

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

Date: 2 October 2017

Public authority: The Conservators of Therfield Heath and Greens
Address: clerk.conservators.therfield@gmail.com

Decision (including any steps ordered)

1. The complainant has requested records relating to the election of trustees of the Therfield Regulation. In response the Conservators of Therfield Heath and Greens (the Conservators) volunteered information which it considered relevant to the request.
2. However the Conservators went on to explain that they are not a public authority for the purposes of the EIR and are therefore not bound by the EIR. They also argued that in any event the requested information was not environmental information and therefore even if they were a public authority they would not be under any obligation to provide the information.
3. The Commissioner's decision is that the Conservators are a public authority for the purposes of the EIR. However as the Commissioner also finds that the requested information is not environmental information the Conservators are not required to take any further action in this matter.

Request and response

4. On date 6 April 2017 the complainant emailed the clerk to the Conservators under the subject "Request under the EIR for information from the Conservators of Therfield Heath and Greens. He went on to request information in the following terms:

"I write to you in your roles as Clerk of the Conservators of Therfield Heath and Greens. I understand that the Conservators are responsible for the election of the Trustees of the Therfield Regulation who own a large piece of common land near Royston.

Below I make a request under EIR for information from the Conservators of Therfield Heath and Greens:

I request all the records relating to the election of trustees of The Therfield Regulation, the names of each trustee and the dates they were in post between 2010 and the present day.

I request that you include all relevant material including but not limited to any records of meetings where the elections took place, who was in attendance at those meetings, who voted in the elections, how many votes were cast for each candidate and the numbers for and against each candidate."

5. On 9 May 2017 the Conservators advised the complainant that they did not consider themselves to be a public authority for the purposes of the EIR and therefore they were not under any obligation to consider the request under the EIR. They also argued that in any event the information requested was not environmental information. However the Conservators said that in the interests of transparency they were prepared to provide information on the governance of the Conservators and the Trust. They also offered to review its decisions if the complainant was not satisfied with the response he had received.
6. The following day, 10 May, the complainant asked the Conservators to conduct an internal review. On 12 June 2017 the Conservators provided the complainant with the outcome of the review. They sought to address some of the issues raised by the complainant when seeking a review, but ultimately they maintained their original position that they were not a public authority.

Background

7. It is not necessary to go into the legal relationship between the Conservators and the Trust in any great detail. However it may be helpful to briefly explain the Commissioner's understanding of the situation. The Conservators were established in 1888 under the Commons Regulation (Therfield) Provisional Order Confirmation Act. Their powers and obligations are governed by that Act and by an Award made under that Act in 1893. The primary function of the Conservators is to manage an area of common land. It understood that the common land was originally owned by the Church Commissioners, but in 1979 The Therfield Regulation Trust was created and it is the Trust that now owns the land. However although the land is owned by the Trust, the responsibility for its management still rests with the Conservators.

Scope of the case

8. The complainant originally contacted the Commissioner on 29 June 2017 to complain about the way his request for information had been handled, but it was only after he submitted all the relevant documentation that the Commissioner accepted his complaint for investigation.
9. The complainant asked the Commissioner to consider firstly whether the Conservators of Therfield Heath and Greens were a public authority under the EIR. Secondly, if it was found that the Conservators were a public authority, to consider whether the Therfield Regulation Trust (the Trust) was also a public authority on the basis that the Trust was under the control of the Conservators. He also wanted the Commissioner to determine whether the Conservators were obliged to provide him with the information he had requested on the election of trustees.
10. The Commissioner considers the main focus of this case is whether the Conservators are a public authority for the purposes of the EIR.
11. In the case of *Fish Legal v Information Commissioner & Others* (GIA/0979/2011 & GIA/0980/2011) ("Fish Legal"), the Upper Tribunal Administrative Appeals Chamber (the "UT") ruled that the Commissioner has jurisdiction to both investigate and decide whether a body is a public authority.
12. Commissioner therefore has jurisdiction to decide this question. The First Tier Tribunal (the "FTT") may also hear appeals against the Commissioner's decisions and the UT may hear appeals against the decisions of the FTT.
13. If it is decided that the Conservators are a public authority under the EIR the Commissioner will go on to consider whether they are obliged to provide the requested information. This will involve deciding whether the requested information constitutes environmental information.
14. The Commissioner will not however deal with the issue of whether the Trust is a public authority for the purposes of the EIR. This is because the Commissioner only has the power to make decisions in respect of whether a particular request has been handled in accordance with the EIR. The request which is the subject of this complaint was made to the Conservators, not the Trust, therefore the question of whether the Trust handled the request in accordance with the EIR does not arise.

