

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

Decision notice

Date: 15 October 2019

Public Authority: Wimbledon and Putney Commons Conservators
Address: Manor Cottage
Windmill Road
Wimbledon Common
London
SW19 5NR

Decision (including any steps ordered)

1. The complainant has requested information regarding the sale of Mill House on Wimbledon Common.
2. The Wimbledon and Putney Commons Conservators (WPCC) refused to provide the information because, although WPCC is a public authority for the purposes of the EIR, the requested information is not environmental.
3. The Commissioner's decision is that the majority of the information within the scope of the request is not environmental and, therefore, there is no obligation on WPCC to provide this information to the complainant under the EIR.
4. However, the Commissioner has identified a small amount of environmental information. In respect of this information, the Commissioner requires WPCC to either make this information available to the complainant or provide a valid refusal notice setting out its reasons for refusing to do so.
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 3 September 2018, the complainant wrote to WPCC and requested information in the following terms:

"I wish to make a request under FOI/EIR in respect of the sale of the freehold of Mill House in 2006.

You will be aware that WPCC sold the freehold for some £2.5m, which was immediately sold to a BVI Nominee for £6.1m.

The charity received advice in respect of the value of their freehold during the transaction. I require you to provide;

- 1. Copies of all "Qualified Surveyors Reports" and/or "valuations" and/or "valuation advice" (whether in formal reports or otherwise) procured by the WPCC at the time of the sale.*
- 2. Copies of all other professional advice received at the time for the sale, (ie from Counsel or solicitors etc acting for the WPCC)*
- 3. Copies of all other information which is held in respect of the sale (ie correspondence between management/trustees/advisors/insurers and so on)*

To facilitate the WPCC in dealing with the request I am prepared to "receive" access by viewing the information at WPCC offices, thus avoiding administrative time".

7. On 27 September 2018, WPCC provided its response. WPCC confirmed that it was not a public authority for the purposes of the Freedom of Information Act. It explained that it had reviewed the requested information and it was of the view that it did not fall within the definition of environmental information as defined under regulation 2(1) of the EIR.
8. WPCC explained that the enfranchisement of Mill House was a complex matter that was resolved by the Conservators in August 2006. WPCC further explained that, in the spirit of openness and transparency, its Board had prepared and published a detailed chronology relating to the enfranchisement of Mill House beginning in 1934.
9. On 29 September 2018, the complainant wrote to WPCC and requested an internal review of its decision. He considered that there is no reason why a charity would wish to deny a levy payer access to the legally required Qualified Surveyors Reports. The complainant raised the issue

of the apparent increase in value following the purchase of the house from WPCC.

10. The complainant confirmed that he would pursue this matter with the Commissioner.
11. On 2 October 2018, WPCC confirmed to the complainant that, as he had referred the matter to the Commissioner, it would take no further action until directed to do so by the Commissioner.

Background

12. Wimbledon and Putney Commons is a charity managed by WPCC. It was established under "The Wimbledon and Putney Common Act 1871¹" (the 1871 Act). The Commons comprise some 1140 acres across Wimbledon Common, Putney Heath and Putney Lower Common.
13. Under the 1871 Act, it is the duty of the 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 Kingston.
15. In August 2006, the property known as Mill House was sold to a private individual following a legal action by WPCC to prevent its sale. WPCC's chronology of this matter is published on its website².

Scope of the case

16. The complainant contacted the Commissioner on 9 October 2018 to complain about the handling of his request for information. Specifically, he disputed WPCC's position that the requested information is not environmental and asserted that WPCC should disclose the information under the EIR.

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

² <https://www.wpcc.org.uk/downloads/wpcc-chronology-on-mill-house---september-2018-website.pdf>

17. WPCC has maintained its position that the requested information is not environmental but has acknowledged that it is a public authority for the purposes of the EIR as previously decided by the Commissioner in decision notice FER0674590³.
18. The Commissioner therefore considers that the scope of this investigation is to determine whether the requested information is environmental as defined in regulation 2(1) of the EIR and therefore whether WPCC is obliged to handle the request under the EIR.

Reasons for decision

19. Regulation 2(1) of the EIR defines environmental information as:

"...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

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172708/fer0674590.pdf>

(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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

20. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when, as in this case, the public authority is refusing to comply with the request.
21. The Commissioner recognises that it can sometimes be difficult to identify environmental information and has published guidance⁴ to assist public authorities and requesters. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC⁵ which the EIR enact.
22. This Directive, in turn, gives effect to the internal obligations of the 1998 UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental matters (the Aarhus Convention).
23. Recitals to the Aarhus Convention include:

"citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters..."

"improved access to information and public participation in decision-making enhance the quality and implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

24. The recitals to the Directive explain its purpose, including in the first recital:

"Increased public access to environmental information and the dissemination of such matters, a free exchange of views, more effective

⁴ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003L0004>

participation by the public in environmental decision making and, eventually, to a better environment."

