



# Minutes of trustees' meetings: disclosure issues

Employment, pensions and benefits: briefing 94

## Executive summary

This briefing looks at the law on disclosure of both the minutes of trustee meetings and documentation on which trustee decisions may be based. The sources of the law are both legislative and judicial. Recent cases have developed and shifted long understood principles regarding disclosure of trust documents.

A related issue, if scheme members are to be allowed to inspect the trustees' minutes, is the extent to which those minutes should record the reasons for the trustees' decisions.

## Disclosure Regulations

The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (Disclosure Regulations) require pension scheme trustees to make various documents available for inspection by specified persons. These include information about the constitution of the scheme; certain basic information about the scheme; information about individual entitlement; audited accounts; actuarial statements; actuarial valuations; schedules of contributions; payment schedules and statements of investment principles. There is no specific requirement to disclose trustee minutes.

As under the common law (see below), trustees are entitled to refuse to disclose documents that do not relate to the particular beneficiary making the request. Trustees are also entitled to require beneficiaries to pay the cost of producing copies of documentation (the actual copying costs themselves rather than the effort that may be involved in producing copies).

Some schemes are (broadly) exempted from the Disclosure Regulations, for example schemes without Revenue approval.

## Data Protection Act 1998

The subject access and privacy provisions of the Data Protection Act 1998 may be relevant depending on the material in the trustee minutes sought to be disclosed.

Under the Data Protection Act an individual has the right to be given by a data controller (in the case of a pension scheme, normally the trustees) details of any personal data relating to him, the purposes for which the data are

held and the recipients to whom data have been, or may be, disclosed. To obtain access to the data, the individual must make a request in writing (together with payment of a small fee). Certain personal data are exempt from disclosure, notably health records.

This obligation applies only to personal data held on a computer or, if in hard copy, in a filing system structured by reference to personal data eg names. If the reasons for a trustee decision relating to a member are held on that member's file, the member will be able to access that information. To avoid this problem, trustee minutes could be kept separately from members' files in an unreferenced filing system.

If trustees are unable to comply with a request for access without disclosing information about a third party, they need only comply if that third party consents or if it is reasonable to comply without that consent. However, if a duty of confidentiality is owed to that third party, then consent is likely to be required.

## Litigation

Disclosure (formerly 'discovery') in the context of litigation requires a court order. A normal court order would be for 'standard disclosure'. This requires a party to disclose documents which are or have been in his control (eg with an agent such as an adviser) and are documents:

- on which he relies; or
- which adversely affect his own case; or
- which adversely affect another party's case; or
- which support another party's case; or

- which he is required to disclose by a relevant practice direction.

Minutes of meetings could therefore fall under such an order. Particular minutes may be exempt from disclosure on the basis of the various defences of legal privilege (set out below).

## Trust law

### Pre-Schmidt

Independently of any right of disclosure in litigation (which is a right to see someone else's documents) the courts have long held that beneficiaries of a trust have a right to require trustees to disclose trust documents and information to them, referring to a beneficiary's 'proprietary right' to inspect all trust documents: the documents are owned by the trust and, therefore, by the beneficiaries.

By contrast, potential beneficiaries under discretionary trusts were entitled only, on request, to information about the trust's assets (*Murphy v Murphy* [1998] 3 All ER 1).

Until the Privy Council case of *Schmidt v Rosewood Trust Limited* [2003] UKPC 26 earlier this year, the leading modern case on what constituted trust documents which the beneficiaries were entitled to inspect was the decision of the Court of Appeal in *Re Londonderry's Settlement* [1965] Ch 918. In that case the court decided that, provided the trustees were acting in good faith, they were not obliged to disclose agendas and minutes of trustee meetings which disclosed the (confidential) deliberations of the trustees on how they should exercise their discretion, the reasons for the exercise of the trustees' discretion or any material upon which those reasons were or might have been based.