Reasons for decision

Are the Conservators a public authority under regulation 2(2) of the EIR

15. 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 public authorities to respond to requests for environmental information.
16. If a public authority receives a request for environmental information they are 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, then the public authority must explain why the exception applies.
17. The definition of public authority is given in Regulation 2(2) of the EIR. In particular it states that a "public authority" means the vast majority of public authorities as defined in Section 3 of the FOIA and:
 - (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.
18. In considering the question of whether the Conservators are a public authority for the purposes of the EIR, it must therefore be established whether the Conservators have functions of public administration or are under the control of a public authority.
19. The Fish Legal case is relevant here. This considered the issue of whether water companies are public authorities for the purposes of regulation 2(2)(c) or (d) of the EIR.
20. When considering whether a body carried out functions of public administration as defined by regulation 2(2)(c) the Upper Tribunal in the Fish Legal case considered whether the body was entrusted by law with the performance of services in the public interest and whether they are vested with special powers.
21. The UT in the Fish Legal case explained that persons 'performing public administrative functions' are:

"entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law".

22. It then considered the question of whether the water companies in that case had 'special powers'.
23. In respect of the definition of a public authority provided by regulation 2(2)(d) the UT set out the test for 'control'. It explained the test applies to the manner in which functions are performed, not the functions themselves. For example, a body is not under control of the Government merely because its powers derive from statute.
24. There are therefore two elements to the test – in order for a body to be under the control of a public authority, it must:
 - (i) operate in fact in a non-autonomous manner; and
 - (ii) do so because a public authority is in a position to control it.
25. In other words, although the public authority need not actually be exercising its powers of control, the existence of the powers must have a real constraining effect on the body in question.
26. Furthermore, the UT decided that the test requires consideration of the body's overall manner of performing its services: it would not be enough to find control in 'one or two marginal aspects' of its business.
27. The UT pointed out that 'no legitimate business has complete freedom of action'. It explained that as all operate in a framework of legal and commercial constraints, something more is needed before one can say that they have lost their autonomy.
28. In this case the Commissioner has focussed her investigation on whether the Conservators are a public authority by virtue of regulation 2(2)(c) ie whether they carry out functions of public administration. She has started by looking at whether the Conservators are entrusted with services in the public interest and, if so, she has gone onto consider whether they have any special powers.

Services in the public interest

29. In its submission to the Commissioner the Conservators explained that their primary function is to manage and control the common land of Therfield Heath and Greens, for the benefit of the neighbourhood. The majority of the site is designated as a Site of Special Scientific Interest.

The site also includes sports pitches and indoor sports facilities. The Commissioner has also viewed the Commons Regulation (Therfield) Provisional Order Confirmation Act 1888 and the Award of 1893 made under that Act. These confirm that the Conservators' function to hold and improve the heath and greens for the benefit of the neighbourhood. The Commissioner is therefore satisfied that the first test established by the UT is met, i.e. that the Conservators are entrusted by law with the performance of services in the public interest. Although not a requirement of the test, the Commissioner notes that these services relate to the environment.

Special powers

30. The Commissioner will now look at whether the Conservators are vested with any special powers in order that they can fulfil their primary functions. Special powers are those over and above those normally available under the civil legal system governing relationship between people and organisations. They can only be used by a particular body and will be set out in legislation.
31. In her guidance 'Public authorities under the EIR' the Commissioner gives some examples of the sort of powers that may be granted to a body and which may indicate it is a public authority for the purposes of the EIR. These include:
 - Compulsory purchase powers
 - The right to access or use a third party's private property
 - Power to create new byelaws
 - Privileged levels of influence or advisory roles
 - Susceptibility to judicial
32. This list is not exhaustive and the more of these special powers enjoyed by a body, the stronger the argument for that body being a public authority under the EIR. Having said that, as set out in the Commissioner's guidance, in principle an organisation may only need to have one special power for it to be deemed a public authority.
33. The Conservators set out the powers they have to manage the land they are responsible for. These include a range of powers which any private landowner would enjoy, for example the power to carry out practical management tasks such as drainage works, to manure land and to plant trees. Another example is the ability to charge for exercising racehorses on the land. The Commissioner finds these powers cannot be considered special.

34. However the Conservators also have the power to make byelaws for the purposes of protecting the common and its users from nuisance and to impose sanctions for breaching those byelaws. The Conservators have argued that this is not an absolute power since any byelaws have to be agreed by a secretary of state. Although any byelaws may need to be agreed, the Commissioner finds that the Conservators power to formulate byelaws does constitute a special power.
35. The Conservators also have the power to seize livestock or animals found on the common and to impose penalties on the owners of those animals. Again the Commissioner considers this constitutes a special power.
36. Although the Conservators have the power to determine the number of sheep permitted to graze the common land, this power has not been exercised this century. Therefore the Commissioner has not given any great weight to the existence of this power when considering whether they are a public authority.
37. Nevertheless the Commissioner is satisfied that the power to make byelaws and to seize stock qualify as special powers and that therefore the Conservators are a public authority for the purposes of the EIR under regulation 2(2)(c). In reaching this decision the Commissioner has had particular regard for the Conservators' power to make byelaws.
38. As the Conservators are a public authority they are obliged to deal with requests in accordance with the provisions of the EIR. However those provisions only oblige a public authority to respond to requests for environmental information. Therefore the Commissioner will now consider whether the information that's been requested is environmental information.