25. In *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney* [2017] EWCA Civ 844 ("Henney")⁶, the Court of Appeal set out two principles to be considered when interpreting the definition of environmental information in article 2(1) of the directive and regulations 2(1) of the EIR.
26. The Court of Appeal set out that the EIR must be interpreted as far as possible in accordance with the original Directive and the Aarhus Convention and drew attention to the recitals set out at paragraph 23 of this notice.
27. The Court of Appeal also confirmed that although the term "*environmental information*" must be construed broadly, there are limits to this broad approach. Essentially, information which has only minimal connection with the environment is not environmental information.
28. The Court of Appeal set out the differences between the definition of information under the Act and the definition of environmental information under the EIR. Under the Act, the definition of information is focussed on the information itself, however, in regulation 2(1)(c) of the EIR the relevant measure can also be the focus. The Court of Appeal states at paragraph 37:

"It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question."

29. The Court of Appeal also stated at paragraph 43:

"It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issues with which the information is concerned. It may be relevant to consider the purpose for which the information was produced, how important the information is to the purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information

⁶ <http://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

itself. It was not in dispute that when identifying the measure, a tribunal should apply the definition of the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."

30. The Court of Appeal agreed with the prior Upper Tribunal decision that concluded that a project having some form of environmental impact does not automatically make all information concerned with the project environmental. However, the Court of Appeal went on to confirm that it was not necessary that "*the information itself be intrinsically environmental*".
31. It is generally necessary to inspect the requested information in order to ascertain whether or not it is environmental information. WPCC has provided the Commissioner with the withheld information and a detailed submission regarding why it considers the information is not environmental and therefore does not fall to be considered under the EIR.

WPCC's position

32. WPCC considers that there is no question of the requested information falling within subparagraphs (a), (b) or (d) of the definition set out at regulation 2(1) of the EIR.
33. WPCC considers that it could be argued that the information falls within subparagraph (c) as the sale could be considered a measure, or within subparagraph (e) as the property valuation regarding the transaction could be considered to be an economic analysis, or within subparagraph (f) which refers to the state of built structures.
34. WPCC's view, however, is that the forced sale of Mill House did not in any way, either directly or indirectly, affect the state of the environment and consequently WPCC believes that the information does not fall within any of the subparagraphs of the definition.
35. WPCC considers its view is substantiated by the finding in Kingston County Court regarding the sale of Mill House. In Her Honour Judge Williams' judgement, dated 4 November 2014, she confirmed her view that the sale of Mill House would not make any significant difference to

the operation and control of the Commons or that the users of the Commons would be affected, as set out below:

"From the long title of the 1967⁷ Act it is clear that parliament intended to pass an expropriatory statute which necessarily must interfere with the rights of land owners. This was in order to give people in the position of the claimant the right to acquire the freehold in certain circumstances. That was not anticipated in 1871. The necessary conditions are met by the claimant. It is not my view this will make any significant difference to the operation and control of the Commons by the defendants, in that the Mill House will continue to be fenced off and be in private use, but instead of returning to the exclusive ownership of the defendants in 2021, the property will remain in private hands. I do not believe the users of the Common will be affected because any transfer to the claimant will contain the necessary restrictive covenants and of course the appropriate price will be paid, to be determined, and the Conservators will benefit financially."

36. On this basis, WPCC believes that the sale of Mill House had no impact on the environment and as such information relating to the sale is not considered to be environmental information for the purposes of the EIR.
37. WPCC explained that it fought for many years to avoid having to sell Mill House. WPCC confirmed that the sale was eventually "forced" on it as a result of the The Commonhold and Leasehold Reform Act 2002 and the subsequent finding in Kingston County Court against WPCC. Therefore, WPCC considers the carrying into effect of the sale was just a process to be followed rather than a decision of WPCC to sell the property. WPCC states that it was an unwilling participant in the sale, in effect, one of its properties was being compulsorily purchased against WPCC's wishes.
38. WPCC set out that Mill House was in existence before the sale and continued to exist after the sale. Therefore, it considers that the sale of the property was not an action that impacted on the environment as the environment, in its widest sense, was the same before, during and after the sale. WPCC explained that all that changed was the ownership of the property. WPCC considers this to be unlike a context in which a property has been sold for the purposes of development or as part of some wider project, which will affect the state of the environment.
39. WPCC considers that the simple sale of property is not a measure likely to affect any of the matters in regulation 2(1)(a) or 2(1)(b), and the

⁷ The Leasehold Reform Act 1967 <http://www.legislation.gov.uk/ukpga/1967/88/contents>

information is not therefore “on” such a measure or is an economic analysis used within such a measure.

