

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2024

Public Authority: Ministry of Housing, Communities & Local Government (MHCLG)

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information regarding a decision to provide free admission to a proposed Holocaust Memorial and Learning Centre ("HMLC") from the Department for Levelling Up, Housing and Communities ("DLUHC"), now MHCLG. MHCLG has withheld all of the requested information under section 35(1)(a) of FOIA (formulation or development of government policy). It has also applied section 42(1) to a paragraph of legal advice and section 40(2) to a small amount of personal data. The complainant has indicated they are not seeking personal data.
2. The Commissioner's decision is that MHCLG is not entitled to withhold the requested information under section 35(1)(a) of FOIA (formulation or development of government policy) as, although the exemption is engaged, the public interest in disclosure outweighs that in maintaining the exemption. However, MHCLG is entitled to withhold the information withheld under section 42(1) on this basis.
3. The Commissioner requires MHCLG to take the following step to ensure compliance with the legislation.
 - Disclose the information withheld under section 35(1)(a) which has not also been withheld under section 40(2) or section 42(1) of FOIA.
4. MHCLG must take these steps within 30 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

5. On 19 January 2024, the complainant wrote to DLUHC and requested information in the following terms:

“Please send me the briefing papers, including the financial plans, which informed the decision of the Communities Secretary, Robert Jenrick, on 28 January 2021 that entry to the proposed Holocaust Memorial and Learning Centre should be free.”

6. DLUHC responded on 21 February 2024. It refused to provide the requested information citing section 35(1)(a) of FOIA (formulation or development of government policy) and section 40(2) of FOIA (personal data) as its bases for doing so.
7. The complainant requested an internal review on 21 February 2024, stating that the decision referred to was taken in 2021 and that they therefore did not consider it to be a live policy issue.
8. Following an internal review DLUHC wrote to the complainant on 19 March 2024. It maintained its original position.

Scope of the case

9. During the course of the Commissioner’s investigation MHCLG stated that it also considered a small amount of the requested information to be exempt from disclosure under section 42 of FOIA (legal professional privilege).
10. In their complaint to the Commissioner the complainant stated that they are content for any personal data to be redacted. This notice will therefore not consider MHCLG’s application of section 40(2) to withhold a small amount of information (some names, email addresses and phone numbers).
11. The scope of this case will therefore be to consider whether MHCLG is entitled to withhold the requested information under section 35(1)(a) of FOIA and whether MHCLG is entitled to withhold the paragraph of information withheld under section 42 of FOIA on this basis.

Reasons for decision

Section 35 – formulation and development of government policy

12. Section 35(1)(a) states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”

13. The Commissioner considers that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. ‘Development’ of policy may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
14. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly. This means that the information itself does not have to be created as part of the activity. Any significant link between the information and the activity is enough.
15. MHCLG has withheld all of the requested information under this exemption.
16. The Commissioner is satisfied that the exemption is engaged as the withheld information relates to the formulation of government policy, specifically the policy that the HMLC will be free of charge to enter, which was announced in 2021.

Public interest test

MHCLG’s view

17. Before turning to the public interest test specifically it should be noted that MHCLG, when explaining why it considers the exemption to be engaged, has stated that it considers the withheld information to relate to the policy of establishing the HMLC in a prominent central London location in addition to the more specific policy regarding free admission which was announced in 2021.
18. MHCLG argues that the formulation of the policy to which this information relates to have been ongoing at the time the complainant submitted their request as, “the Government does not yet have planning permission for construction of the HMLC. Policy formulation about how

the Holocaust Memorial and Learning Centre will be operated therefore continues until planning permission is regained and Ministers give final sign-off to proceed. On operational matters final Ministerial sign-off may not come until closer to the opening date”.

19. MHCLG stated it had taken the following public interest arguments in favour of disclosing the information into account:

“There is a benefit in making information about the decision-making process leading to the announcement of free entry because it aids transparency and accountability of Government. In this case, accountability for decisions that impact on the amount of public money that may be needed to cover the future operational costs of the Holocaust Memorial and Learning Centre.