The court noted, however, that if trustees do give reasons, their soundness can be considered by the court. It therefore became common in drafting minutes to refer to the outcome of the exercise of a discretion 'after consideration of all the relevant matters' but not to state what those matters were, or what discussion took place.

This did not, however, prevent trustees' decisions from being successfully challenged in the courts if the trustees could be shown to have acted improperly, whether from an improper motive or by taking account of factors which

the trustee should not have taken into account or not taking into account factors which the trustee should have taken into account.

### *Schmidt v Rosewood Trust Limited* (2003)

This recent Privy Council (PC) decision, on appeal from the Isle of Man, concerned the right of beneficiaries of a trust to disclosure of information by trustees<sup>1</sup>. As a PC ruling, the decision is strictly only valid in the Isle of Man; however, it will almost certainly be followed by the English courts.

Mr Schmidt was a potential beneficiary under discretionary trusts set up in the Isle of Man. He appealed against a court ruling that he was not entitled to disclosure of trust documentation and information because he was not a beneficiary but had only a discretionary interest or expectation.

The PC held that:

- there is *no* absolute right for a beneficiary to request documents or information from trustees; and
- there is no distinction for this purpose between discretionary beneficiaries and absolute beneficiaries.

The PC stated that it is a better test to allow beneficiaries a right to require access to information as part of the court's overall jurisdiction to supervise and intervene in the administration of trusts, discretionary or otherwise. The right to seek disclosure is one such area of intervention.

The court cast doubt on cases which had interpreted *Re Londonderry* as meaning that there was a *right* to disclosure, saying that the more recent cases should be regarded as beginning to work out in some detail how the court should exercise its discretion where beneficiaries apply for disclosure. The PC has thus recast the approach as a balancing judgment by the trustees between the interests of the beneficiary requesting information and the interests of the other beneficiaries under the trust.

The PC identified areas in which the court may have to form a discretionary judgment:

- whether a discretionary object should be granted relief at all (the wishes of the settlor being but one relevant factor);
- what classes of documents should be disclosed, either completely or in an edited form;

<sup>1</sup> Available at [www.privacy-council.org.uk](http://www.privacy-council.org.uk)

- especially when there are issues of personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties; and
- what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court.

This decision will almost certainly be followed in England on the basis that the PC is restating what the earlier cases were deciding: those cases were not wrong but instead examples of the factors to be considered (by trustees and the courts).

## Legal privilege

Under the rules of court, advice from a legal adviser to the client is normally exempt from being disclosed to the other party in legal proceedings.

Advice from a legal adviser regarding the trust may be a trust document and therefore subject to the trust law principles above rather than being covered by legal privilege. However, under the trust law principles, trustees do not generally have to disclose advice relating to a claim by a beneficiary to that beneficiary. The same would generally apply to a legal opinion obtained in contemplation of litigation (subject to the trust law principles described above if the opinion was paid for by the fund).

## The Pensions Ombudsman

As noted above, the common law right seems to be for trustees to refuse to disclose information that would give details of their reasons (*Re Londonderry*). However, the Pensions Ombudsman has strongly indicated in a number of his determinations that failure to disclose reasons for exercising a discretion could, in appropriate circumstances, be considered to be maladministration, at least where the decision taken is adverse to the individual beneficiary and the individual could appeal that decision on the basis of the reasons for the decision.

In *Allen v TKM Group Pension Trust Limited* [2002] PLR 333, the Ombudsman found that there had been

maladministration on the part of the trustee in that it had:

- misdirected itself and failed properly to exercise its discretion to grant an unreduced early retirement pension; and
- failed to provide a copy of the minutes of the meeting at which they determined not to grant Mr Allen an unreduced early retirement pension.

He commented that, although there is no legal duty on trustees to make copies of their minutes available to members, ‘... as a matter of good administrative practice Trustees should provide reasons for their decision to those with a legitimate interest in the matter and, subject to the need to preserve rights to privacy of individual members, should also make the minutes of their meeting available to scheme members. I can see no good reason for the Trustee not to have done so in this case and the failure of the Trustee to do this for Mr Allen was also maladministration. Not knowing the basis on which an adverse decision is taken is itself an injustice.’

