

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

### **Decision notice**

**Date:** 29 June 2023

**Public Authority:** Department for Levelling Up, Housing and  
**Address:** Communities  
2 Marsham Street  
London  
SW1P 4DF

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

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1. The complainant has requested information relating to the UK Holocaust Memorial. The Department for Levelling Up, Housing and Communities ("the DLUCH") withheld the requested information under section 35(1)(a) (formulation or development of government policy) and section 43(2) (commercial interests).
2. The Commissioner's decision is that the requested information can be withheld under section 35(1)(a).
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 16 December 2022 the complainant wrote to the DLUCH and requested:

"Please could you send me copies of the following documents:

The passages in the minutes of the UK Holocaust Memorial Foundation from 23 July 2015 to 13 July 2016 inclusive which relate to the choice of location for the UK Holocaust Memorial and the associated Learning Centre, including the following:

- (a) section 4 of the Minutes dated 23 July 2015 ('4. Property Sites: Progress to Date');
- (b) a section on pages 1 - 2 of the Minutes dated 10 November 2015 ('Memorial and Learning Centre site search');
- (c) section 1 of the Minutes dated 13 January 2016 ('1. National Memorial and Learning Centre site search');
- (d) a section on pages 1 - 2 of the Minutes dated 13 April 2016 ('Learning Centre Site Selection'); and
- (e) a section on pages 1 - 2 of the Minutes dated 13 July 2016 ('UPDATE ON VICTORIA TOWER GARDENS'); together with any other relevant passages;

The passages in the minutes of the UK Holocaust Memorial Foundation from 23 July 2015 to 13 July 2016 inclusive which relate to changes in the specification of the features and facilities of the Learning Centre between the publication of the document entitled 'National Memorial and Learning Centre: Search for a central London site' in September 2015 and the launch of the design competition in September 2016; and

The papers circulated to the board of the UK Holocaust Memorial Foundation for the agenda items which gave rise to the items in the board's minutes listed above as parts (1) and (2) of this request."

- 5. The DLUHC responded on 19 January 2023, confirming that it held the information but that it was exempt under section 35(1)(a) (formulation or development of government policy) and section 43(2) (commercial interests).
- 6. Following an internal review, the DLUHC wrote to the complainant on 3 March 2023. It upheld its previous position and also explained that all personal information was exempt under section 40(2) (personal information). The complainant hasn't raised any concerns about section 40(2) so the Commissioner won't investigate this any further.

## **Background information**

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- 7. The request relates to the Government's commitment to build a UK Holocaust Memorial and Learning Centre (HMLC). The DLUHC has explained that "DLUHC leads for Government on delivering the HMLC. The UK Holocaust Memorial Foundation (UKHMF) was set up in 2015 to provide independent advice to the Department's Ministers on a wide range of issues relating to the formulation and delivery of the policy relating to the HMLC including the design, implementation/construction and operation of the Memorial, and development and presentation of its learning content."

8. The complainant has requested the same information in two previous requests.<sup>1</sup> Both cases were brought to the Commissioner who upheld the DLUHC's (the Ministry of Housing, Communities and Local Government as it was at the time) application of section 35(1)(a).
9. The complainant appealed both decisions which were heard together in January 2021 by the First-tier Tribunal (General Regulatory Chamber). The Tribunal's dismissed<sup>2</sup> the appeals, agreeing that that requested information relate to live policy and therefore engaged section 35(1)(a). The complainant's subsequent request for permission to appeal to the Upper Tribunal was refused.

## Reasons for decision

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### Section 35(1)(a) – formulation or development of government policy

10. The DLUHC has confirmed to the Commissioner that it has applied section 35(1)(a) to all of the withheld information and section 43(2) to only specific information. The Commissioner will therefore consider section 31(1)(a) first and, depending on his findings, may go onto consider section 43(2).
11. Section 35 of FOIA states:

“(1) Information held by a government department is exempt information if it relates to -

(a) the formulation or development of government policy.
12. The Commissioner's guidance 'Section 35 – Government Policy'<sup>3</sup> states 'the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.'
13. Section 35 is a class-based exemption; this means that information simply has to relate to the formulation or development of government policy; there is no requirement for disclosure to prejudice either of those

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<sup>1</sup> [FS50879089](#) and [IC-46798-T0X1](#)

<sup>2</sup> [\(EA.2020.0202 & EA.2020.0300\) Dismissed.pdf \(tribunals.gov.uk\)](#)

<sup>3</sup> [section-35-government-policy.pdf \(ico.org.uk\)](#)

policy processes. Section 35 only applies to central government departments, such as the DLUHC.