Release of briefing papers and financial plans which supported the 2021 decision to announce free entry would not mean that the disclosure of other information related to the Holocaust Memorial and Learning Centre programme or further policy development on entrance fees would necessarily become routine.”

20. MHCLG stated it had taken the following public interest argument in favour of maintaining the exemption into account:

“The Holocaust Memorial and Learning Centre does not have planning permission; it is still policy being formulated. Government needs to be given safe space to consider and discuss policy that is still being formulated.”

21. MHCLG also provided further details regarding why it considers that, on balance, the public interest in maintaining the exemption outweighs that in disclosing the withheld information.

22. It highlighted that there is already a significant amount of information in the public domain about the plans for free entry. Specifically, the announcement on free entry included information about the rationale for free entry¹. Other information about cost projections is already in the public domain through Accounting Officer Assessments^{2,3} and the

¹ [Jenrick announces free admission to the proposed UK Holocaust Memorial - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/jenrick-announces-free-admission-to-the-proposed-uk-holocaust-memorial)

² [UK Holocaust Memorial and Learning Centre \(UKHM&LC\): accounting officer assessment - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/90422/uk-holocaust-memorial-and-learning-centre-ukhm&lc-accounting-officer-assessment)

³ [UK Holocaust Memorial and Learning Centre: revised accounting officer assessment - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/90422/uk-holocaust-memorial-and-learning-centre-revised-accounting-officer-assessment)

National Audit Office's 2022 report⁴. It considers that this information goes a long way in meeting the public interest in transparency about the policy decision.

23. Regarding the link between the disclosure of information about the free admission policy specifically and the impact on ongoing broader policy formulation and development, MHCLG stated:

"The 2021 announcement on free entry has happened and releasing briefing papers and financial plans to support that announcement would not necessarily set a precedent for releasing other information related to the wider policy of creating a Holocaust Memorial and Learning Centre. However, the Holocaust Memorial and Learning Centre is still live policy. It does not yet have planning permission and until it does, Ministers cannot give final sign-off for the project, nor the operational arrangements."

and

"Release of briefing notes and financial plans could increase public participation in decision-making, in this case the decision to announce free entry. Release of this information would also however create a chilling effect on future candid discussion about the project, which is still live policy. The Holocaust Memorial and Learning Centre is a controversial project locally and until planning permission is granted is likely to remain so. Those opposed to the proposed Memorial and Learning Centre project have already criticised the project on an extensive set of grounds, some of which relate to the projected running costs of the completed HMLC (e.g. see Petition by Thorney Island Society to the Commons Select Committee (paras 22 and 23): committees.parliament.uk/hybridbillpetition/172/default/."

24. MHCLG also highlighted four previous decision notices in which the Commissioner found that MHCLG/DLUHC was entitled to withhold information relating to the HMLC under section 35(1)(a):

"The ICO has previously upheld the Department's approach to withholding information on the basis that the policy is still live because the planning application for the HMLC has not been resolved, as the following decision notices make clear:

⁴ [Investigation into the management of the Holocaust Memorial and Learning Centre \(nao.org.uk\)](https://nao.org.uk)

[FS50879089](#) of 18 June 2020; [IC-46798-T0X1](#) of 12 October 2020; [IC-221307-J7P8](#) of 29 June 2023; and [IC-265075-R4R3](#) of 16 April 2024. The first two of these decision notices were also upheld by the First Tier Tribunal, where the Judge agreed that the policy was still live because the planning application had not been decided, and therefore dismissed the appeals. For the avoidance of doubt, at the time of writing it is still the case that the planning application is not resolved.”

25. MHCLG also argues that there is a risk that if the information were disclosed it may be misconstrued. It argues that if that were to happen it would have a chilling effect on the willingness of officials and Ministers to have free and frank discussions in future about the HMLC programme.

The complainant's view

26. The complainant's view is that MHCLG has not carried out the public interest test correctly, because it is treating a decision already made and announced as part of an overall future decision on a much broader policy. Specifically in their complaint to the Commissioner they stated the following:

“The point at issue is whether the decision on free entry to the proposed HMLC (a) is a freestanding decision already made and announced, or (b) should be regarded as part of the wider policy on the proposed HMLC on which no 'final policy decision' has been taken; and the consequences for the public interest test.