In the 1998 case of *Blaney v BS Pension Fund Trustee* the previous Ombudsman disagreed with the trustee’s assertion that, because of *Re Londonderry*, he was precluded from requiring the trustee to give the reasons for its decision regarding an incapacity pension. He said that, whatever the trust law position, he was entitled to find that a trustee’s failure to give reasons constituted maladministration insofar as that failure did not meet the standards of good administrative practice applied by, and expected of, pension scheme trustees.

## What should trustees now do when beneficiaries request information?

In practice, the courts are likely still to continue to treat a beneficiary as having a right to inspect trust documents. If a legal opinion, for example, has been obtained at the expense of the trust then it is an asset of the trust and so the presumption is that it should be available to the beneficiaries. If the trustees do not consider that it is appropriate to disclose the documents, their reasons should be properly considered and given due weight.

It seems that legal advice is disclosable. Legal professional privilege is still not by itself a defence to a disclosure request (unlike the situation in relation to disclosure as part of litigation). However, the fact that legal advice may

be confidential or relevant to some other litigation could still mean that disclosure is not appropriate.

It may be that trustees face a difficulty if they have received information under an obligation of confidentiality (subject only to disclosure required by law). If they then disclose this to a beneficiary they may be at risk of a claim by the third party. If they do not, they risk a claim by the beneficiary. Such confidentiality obligations are increasingly common in agreements with professional advisers (eg actuaries and accountants) who are attempting to reduce their potential exposure of liability to third parties by limiting distribution of their advice.

Trustees are at risk as to their costs if they wrongfully refuse to disclose (ie the court takes a different view).

## Conclusion

Trustees should:

- give serious consideration to how decisions are recorded;
- consider when drafting minutes how much detail it is advisable to include especially, for example, where sensitive issues such as the distribution of lump sum death benefits are involved;
- when requested to disclose minutes, consider whether those minutes contain sensitive information which should not be disclosed; and
- consider whether to disclose on a case-by-case basis.

The table below is a summary of the considerations which could apply if members seek to have the minutes of trustee meetings disclosed. Whether in a particular case trustee minutes must be disclosed will depend on the particular decisions and deliberations being recorded in those minutes and the surrounding facts. Advice should be sought if there is a concern over a specific decision or debate.

Issue	Factors relevant to disclosure
<b>Disclosure Regulations</b>	No specific requirement to disclose trustee minutes.
<b>Litigation</b>	Disclosure requires a court order, normally for 'standard disclosure'. Minutes of meetings could fall under such an order, and particular minutes would have to be defended from disclosure on the basis of the various defences set out below.
<b>Trust law</b>	Following <i>Schmidt v Rosewood</i> no 'right' to see trust documents, but the court has power to order disclosure. Whether a court would order trustee minutes to be disclosed would depend on, among other things, the nature of the interest of the particular beneficiary requiring disclosure, and the contents of the particular minutes sought. (If minutes relate not only to the member's but also to others' benefits, any confidential parts should be blanked out.)
<b>Legal privilege</b>	Legal advice regarding the trust may be a trust document and therefore subject to trust law principles, not legal privilege. However, trustees do not generally have to disclose: <ul style="list-style-type: none"> <li>• advice relating to a claim by a beneficiary to that beneficiary; or</li> <li>• a legal opinion obtained in contemplation of litigation, subject to trust law principles if the opinion was paid for by the fund.</li> </ul>
<b>Pensions Ombudsman's jurisdiction</b>	The Pensions Ombudsman has taken the view that maladministration includes failure by trustees to disclose their reasons for exercising a discretion, at least where the decision taken is adverse to the individual beneficiary and the individual could appeal that decision on the basis of the reasons for the decision.
<b>Data protection</b>	The subject access and privacy provisions of the Data Protection Act 1998 may be relevant depending on the material in the trustee minutes sought to be disclosed.

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