

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 5 July 2022

**Public Authority:** National Employment Savings Trust Corporation

**Address:** 10 South Colonnade  
Canary Wharf  
London  
E14 4PU

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the contract for the administration of the National Employment Savings Trust pension scheme. The National Employment Savings Trust Corporation (“the Corporation”) stated that it did not hold this information for the purposes of FOIA as it only held it in its capacity as the Trustee of the scheme.
2. The Commissioner’s decision is that the Corporation does hold this information for the purposes of FOIA and has failed to comply with its obligations under section 1(1) of FOIA.
3. The Commissioner requires the Corporation to take the following steps to ensure compliance with the legislation.
  - Either disclose the contract to the complainant or issue a refusal notice that complies with section 17 of FOIA.
4. The Corporation 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

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5. On 9 June 2021 the complainant requested information of the following description:

“Please provide me with a copy of the contract for the "Provision of Nest Scheme Administration Services", as detailed at <https://www.contractsfinder.service.gov.uk/notice/2cd23ff5-0649-4bc1-a9bb-8881b06908a4?origin=SearchResults&p=1>”

6. On 1 July 2021, the Corporation responded. It denied holding the requested information for the purposes of FOIA. It stated that any information it did hold would be held in its capacity acting as the Trustee of the National Employment Savings Trust pension scheme.
7. The complainant requested an internal review on the same day. The Corporation sent the outcome of its internal review on 21 July 2021. It upheld its original position.

## Scope of the case

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8. The complainant contacted the Commissioner on 16 August 2021 to complain about the way her request for information had been handled.
9. There appears to be no dispute that the Corporation have, in its possession, a copy of the contract that the complainant has sought – however the Corporation maintains that this does not amount to the information being “held” for the purposes of FOIA.
10. The Commissioner considers that the scope of his investigation is to determine whether the Corporation holds the information for the purposes of FOIA.

## Background

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11. The National Employment Savings Trust (“the Scheme”) is a defined contribution workplace pension scheme. The Pension Act 2008 requires all employees to be enrolled in an occupational pension scheme unless they specifically choose to opt out. Many employers choose to become members of the Scheme rather than taking on the administrative burden and financial risk of establishing their own pension scheme.
12. The Pensions Act required the Scheme to have a single trustee (“the Trustee”) and also established a trustee corporation (subsequently

named the National Employment Savings Trust Corporation). The National Employment Savings Trust Order 2010 designates the Corporation as the Trustee.

## Reasons for decision

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13. Section 1(1) of FOIA states that:

Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

14. Section 3(2) of FOIA states that:

For the purposes of this Act, information is held by a public authority if—

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.

## The Corporation's position

15. At the outset of his investigation, the Commissioner wrote to the Corporation, seeking submission as to why it considered that it did not hold the contract for the purposes of FOIA. The Commissioner asked the Corporation to set out the legal basis on which the contract was created and maintained – as well as more practical questions about how the contract might be accessed on a day to day basis.

16. The Corporation explained to the Commissioner that as a matter of practice and of law, it kept its Trustee role and its wider role separate. Therefore any information created or acquired when acting as the Trustee would not be covered by FOIA and to conflate the two roles would conflict with pension law:

“The information and data which is held in respect of the Scheme, which necessarily includes agreements relating to the administration and management of the Scheme, are held by the Corporation in its capacity as the Trustee. There is no other basis on which it can be held. To conclude otherwise would mean that the Corporation would

be treated as a trustee and therefore subject to pensions law, trust law and fiduciary duties as a trustee in respect of and for the purposes of all of its actions and proceedings. This is not considered to be the correct position given the Corporation exists as a public body and has specific powers as such, which are distinct from its appointment as the trustee of the Scheme (as to which, please refer to section 76(3) of the Pensions Act 2008 which makes clear that the Corporation has power to borrow money and invest money separate from its status as trustee of the Scheme).

"The Corporation has a unique position in the UK as the sole public corporation which is the trustee of a commercial master trust (authorised by the Pensions Regulator). It is therefore subject to all applicable pensions regulations and trust law, as well as the necessary separation of powers that the Corporation is required to follow in order to comply with its various obligations, and the complex legislative framework under which it was created as the Corporation, and given powers for day to day functions as the Authority (including the ability to take on trustee roles where appointed to do so).

