

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

Decision notice

Date: 16 March 2022

Public Authority: The National Trust for Places of Historic Interest or Natural Beauty

Address: Heelis
Kemble Drive
Swindon
SN2 2NA

Decision (including any steps ordered)

1. The complainant requested information about searches for unexploded ordnance in Studland, Dorset. The National Trust for Places of Historic Interest or Natural Beauty ("the National Trust") drew the complainant's attention to some information in the public domain, but refused to comply with the request in full because it did not consider itself obliged to comply with requests made under the Environmental Information Regulations ("the EIR") as it was not a public authority for the purposes of the legislation.
2. The Commissioner's decision is that the National Trust is not a public authority for the purposes of the EIR and was therefore not obliged to comply with the request.
3. As the National Trust is not a public authority, the Commissioner has no power to require it to take remedial steps.

Background

4. The request in this particular case followed on from an exchange of correspondence between the complainant and the National Trust. The complainant first enquired about the Trust's status under EIR and then subsequently insisted that it was covered. The National Trust maintained throughout that it was not subject to the legislation.

Request and response

5. On 12 August 2021, the complainant wrote to the National Trust and requested information in the following terms:

"I understand that in October 2006, January 2007 and July 2010 the National Trust requested the Ministry of Defence to conduct a search of Studland in Dorset for unexploded ordnance. Please could you provide me with the following information/answer the following questions.

1. Could you give me a detailed description as to why the MOD was asked by the Trust to search their land, and what specifically triggered this decision?
 2. If the Trust requested a third-party assessment of the UXB risk at Studland, could you provide me with a copy of their report?
 3. How come the Army team returned in 2010, was this at their advice or did the trust specifically request them to return again after 2007?
 4. Could you give me copies the Army's final reports (such as Bomb Disposal Officers or CMD) given to the trust at the end of their survey?
 5. Is it planned to ask the MOD to search the Studland area again in the future and did the Army give any advice on this topic to the Trust?"
6. The National Trust responded on 1 September 2021. It reiterated that it did not consider itself subject to the EIR, but nevertheless provided a small quantity of information and directed the complainant to other information it had previously published. It confirmed that it held further information, but was unwilling to disclose it.
7. The complainant wrote to the National Trust again on Friday 24 September 2021, asking it to clarify some of its previous answers and to provide more details about the information it held. The National Trust issued its final response on the same day. It provided some further information but once again maintained that it was not subject to the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 27 September 2021 to ask him to consider whether or not the National Trust was a public authority for the purposes of the EIR.
9. In June 2021, the Commissioner considered a separate complaint about the National Trust which involved consideration of the Trust's status under the EIR. That complaint was ultimately resolved informally, without it being necessary for the Commissioner to issue a binding decision but, as part of his investigation, the Commissioner sought a submission from the National Trust explaining why it did not consider itself a public authority for the purposes of the EIR. At the conclusion of this case, the Commissioner warned the National Trust that its status remained undetermined, but agreed to keep its submission on file in the event that a future complaint required a decision notice.
10. At the outset of the current investigation, the Commissioner wrote to the National Trust, noting that a new complaint had been submitted. He further noted that he was already in possession of the Trust's previous submission on its EIR status, but invited it to provide additional arguments if it wished to do so. The correspondence was neither acknowledged nor responded to.
11. The Commissioner considers that the scope of his investigation is to determine whether the National Trust is a public authority for the purposes of the EIR.

Reasons for decision

Would the requested information be environmental?

12. Regulation 2(1) of the EIR defines environmental information as being information 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)...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
13. Although he has not seen the requested information, as it is information relating to the location of World War Two ordnance scattered across the countryside, the Commissioner believes that the requested information is likely to be information on either "factors" affecting the elements of the environment, on "measures" affecting those factors or directly on the state of the elements themselves. For procedural reasons, he has therefore assessed this case under the EIR.

Is the National Trust a public authority for the purposes of the EIR?

14. 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..
15. Regulation 2(2) of the EIR sets out the definition thus:
- (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 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.
16. Clearly, the National Trust is not a government department, nor is it a publicly-owned company. The National Trust is not listed in Schedule 1 of FOIA and therefore it does not fit within the definition of either Regulation 2(2)(a) or Regulation 2(2)(b) of the EIR.
17. The National Trust is an independent organisation and it is not under the control of another public authority. Therefore the Trust cannot fall within the definition of Regulation 2(2)(d) of the EIR.