The decision on free entry is in fact a separate policy announced on 28 January 2021. It is a freestanding decision, taken independently of and not affected by the other decisions needed on the HMLC. The information requested will not inform the 'final policy decision' because the decision-making on free entry is already complete and is not subject to any further formulation or development. The Department is using the 'seamless web' argument, contrary to FOIA precedent, implying that no decisions on the HMLC will be made until some 'final' decision is made on every aspect.

The decision is of considerable public interest because it will impose a large annual cost on the public purse in perpetuity, for which only figures within a broad range have been provided (most recently £6½ to £8½ million). It is part of ministerial accountability for the public to be able to see whether a serious attempt has been made to assess costs and benefits before a decision on extra spending is made.

The 'safe space' and 'chilling effect' arguments given are entirely generic. As the decision has already been taken, no free and frank discussions are needed and public scrutiny would not be 'premature'."

The Commissioner's decision

27. The Commissioner's view is that the requested information relates to a specific policy matter which has already been decided, and the decision announced.
28. He considers this request to differ significantly from the requests considered under the decision notices referred to in paragraph 24 of this notice. The information withheld in response to two of these previous requests (IC-46798-T0X1 and IC-221307-J7P8) related specifically to the site for the HMLC. As noted in MHCLG's submissions, planning permission has not yet been granted and there is some opposition to the proposed location at Victoria Tower Gardens. Another of the requests (IC-265075-R4R3) was for the plans of the content in each room of the HMLC; these plans are specifically based on the proposed design for the Victoria Tower Gardens site. The other request (FS50879089) was a much broader request than this request and the information withheld related to a wide range of topics relating to the establishment and operation of the HMLC, in that case the Commissioner accepted that these policy matters were live at the time of the request.
29. The Commissioner accepts that the location of the HMLC and many aspects of its design and operation which will be impacted by the site selected continue to be live issues for the reasons set out by MHCLG. However, he does not consider the free admission policy to be a live policy matter.
30. MHCLG has highlighted that the petition by Thorney Island Society for amendments to the Holocaust Memorial Bill includes concerns about the running costs of the HMLC. The petition is clear that the petitioners are not opposed to the proposal for a HMLC in principle, they oppose the proposed location and current designs. The petition does not call for the free admission policy to be scrapped or reviewed, rather, it calls for governance arrangements and a business plan for both its construction and its subsequent management to be put in place before works start.
31. Having viewed the withheld information, the Commissioner does not accept the arguments put forward by MHCLG that disclosure of the information relating to the formulation of the free admission policy would create a chilling effect on ongoing or future discussions about other aspects of the establishment of the HMLC.

32. As the Commissioner does not accept that any such chilling effect would occur, his view is that the public interest in disclosure outweighs that in maintaining the exemption.
33. The Commissioner's decision is therefore that MHCLG is not entitled to withhold the requested information under section 35(1)(a) of FOIA.

Section 42 - Legal professional privilege

34. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. Legal professional privilege protects the confidentiality of communications between a lawyer and client.
35. In this case MHCLG has withheld a single paragraph of the briefing papers on the grounds that this information is legal advice and exempt from disclosure due to legal professional privilege. MHCLG states that this information is legal advice provided to an MHCLG Accounting Officer by MHCLG's legal advisers. The Commissioner is satisfied that the information is subject to legal advice privilege, and he is aware of no evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of the FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.
36. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
37. It is well established that where section 42(1) of FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".

38. Whilst the Commissioner has taken into account the public interest in greater transparency of the decision making process, he considers that, in this case, the balance of public interest lies in protecting MHCLG's ability to obtain full and frank legal advice on a confidential basis. The Commissioner is not aware of any public interest arguments that are strong enough to outweigh or override the inbuilt public interest in the information remaining protected by legal professional privilege.
39. The Commissioner has therefore decided that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, MHCLG has correctly applied section 42(1).

Right of appeal

40. 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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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