"Importantly, further steps and legislation were needed subsequent to the creation of the Corporation, to appoint the Corporation to its current role as Trustee. If there were no legal distinction between the Corporation as Authority and the Corporation acting as the Trustee, such an additional step would not have been needed, as the Authority would already and automatically have been the Trustee without anything further being needed. As such additional appointment legislation was required, it must have been an important legal requirement – which clearly illustrates the distinctly separate roles of the Corporation and the difference between its Authority and Trustee roles."

17. The Commissioner drew the Corporation's attention to the finding of the First Tier Tribunal in *Ian Hutchinson v Information Commissioner and Kirklees Metropolitan Council* (EA/2017/0194) ("the Hutchinson ruling") in which the Tribunal found that information the council claimed it only held in its capacity as the sole trustee of a charitable trust was in fact held by the council:

"The duty of a trustee to act only in the best interests of the trust when dealing with the affairs of the trust does not mean that the local authority as trustee is performing functions distinct from the functions of a local authority."

18. The Corporation responded to say that it did not consider that the Hutchinson ruling (which concerned a charitable trust) was applicable to a pension trust. It noted that:

"We do not believe that it can be the case for NEST that the role of the Authority and Trustee are "indistinguishable". The role of trustee of an authorised master trust is entirely separate from any public body status. There are specific legal duties and regulatory obligations which must be complied with, including those provided for by the Pension Schemes Act 2017 and the Occupational Pension Schemes (Master Trusts) Regulations 2018. Accordingly, this is not a case where a public authority has itself established a charity, for example, in order to provide a particular service which it would otherwise be required to deliver. Rather, the Corporation is specifically appointed under the NEST Order and Rules as the Trustee of the Scheme. There would be no other basis on which the Corporation could undertake this role and it would not be the Trustee, only the Authority, but for such additional appointment. Therefore, without having been appointed as the Trustee, the Corporation would not have any trustee duties in respect of the administration and management of the Scheme – including, the appointment of the third party administrator, the ability to enter into the Trustee Pension Contract and having possession of that document as a result. Accordingly, it is considered that the interests of the Corporation (as the Authority) and the Trustee must by law be kept distinct.

"If such a distinction were not properly observed, this would mean that the Corporation would be subject to trust law in all cases and would have to exercise all powers subject to the fiduciary duty owed to the Scheme members in the capacity as trustee. Where the Corporation has separate public law duties and obligations, it would not have been intended that these would be subject to trust law and the fiduciary duty as mentioned. Instead, those duties and obligations would be, and are, exercisable in its capacity as the Authority and not as the Trustee of a commercial master trust...

"...It is also key to recognise in this respect that the Corporation as itself does not have the power or vires to enter into any contracts or agreements in relation to the administration and management of the Scheme. It is only by virtue of the appointment as trustee of the Scheme under Article 4 of the NEST Order, i.e. acting as the Trustee, that the Corporation has any basis or power to act as trustee to administer and manage the Scheme, including the appointment of a third party administrator, such as by means of the Trustee Pension Contract.

If the two roles were blurred and the Corporation in its capacity as Authority strayed into decision making for the Trustee and vice versa, this would lead to decisions being taken and powers being exercised in breach of trust and unlawfully. This cannot have been the intention of the DWP or the FOIA. Likewise, the Corporation must completely

separate its funds and accounting as an Authority, compared to its Trustee role, with all pension assets completely separated from and ring fenced from Corporation assets and monies. Again, this is a fundamental principle of trust law which is complied with in respect of the Scheme such that the Trustee role and capacity is entirely separate from that of the Corporation as a public body.”

19. Finally, the Corporation noted that, whilst it had been designated as the Trustee of the Scheme by legislation, there was nothing to prevent further legislation being passed which would designate another Trustee.