Regulation 2(2)(c) – carrying out functions of public administration

18. The Commissioner turns next to the question of whether the Trust can be said to be carrying out 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.

Background

22. Before considering the extent to which it satisfies the dual functionality test, it is important to set out some of the National Trust’s history.

23. The Trust was first incorporated on 12 January 1895 as the National Trust for places of Historic Interest or Natural Beauty. Its purpose was to “promote the permanent preservation for the benefit of the Nation of lands and tenements (including buildings) of beauty or historic interest.” It acquired its first piece of land the same year and its first building the year after.

24. In 1907, Parliament passed the National Trust Act (“the 1907 Act”) which dissolved the existing body and re-incorporated it in statute. As well as setting out borrowing powers and limits on the sale of its assets, the 1907 Act also provided the National Trust with the power to make byelaws governing the use of its properties.

25. Further National Trust Acts followed in 1919, 1937, 1939, 1953 and 1971. Generally these dealt with governance, borrowing powers and matters relating to land ownership. However the 1971 Act reconstituted

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.

the National Trust's power to make and enforce byelaws on land or in properties that it owns.

26. Today, the National Trust is a membership organisation, governed by a Board of Trustees. Its most recent annual report stated that the National Trust had over five million members and employed over ten thousand staff.²

The "Entrustment" condition

27. In considering the question of entrustment, the Commissioner has first considered whether the functions the National Trust performs "have a sufficient connection with what entities that are organically part of the administration or the executive of the state do".³ He considers that there is a sufficient connection.
28. Whilst not always the case (for historical or cultural reasons it varies between jurisdictions), the preservation of buildings and landscapes of historical importance for the benefit of the nation is a function carried out by the state in some jurisdictions. For example, the National Parks Service in the USA is part of the US Department for the Interior. The French Ministry of Culture is responsible for overseeing "monuments historiques" – as is the Italian Ministero della Cultura. Even in the UK, English Heritage (which, interestingly, is subject to FOIA and, hence the EIR) used to be an executive agency of the Department for Culture Media and Sport but is now an independent charity.
29. If the National Trust is carrying out functions which might otherwise have been carried out by the state, has it been entrusted in law with those functions?
30. Section 4(1) of the 1907 Act states that:
- "The National Trust shall be established for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as

² <https://nt.global.ssl.fastly.net/documents/annual-report-202021.pdf>

³ See Cross – para 94

regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life.⁴

31. The National Trust, in its previous submission, argued that this did not amount to entrustment. It pointed out that the National Trust had been created by a private Act of Parliament, rather than a public Act. It argued that:

"The latter are passed for the public advantage; the former are passed for the benefit of private persons. That distinction is reflected in the different approach that is taken to their interpretation. Accordingly, the National Trust was created by legislation expressly restricted to benefit of private persons only and not the public at large. This is an anathema to a body entrusted with the carrying out of 'public administrative functions.'"

32. The Commissioner does not consider that a private Act of parliament is incapable of entrusting powers. Indeed he notes that, historically one of the functions of private Acts was to legislate for public works such as harbours or railways.⁵ A private Act only means that the Act's effects apply to the entity or entities named in the Act and not to the wider public. Private Acts may benefit their recipients but they can also impose legal restraints on those recipients that do not apply to other persons.⁶ A House of Commons Library briefing paper on the subject notes that:

"The majority of private bills today are promoted by local authorities or other statutory bodies, seeking to change their powers in order to better fulfil their functions."

33. The 1907 Act (and its successor Acts) do grant the National Trust powers to enforce byelaws, but they also restrict the Trust's activities. For example the Trust is required to afford public access to its land and cannot sell its land or properties without an Act of Parliament. Therefore in passing these Acts, the state has clearly interfered with the Trust's work in the sense that it has defined in law what the Trust can and cannot do.

⁴ <https://nt.global.ssl.fastly.net/documents/download-national-trust-acts-1907-1971-post-order-2005.pdf>