Is the requested information environmental information under regulation 2(1)

39. The information that has been requested relates to the election of the trustees of the Therfield Regulation Trust which the complainant believes the Conservators to be responsible for.
40. Environmental information is defined in regulation 2(1) as being:
 - "any information in written, visual, aural, electronic or any other material form on –
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(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); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);”

41. The Commissioner considers that regulation 2(1)(c) is the only provision of any possible relevance to the requested information.
42. The Conservators provided the complainant with the names of what they describe as the ‘managing trustees’ of the Trust. The managing trustees are the current Conservators and it is these individuals who are responsible for directing the Trust. The Conservators went on to explain to the complainant the process by which individuals are elected Conservators. It also explained that the actual land was held by what it referred to as ‘property holding trustees’. Originally these were the actual Conservators in post at the time the Trust was established in 1979 when the land passed from the Church Commissioners to the Trust. Only some of these trustees have continued as Conservators. The relationship between Conservators and the Trust is described as being quite novel by the Conservators themselves and it is apparent that the complainant and the Conservators hold different views on who constitutes a trustee and the procedures for the appointment of trustees. However it is not for the Commissioner to resolve the issue of what is the correct process for appointing trustees. She will however consider the extent to which the appointment of trustees is a measure effecting the environment.
43. The Conservators’ arguments have focussed on the election of Conservators themselves, who during their period in office, act as the managing trustees of the Trust. The Conservators have suggested that arguably the names of these Conservators could arguably be considered environmental information. However the Conservators maintain that the

process by which they are elected is too far removed from any matters effecting the environment.

44. During the course of the investigation the complainant made it clear to the Commissioner that he was not interested in information on the election of the Conservators. He was interested in the process by which the Conservators had appointed the land owning trustees.
45. The complainant has volunteered the purpose behind his request as he argues this has a direct bearing on whether the information in question is environmental. In brief, his concerns relate to an application to deregister a piece of common. The complainant argues that such applications have to be submitted by the owner of the land. He is therefore wishing to establish whether the person submitting the application is actually a trustee of the Therfield Regulation Trust. The complainant has informed the Commissioner that the application to deregister the land states it is intended to sell the land for housing.
46. The Commissioner accepts that in these circumstances the decision to deregister the land and the process of deregistration is a measure effecting the environment. Certainly the name of signatory would in that context also be environmental information. However although the Commissioner follows the complainant's rationale she has had to consider very carefully whether the process by which that person was appointed as a trustee is also information on that measure.
47. Whilst recognising that the appointment of trustees is a prerequisite for the Trust being able to act, the Commissioner considers the procedures for appointing those trustees is a separate process, distinct from the decisions subsequently taken by the Trust.
48. Furthermore, having considered the Trust deed itself and the Conservators' submission it appears to the Commissioner that the trustees are obliged to follow the directions of the Conservators. This provides an additional degree of separation between the appointment of trustees and the measures initiated by the Conservators and then endorsed by the trustees.
49. The complainant's request includes the names of the trustees going back over the last ten years and has argued very strongly that the names of individuals can fall within the definition of environmental information. Commissioner does not dispute that names can be environmental. However this very much depends on the relevant context. The Commissioner has accepted that in the circumstances of this case the application to deregister part of the common land would be environmental information, and as such the name of the trustee who signed that application would also be environmental information. But

this does not mean that the name of that individual in every other context in which it is held, is also environmental information.

50. Although the Commissioner does not accept that requested information is environmental information by virtue of being information on deregistering the common land she has gone on to consider whether the establishment and governance of the Trust is itself a measure effecting the environment. Having looked at the 1979 deed that established the Trust the Commissioner considers that it simply creates a new body in order to facilitate the transfer of the land from the Church Commissioners. It is clear from the deed that the management of the land still rests with the Conservators. The Commissioner therefore finds that the requested information does not relate to a measure effecting the environment, it is not environmental information.
51. In conclusion the Commissioner finds that although the Conservators are a public authority for the purposes of the EIR, the information sought by the complainant in his request is not environmental information. The Conservators are therefore under no obligation to respond to the request under the EIR.

Right of appeal

52. 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

53. 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.
54. 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

Rob Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF