

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

Date: 29 August 2023

Public authority: Chichester Harbour Conservancy
Address: The Harbour Office
Itchenor
Chichester
West Sussex
PO20 7AW

Decision (including any steps ordered)

1. The complainant requested information from Chichester Harbour Conservancy ("the Conservancy") about a track being designated a footpath only. By the date of this notice, the Conservancy has not responded to the request and does not consider itself subject to FOIA nor the EIR.
2. The Commissioner considers that the Conservancy is a public authority for the purposes of the EIR.
3. The Commissioner therefore requires the Conservancy to respond to this information request in accordance with its obligations under the EIR.
4. The public authority must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 25 June 2023, the complainant wrote to the Conservancy and requested information in the following terms:

"This is an environmental information regulations request.

Please confirm whether or not the conservancy is responsible for erecting a sign at the northern end of the track from the road to bosham to the northern terminal of the itchenor ferry, which asserts that the track is a footpath only.

If so, please provide copies of any information held by the conservancy that supports this assertion"

6. The Conservancy did not respond to the request and so the complainant chased for a response on 25 July 2023 but again did not receive any response.

Scope of the case

7. The complainant contacted the Commissioner on 8 August 2023, to complain about the lack of response to their request.
8. On 16 August 2023, the Commissioner's representative wrote to the Conservancy to ask it whether it was a public authority for the purposes of FOIA and/or the EIR. The Conservancy responded to advise that:
- "The Conservancy is not a public body and therefore is not subject to either the FOIA or the EIR."
- However, the Conservancy supplied no detailed argument as to why they were not a public authority under the EIR.
9. The Commissioner considers that the information requested is environmental information as defined in regulation 2(1)(c) of the EIR, as it constitutes "measures" in the form of policy affecting activities on an area of land. A footpath has an impact upon the land.
10. The scope of this case is to therefore to determine whether or not the Conservancy is 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. The 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.

Reasons for decision

13. 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.
14. 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.
15. The EIR definition of what constitutes a public authority is broader than that of FOIA and focuses more on the functions the particular organisation performs.
16. The definition of a public authority is given in Regulation 2(2) of the EIR as being:
 - (a) government departments;
 - (b) any other public authority as defined in section 3(1) of [FOIA], disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to [FOIA], but excluding—
 - (i) any body or office-holder listed in Schedule 1 to [FOIA] only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of [FOIA];

- (c) any other body or other person, that carries out functions of a public administration; or
 - (d) any other body or other person that is under the control of a person falling within sub-paragraphs (a), (b) or (c) 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.
17. The Conservancy is not a government department, nor is it under the control of another public authority and it is not listed in Schedule 1 of FOIA and therefore it does not fit within the definitions of either Regulation 2(2)(a), Regulation 2(2)(b) or 2(2)(d) of the EIR.
18. In considering the question of whether the Conservancy is a public authority for the purposes of the EIR, it must therefore be established whether the Conservancy has functions of public administration.
19. Regulation 2(2)(c) of the EIR transposes, into UK law, Article 2(2)(b) of Directive 2003/4/EC, which defines one category of public authorities to include:
- “Any natural or legal person performing public administrative functions under national law, including specific duties or services in relation to the environment.”
20. In *Fish Legal & Another v Information Commissioner & Others* [CJ-279/12] (“Fish Legal CJEU”), the Grand Chamber of the Court of Justice of the European Union further defined that Article:

“The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely 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.”¹

21. In *Cross v Information Commissioner* [2016] AACR 39 and subsequently in *Information Commissioner v Poplar Housing and Community Regeneration Association* [2020] UKUT 182 (AAC), the Upper Tribunal further interpreted the judgement in *Fish Legal* CJEU as laying out a dual functional test which requires two distinct conditions to be met in order for an organisation to qualify as a public authority under Regulation 2(2)(c):

- Firstly, the organisation must have been entrusted, under the legal regime applicable to the organisation, with the performance of services of public interest (in practice this means a specific piece of law must delegate functions to the organisation).
- Secondly, the organisation must have been vested with “special powers” for the purpose of performing those services.

The “Entrustment” condition

22. The Conservancy was established as a statutory harbour authority pursuant to the Chichester Harbour Conservancy Act 1971. This conferred upon the Conservancy, certain powers to enable them to operate, maintain, improve and conserve Chichester harbour and amenity area as a public harbour undertaking; including the power to compulsory purchase, make byelaws, construct works in the harbour; and for other purposes.

¹ Whilst the *Fish Legal* CJEU ruling was issued prior to the UK leaving the European Union, the Commissioner considers that it stands as retained case law (and is therefore binding) unless and until such times as the UK’s senior courts decide otherwise.

23. The Commissioner's view is that operating a public harbour meets the criterium of performance of services of public interest. As the function was delegated to the Conservancy under the Chichester Harbour Conservancy Act 1971, the Commissioner's view is that the entrustment condition is met.
24. In *Fish Legal* CJEU, the Court held that a public authority must have:
"special powers beyond those which result from the normal rules applicable in relations between persons governed by private law"
25. After having sought the opinion of the European Court of Justice, the *Fish Legal* case was referred back to the UK courts where it was considered by a three-judge panel of the Upper Tribunal in *Fish Legal & Shirley v Information Commissioner and others* [2015] UKUT 0052 (AAC) ("*Fish Legal* UT"). In its ruling, the UT stated that the question to be asked was:
"Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law?"
26. The Chichester Harbour Conservancy Act 1971, vests the Conservancy with a wide range of powers. The Commissioner must consider whether these powers provide the Conservancy with a practical advantage relative to the rules of private law.
27. The Chichester Harbour Conservancy Act 1971, was enacted in order to give the Conservancy the powers it needs to carry out its duties. Of particular note are the following powers.
28. Paragraph 11 of the Chichester Harbour Conservancy Act 1971, establishes an advisory committee to representative specified related interests and as such it is consulted on planning policies and planning applications affecting the area. Accordingly, it is considered that its advisory role, given to it by statute, gives it a special level of influence.
29. Likewise, paragraph 23, which confers the power to promote or oppose Bills in Parliament, is also considered to give it a special level of influence.

30. Paragraph 22 of the Chichester Harbour Conservancy Act 1971, confers power to the Conservancy to be able to provide and erect accommodation such as houses, caravan sites and for the "provision of, meals and refreshments (including intoxicating liquor)" and to hold entertainment events "in or in connection with the harbour or the amenity area" and for the "levying of charges for admission to, or the use of, any of the facilities provided under this Act".

31. Paragraph 25(2) of the Chichester Harbour Conservancy Act 1971, states that:

"The Conservancy, by means of an order made by them and submitted to and confirmed by the Secretary of State may be authorised to purchase compulsorily any such land as aforesaid ..."

32. Paragraph 30(1) of the Chichester Harbour Conservancy Act 1971, states that:

"Within the amenity area the Conservancy shall have all the powers of a county council under the following enactments ..."

This includes the power to establish nature reserves and country parks and make certain byelaws.

33. The Commissioner's view is that the powers conferred under the Chichester Harbour Conservancy Act 1971, were considered to provide the Conservancy with a practical advantage relative to the rules of private law. The Commissioner therefore considers that the special powers condition is met.

The Commissioner's Decision

34. As both the entrustment and special powers conditions are met, the Commissioner's decision is that the Conservancy is a public authority for the purposes of the EIR as it is a body that carries out functions of public administration as defined in regulation 2(2)(c) of the EIR.

35. The Conservancy is therefore bound by the provisions of the EIR. The Conservancy did not deal with the request for information as required by the EIR. As per paragraph 3 above, the Conservancy is now required to respond to the complainant's request in accordance with the EIR.

Right of appeal

36. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

37. 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.
38. 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

Michael Lea
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Wycliffe House
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SK9 5AF