Commissioner contacted WPCC to request the withheld information together with any further arguments as to why it believed it was not 'environmental' within the meaning of the EIR.
32. WPCC provided the Commissioner with the withheld information in complete confidence on 22 May 2017 together with legal advice from its solicitors in relation to the matter.
33. The Commissioner contacted WPCC on a number of occasions in May and June 2017. She requested further information in relation to the sale of the easement and the intervention of the Charity Commission and also enquired as to whether WPCC was prepared to disclose a redacted version of the withheld information in view of the references to it in the public domain¹³.
34. WPCC responded on 6 and 14 June and 14 July 2017 saying having discussed the matter with its Board, the Interim Manager appointed by the Charity Commission and its solicitors, it did not believe it would be appropriate to disclose the information at the present time. It said that this was because much of the information was legally privileged and disclosure might adversely affect the course of justice under Regulation 12(5)(b) of the EIR by prejudicing any future legal action and the work of the Interim Manager.
35. The Commissioner contacted WPCC again on 20 July 2017 and reiterated that a lot of the information comprising the withheld information was already in the public domain or was so anodyne that its disclosure would not have an adverse effect on the course of justice. Accordingly, she invited WPCC to reconsider its position and disclose the requested information in a redacted format.
36. WPCC responded on 28 July 2017. It reiterated its position that it did not believe it was a 'public authority' for the purposes of the EIR in this particular case as the requested information was not 'environmental' within the meaning of Regulation 2(1). WPCC accepted that its decision to grant an easement and any use relating to it could be regarded as a 'measure' that could affect the elements of the environment and therefore might be covered by Regulation 2(1)(c) of the EIR. However, it did not believe the issue of whether it obtained the appropriate value for

¹³ <https://www.thirdsector.co.uk/regulator-appoints-interim-manager-wimbledon-putney-commons-charity/governance/article/1435169>

the easement and whether it had complied with its fiduciary in relation to its sale was a matter covered by the EIR as it was too remote to affect the elements of the environment. WPCC added that even if it was a public authority for the purposes of the EIR and the information was environmental within the meaning of Regulation 2(1), it would be exempt from disclosure under Regulation 12(5)(b).

37. In view of the ongoing Statutory Inquiry and the appointment of the Interim Manager, WPCC said it did not believe it would be appropriate to disclose the requested information (even in a redacted form) at this stage.
38. The Commissioner contacted WPCC again on 5 October 2017 to see whether there had been any recent developments that may have resulted in it changing its position.
39. WPCC responded on 7 October 2017. It stated that the Interim Manager had completed his report which had been submitted to the Charity Commission for consideration. It also stated that it would review the request at its Board meeting on 9 October 2017 but did not believe it would be likely to change its original decision.
40. WPCC contacted the Commissioner again 12 October 2017 and stated that having considered the matter at its Board meeting on 9 October 2017 it was maintaining its original decision not to disclose the requested information.

Reasons for decision

Is WPCC a public authority for the purposes of the EIR?

41. The EIR gives members of the public the right to access environmental information held by the vast majority of public authorities and places a duty on them to respond to requests for it.
42. If a public authority receives a request for environmental information it is legally obliged to provide it, usually within 20 working days, unless any of the exceptions contained within the EIR apply. If a public authority believes an exception does apply to the information that has been requested, it must explain the reasons why.
43. The definition of public authority is given in Regulation 2(2) of the EIR. In particular, it states that a "public authority" means;
 - (a) government departments;

(b) any other public authority as defined in section 3(1) of the Freedom of Information Act (the Act), disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –

- (i) any body or office-holder listed in Schedule 1 to the act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; and
- (d) any other body or other person that is under the control of a public authority and:
- (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.

44. The Commissioner has considered the ICO's guidance on 'Public Authorities under the EIR'¹⁴.
45. The Commissioner takes the view that WPCC is not a government department (Regulation 2(2)(a)) and does not believe it is a public authority for the purposes of FOIA (Regulation 2(2)(b)). However, she considers it will be a public authority for the purposes of the EIR if it carries out functions of public administration or is under the control of another public authority (or public authorities) (Regulations 2(2)(c) and (d)).
46. Bodies perform functions of public administration if they carry out services of public interest and are, for this purpose, given special legal powers to allow them to carry out those functions. Special legal powers are created in law and can only be used by the relevant body. They go beyond the normal rules of private law which apply to any company or person.
47. The Commissioner is satisfied that WPCC carries out services in the public interest and that it operates within a specific legal framework (i.e.

¹⁴ <https://ico.org.uk/media/for-organisations/documents/1623665/public-authorities-under-eir.pdf>

the [Wimbledon and Putney Common Conservators Act 1871¹⁵](#)). The test is whether that particular Act gives WPCC 'special powers'. There are some WPCC powers and functions which the Commissioner believes would be deemed special powers.