⁵ <https://researchbriefings.files.parliament.uk/documents/SN06508/SN06508.pdf>

⁶ <https://www.parliament.uk/about/how/laws/bills/private/>

34. More particularly, the National Trust's fundamental mission and purpose is set out in the 1907 Act: the preservation of land and buildings for the benefit of the nation. The Trust cannot simply decide that it wants alleviate poverty or help sick animals instead – even if that's what its members and trustees wish the charity's purpose to be. The National Trust's purpose has been set in statute and can only be changed by Parliament.
35. That having been said, the Commissioner is not persuaded that the National Trust has been entrusted with the performance of services of public interest as he considers that the various National Trust Acts do not provide a sufficient delegation of functions.
36. The Government of the time did not create the National Trust – the Trust created itself, set its own objectives and raised its own funds to support its work. The various National Trust Acts give the Trust a special status in law, but they do not, in the Commissioner's view, amount to the express delegation of the functions of the state to the National Trust.
37. The National Trust is a charitable organisation made up of members who pay an annual membership fee. The organisation was reconstituted by the 1907 Act, but this Act merely recognised the work that the Trust was doing and put in place certain measures allowing it continue that work effectively.
38. The Commissioner considers that this view accords with the judgement in "Poplar" where the Upper Tribunal, referring to Fish Legal CJEU found that:

"The view that an entity's power to performs its functions must be set down in national law is consistent with other passages of the Court's judgment. The words "by virtue of a legal basis specifically defined in the national legislation which is applicable to them" (at para 48; see above) relate to the empowering of an entity to perform functions, as does the reference to "an entity empowered by the state to act on its behalf" (at para 67; see above). The Court's reference (at para 49) to "Flachglas Torgau"⁷ demonstrates that article 2(2)(b) refers to entities which are administrative authorities as established in national law and **not to entities which may carry out some of the same functions**

⁷ Case C-204/09 Flachglas Torgau [2012] ECR

as are performed by the State but which cannot be regarded as bound by legislation to do so.” [emphasis added]

39. The Commissioner therefore takes the view that the National Trust has not been entrusted, in law, with carrying out services of public interest and therefore it cannot be a public authority for the purposes of the EIR. However, for completeness, he has gone on to consider the second part of the dual functionality test: whether or not the National Trust has been “vested with special powers.”

The “Special Powers” condition

40. As has been recorded above, in order to meet the definition under Regulation 2(2)(c) of the EIR, a public authority must not only have been entrusted with the functions of the state it must also have been vested with special powers in order to carry out those functions.

41. 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”

42. 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?”

43. In its original submission, the National Trust argued that it did not have special powers not available under private law. It argued that:

“the powers granted are in order to facilitate a duty imposed upon the Trust that **restricts** the powers private landowners would otherwise have. All the powers granted are all powers which a private landowner would otherwise be able to exercise and cannot be described as ‘special’ being powers that a private landowner could not exercise.” [original emphasis]

44. When the Commissioner pointed out that the National Trust could impose byelaws on land it owned, the Trust countered that this was not a special power because:

“This power must be understood in its statutory context. It is not ‘a special power.’ It is actually part of **restriction** or **duty** imposed

upon National Trust namely, that the National Trust must afford the public access to its land. This is not something that a private landowner must do. The byelaws simply allow the National Trust to set the conditions of entry under that overarching obligation. It is not a 'special power' in the sense of giving the National Trust not afforded to a private landowner who can simply prohibit anyone from entering his land. Bylaws can be made by private companies or charities and are not restricted to public authorities. The bylaws in question condition access to private land which must be made accessible by the National Trust to the public – it confers no practical advantage over a private landowner who is under no obligation to admit the public at all to his land." [original emphasis]

45. The Commissioner disagrees that the power to impose byelaws does not provide the National Trust with a practical advantage relative to the rules of private law.
46. One of the powers granted to the National Trust in the 1971 Act is the power to make byelaws regulating the "games to be played" on land which it owns. The owner of a private housing development may erect a sign saying "No Ball Games" on an open space that belongs to the development and to which access is not restricted – but if someone disregards that sign, the company can only threaten to bring a civil tort for trespass. What the company cannot do is take out a criminal prosecution. Through its power to make byelaws, the National Trust is permitted (at least in theory) to initiate a criminal prosecution.
47. As the Upper Tribunal explained in *Fish Legal UT*:

"The characterisation of the powers to which the CJEU referred (special – beyond the rules of private law) is not limited to activities or outcomes, **but includes the means by which they may be secured**. The power not only to promote the making of a byelaw, but the making of a byelaw breach of which constitutes a criminal offence, is not a power that is available under private law. It is not comparable to the private landowner's power to enforce a licence to enter on and enjoy land through the civil law. [emphasis added]"
48. Had it been necessary for him to do so, the Commissioner would have concluded that the National Trust has been vested with special powers. However as the National Trust fails the entrustment test, it cannot be considered a public authority for the purposes of the EIR.
49. As the National Trust is not a public authority, it was under no obligation to respond to the complainant's request.

Right of appeal

50. 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

51. 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.
52. 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

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