### **The Commissioner's view**

20. The Commissioner appreciates that pensions law is complex and he has considered the Corporation's arguments carefully. However he considers that the dispute comes down to one question: is the Corporation two separate legal entities or a single entity with multiple functions, some of which must be performed independently of the others? In his view, the latter case applies to the Corporation.
21. Section 67 of the Pensions Act 2008 requires the Secretary of State to establish a pension scheme and make provision for its administration.
22. Section 75 of the same Act provides for the establishment of a trustee corporation.
23. Section 76 of the Act sets out what the functions of the trustee corporation are to be:
  - to act as a trustee of any scheme established under section 67 and
  - any other functions it is given by or under an enactment in connection with the scheme.
24. The trustee corporation may do anything calculated to facilitate, or incidental or conducive to, the carrying out of any of its functions and may enter into agreements, borrow money or invest money (the latter two only with the consent of the Secretary of State). The exercise of the functions of borrowing money and investing money are without prejudice to the exercise by the trustee corporation of any power vested in it as a trustee of a scheme established under section 67. This means that it can only carry out those function if it does not prejudice the exercise of the Scheme.
25. Whilst the Commissioner has considered the arguments put forward about the operation of pension law, he does not consider that these arguments suggest anything other than that the Corporation is a single entity, some of whose functions must be kept administratively separate.

The fact that this separation has a basis in law does not split the Corporation into two separate legal entities. It merely requires that the Corporation must perform its functions as Trustee independently from its other functions.

26. The Commissioner notes that the Pensions Act 2008 does not give the (to-be established) trustee corporation separate legal personalities: acting as trustee of the scheme is a designated function of the trustee corporation.
27. The Commissioner further notes that it is hardly an unusual situation for an organisation to ring-fence certain functions or certain information. For example, the Commissioner himself is required to maintain administrative separation between his function as a public authority, subject to FOIA (and as a data controller for the purposes of the UKGDPR) and his function as the regulator of FOIA and data protection legislation – it does not mean that he takes on separate legal personalities.
28. The National Employment Savings Trust Corporation was designated as a public authority in October 2011 when the Freedom of Information (Additional Public Authorities) Order 2011 came into force. No caveats were added to the Corporation's designation.
29. The Corporation implied that, in this instance, the absence of evidence was evidence of absence: namely that, because of the way the Corporation had been established in law, had Parliament intended information held by the Trustee to be covered by FOIA it would have legislated specifically for this.
30. The Commissioner takes the opposite view. The Corporation was specifically set up to act as the Trustee of the Scheme – a function enshrined in law. Acting as Trustee is not some minor ancillary function of the Corporation: it is the reason the Corporation exists in the first place – even if that function could, in theory, be transferred to another person.
31. When deciding whether and how the Corporation should be covered by FOIA, Parliament must have been aware of this potential conflict – yet the Commissioner is unable to locate any record in Hansard that would suggest that the Corporation's designation was only intended to apply in part. Contrast that to the position of the Competition and Markets



Authority<sup>1</sup> or the Office for Standards in Education, Children's Services and Skills<sup>2</sup> – both of which have bespoke designations, indicating that Parliament considers carefully whether a particular public authority should be wholly or partially covered by FOIA.

32. The Commissioner therefore considers that the Corporation is completely covered by FOIA – regardless of the function that it might have performed, or be performing, at any given point in time. Any information the Corporation holds when exercising its function as the Trustee, is held for the purposes of FOIA.
33. As such, the Commissioner considers that the contract is held by the Corporation and therefore the request triggered the Corporation's obligations under section 1(1) of FOIA. As it has neither disclosed the requested information nor cited an exemption from disclosure, the Commissioner considers that the Corporation has failed to comply with its duty under section 1(1) of FOIA.

### **Remedial steps**

34. Given that the Commissioner has found an outstanding breach of section 1(1) of FOIA, he is obligated to order the Corporation to take such remedial steps as are necessary to bring it back into compliance with the legislation.
35. As the Corporation has, to this point, maintained that it does not hold the contract (but confirmed that it exists), the Commissioner accepts that the Corporation has not (at least in theory) had the opportunity to consider whether any exemption from disclosure applies to the contract. The Commissioner has therefore allowed for an opportunity to consider exemptions.
36. It will be open to the Corporation to rely on any exemption it reasonably believes would apply – should it wish to do so. Should it cite exemptions, it will be open to the complainant to challenge those exemptions via a further complaint to the Commissioner.

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<sup>1</sup> Only information the CMA holds in its capacity as a tribunal is subject to FOIA.

<sup>2</sup> Any information Ofsted holds in relation to its function of maintaining a register of children's service providers falls outside the scope of FOIA.



## Right of appeal

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37. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**