48. The Commissioner notes that WPCC has the power to create byelaws governing the area it controls. Although the byelaws must be signed off by the Secretary of State, it appears that WPCC is responsible for their drafting and enforcement. The Upper Tribunal in the case of [Fish Legal 2015 UKUT 0052¹⁶](#) examined this precise issue and found very clearly that the creation of byelaws in this manner is a special legal power (see paragraph 109). The publication of the [current byelaws¹⁷](#) on the WPCC website indicates that this is still an active power.
49. The Commissioner also believes that the levy which is used to fund WPCC might also be a demonstration of special legal powers. The 1871 Act¹⁸ defines which residents are covered by the levy and sets the initial rates. It gives WPCC the power to enforce collection of the levy and change the rates when necessary. The mechanism appears to have changed over time, and the WPCC website states:

"Since 1st April 1991, the Commons have been largely financed by means of a levy on the Boroughs of Wandsworth, Merton and Kingston in a proportion relevant to the number of "D" Band properties in each Borough within 3/4 mile of the Commons or in the old Parish of Putney. The Boroughs pass on this levy by way of an addition to the Council Tax on properties in the area."
50. The Commissioner takes the view that if WPCC is still in a position to influence the amount of the levy (even if it is not a decisive influence) this may also constitute a special legal power.
51. The Commissioner has considered the Decision Notice [FER0534921](#) dated 21 July 2015 which found that the Verderers of the Forest of Dean were a public authority for the purposes of EIR because they performed

¹⁵ <http://www.ledr.com/acts/wpca/1871024.htm>

¹⁶ https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-55/Correspondence%20with%20communicant/frCommC55_24.02.2015_annex1_Upper_Tribunal_decision.pdf

¹⁷ <https://v-whcwcme04.child.indigo.local/cmeh/jsp/KainosCaseManagementFramework.jsp>

¹⁸ <http://www.ledr.com/acts/wpca/1871024.htm>

functions of public administration. The Commissioner considers that the functions of the Verderers are similar to those of WPCC so the case is a useful comparison. Both bodies were created by statute to oversee and protect a defined area of land. If WPCC is in a position by virtue of its legal status to influence policies affecting the commons, this is a further indication that it performs functions of public administration.

52. The Commissioner takes the view that the collective effect of WPCC's powers appears to distinguish it from an ordinary body. Many public spaces will have a 'Friends' group or some sort of charitable body which seeks to promote and protect an area. WPCC has a role which goes beyond this; it has particular legal powers which give it powers not available to other bodies.
53. The Commissioner therefore concludes that WPCC is carrying out functions of public administration and is therefore a public authority under EIR Regulation 2(2)(c) of the EIR.

Is the requested environmental information?

54. The next question for the Commissioner to consider is whether the information requested is 'environmental' within the meaning of the EIR.
55. Under Regulation 2(1) of the EIR environmental information is defined as;

'any information in written, visual, aural, electronic or any other material form on:

(a) the state of the elements of the environment such asland, landscape and natural sites including wetlands...biological diversity...

(b) factors, such as substances, energy, noise, radiation or waste....

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements.

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);'

56. The Commissioner has seen the requested information which consists of the instructions issued to Daniel Watney LLP and the resulting retrospective valuation report (RVR).
57. The reason for obtaining this report was to place a value on the easement granted to Wandsworth Council as at February 2012 to see whether WPCCC obtained 'best value'.
58. WPCCC has argued that while the actual granting of the easement and any issues relating to its use might potentially be covered by the EIR, information as to whether it obtained best value would not.
59. WPCCC accept that the granting and use of the easement might be regarded as a factor or measure affecting or likely to affect the elements of the environment, such as land and landscape, under Regulation 2(1)(b) and (c) of the EIR. However, it believes that information in relation to its finances and governance, such as whether it obtained best value for the easement, would be too remote to be regarded as 'environmental' within the meaning of the EIR. It does not believe that disclosure of such information would or would be likely to affect the elements of the environment.
60. The Commissioner has considered the requested information and agrees that the granting and use of the easement is an 'administrative measure' and activity affecting or likely to affect the elements of the environment, namely land and landscape.
61. The Commissioner takes the view that the easement, which is effectively a right of way over the land, is a continuing one. Therefore its use continues to affect the environment. As a result the Commissioner believes that the financial value of the easement is still information on an 'activity' affecting the environment. The requested information would effectively provide an insight to the actual value in monetary terms of allowing the public to use the land and affect the environment on and around it.
62. The Commissioner also takes the view that the easement is covered by Regulation 2(1)(e) of the EIR as it is information on a 'cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in 2(1)(c). The activity is the granting of an easement to pass over the land, the cost benefit or economic analyses is the value of that easement to WPCCC (which is the retrospective valuation report itself).
63. The Commissioner therefore concludes that the requested information is environmental within the meaning of the EIR as it is information on a measure and an activity affecting or likely to affect the elements of the environment, namely land and landscape.

Right of appeal

64. 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

65. 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.
66. 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

**Jon Manners
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