40. WPCC stated that it is important that the application of the EIR does not slide into covering information which only has a minimal connection with any of the designated environmental factors in accordance with case C-316/01 *Glawischnig v Bundesminister für Sicherheit und Generationen* (13 June 2003)⁸.
41. WPCC considers that the “*mere (forced) sale of a residential property*” has no, or only the most minimal, connection to any environmental factor. WPCC considers this case is analogous to *Department for Transport and Driver and Vehicles Standards Agency & Porsche Cars GB Ltd v Information Commissioner & Cieslik* [2018] UKUT 127 (AAC) (*Cieslik*) in which the Upper Tribunal emphasised the need to not apply the EIR in an inappropriately broad manner.
42. WPCC cited one of the principle objectives of the original environmental information initiative, as set out in the preamble to the Council of European Communities Directive of 7 June 1990 (90/313/EEC) was to improve environmental protection:

“*whereas access to information on the environment held by public authorities will improve environment protection.*”
43. WPCC set out that this objective was further expanded in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 which replaced Council Directive 90/313/EEC:

“*Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.*”
44. WPCC set out that this objective captured the principle of improving environmental protection as agreed in the Aarhus Convention of 25 June 1998, which came into force on 30 October 2001:

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1565276854086&uri=CELEX:62001CJ0316>

"Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development."

45. WPCC asserted that it is clear that the information relating to the sale of Mill House has no bearing on matters relating to the environment or environmental protection and, as such, the publication of such information cannot be justified on the basis of the more general objective. The general objective cannot be used to broaden the definitions or to circumvent the restrictions emphasised by binding case law. WPCC considers that the Cieslik case supports this view.
46. WPCC confirmed that it had carefully reviewed the Commissioner's guidance and the binding case law on the scope of environmental information. WPCC considers that the forced sale of Mill House did not affect the environment and disclosure of information relating to the sale would not inform the public of matters of environmental decision-making. Rather, the sale, which WPCC had no decision making control over, simply resulted in a change of ownership.

Complainant's position

47. The complainant provided the Commissioner with background information regarding WPCC and the sale of Mill House.
48. The complainant explained that he considered disclosure of the requested information is in the public interest to inform the public of whether WPCC were correctly advised with regards to the sale value of the property.
49. The complainant considers that had WPCC been able to secure a higher selling price, this would have had a beneficial impact on the environment as WPCC would have greater funds to carry out its duties and improvements.

The Commissioner's position

50. The Commissioner has considered WPCC's arguments and has had sight of the requested information. This consists of number documents spanning the process of enfranchising Mill House as set out in WPCC's published timeline.
51. The Commissioner considers that the majority of requested information is not environmental, however, a small amount of the information is environmental by virtue of regulation 2(1)(a) and 2(1)(c) of the EIR.

52. The Commissioner considers that the key issue in this case is identifying the “measure” which is likely to affect the environment in line with the Court of Appeal’s reasoning set out at paragraph 29.
53. The vast majority of the requested information relates to the legal process of attempting to prevent and negotiating the sale of Mill House. Whilst the Commissioner acknowledges that this is, in essence, the sale of land and property, it is not apparent to her how this sale would affect the environment. As set out by WPCC, the sale was simply a transfer of ownership from WPCC as landlord to its tenant.
54. The complainant has made the Commissioner aware that Mill House was subsequently resold to a third party, however, the Commissioner does not consider that this means the original sale retrospectively had an impact on the environment, particularly as she has not been provided with evidence to suggest the subsequent sale itself affected the environment.
55. The Commissioner has, however, identified a section of the information which would comprise a measure for the purposes of the EIR.
56. The sale of Mill House included covenants to protect the Commons and the aims of the Conservators. The Commissioner considers that this information is clearly a measure likely to affect the environment as the purpose of the information is to protect, and prevent damage to, the environment.
57. WPCC set out that the covenants were in place as part of the tenancy and remain as part of the sale, therefore did not affect the environment as no change was implemented. The Commissioner does not accept that this means the environment has not been affected, the protection of the environment and prevention of change affects the environment substantially.
58. The requested information also included a “site plan” of the property within the paperwork for the transfer of ownership. The Commissioner considers that this is information on the state of the land and is therefore environmental information as set out on regulation 2(1)(a).
59. The Commissioner requires WPCC to provide a response under the EIR regarding the above covenants to the sale and the “site plan”. This response should either make the information available or provide a valid refusal notice setting out which exception WPCC is relying on to refuse to provide this information and its consideration of the public interest test.

Other matters

60. The complainant has raised concerns that WPCC are refusing to provide the information in order to prevent disclosure of information that would reveal potential maladministration. The Commissioner cannot comment why a public authority may not wish to disclose information outside of the EIR, however, it may be helpful to note at this point that she has seen no evidence during the course of the investigation that the chronology published online is not an accurate representation of the sale of Mill House.

Right of appeal

61. 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

62. 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.
63. 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

**Gerrard Tracey
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