14. Section 35 is also a qualified exemption which means that it is subject to the public interest test. A department may only withhold information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
15. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. Information does not have to contain policy options, advice or decisions; any significant link between the information and the formulation or development of government policy is sufficient.
16. However, the exemption will not cover information relating purely to the application or implementation of established policy. Its therefore important to identify where policy formulation or development ends and implementation begins.
17. The Commissioner understands that the Minister for Housing originally granted planning permission for the HMLC to be built on Victoria Tower Gardens. This decision was later quashed by the High Court after challenge from the London Historic Parks and Gardens Trust. The government has pledged that the Holocaust Memorial Bill will supersede any legal obstacle that prevents the building of the HMLC.<sup>4</sup>
18. The DLUHC has explained 'Although the Government's commitment to building a HMLC was announced in January 2015, the policy on delivering the various components of this major project is still under development...final policy decisions relating to the delivery of the HMLC is subject to approval by the Department's Ministers.'
19. The withheld information relates to the choice of site for the HMLC, each sites advantages and disadvantages, practical considerations, costs and potential opposition. This clearly relates to the development of policy, ie where the HMLC will be built. The complainant accepts that section 35(1)(a) is engaged and so does the Commissioner, therefore he will go onto consider where the balance of the public interest lies.

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<sup>4</sup> [PM promises law to build Holocaust memorial centre - BBC News](#)

## **The public interest**

### **Arguments in favour of disclosure**

20. The DLUHC acknowledges that 'there is always a degree of benefit in making information held by public authorities available as it increases public participation in decision making and aids the transparency and accountability of Government. This, in turn, may serve to increase public trust and confidence in the policy decisions made by Ministers and in good governance.'
21. It also recognises that there is a specific public interest in how decisions around the HMLC are made. There has also been opposition to the HMLC's proposed location of Victoria Tower Gardens.<sup>5</sup>
22. There is a public interest in understanding why Victoria Tower Gardens remains the DLUHC's preferred site, especially since the High Court quashed the previous decision to grant planning permission at Victoria Tower Gardens for the HMLC. The summary of that judgement stated that the Planning Inspector and Minister erred in their treatment of alternative sites for the Memorial and disclosure would allow the public to scrutinise all potential sites.

### **Arguments in favour of maintaining the exception**

23. The DLUHC has explained 'Release of the information requested would potentially impact on the private thinking space in which officials and advisers are able to assess information and provide advice to Ministers which will inform their eventual policy decisions. In turn Ministers must feel able to consider the information and advice before them and be able to reach objective, fully informed decisions, without the risk of premature disclosure of the material or advice which informed those decisions.'
24. The Commissioner notes that 'safe space' arguments will be at their strongest when the matter is still 'live' and in this case site selection for the HMLC has not concluded. The DLUHC is concerned that disclosure would result in a chilling effect, where officials would be less inclined to have fully effective and robust conversations due to concerns about public scrutiny.

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<sup>5</sup> [Home \(savevictoriatowergardens.co.uk\)](http://savevictoriatowergardens.co.uk)

## **Balance of the public interest**

25. In the Commissioner's view, the balance of the public interest lies in maintaining the exemption.
26. The complainant is concerned that the balance of the public interest no longer lies in maintaining the exemption, in relation to information about sites that were considered seven years ago but then disregarded for the Memorial. The complainant notes that 'there is no plan B' for the HMLC apart from Victoria Tower Gardens.
27. However, the DLUHC maintains that 'as the application for planning consent for the Memorial to be built on the preferred site is not resolved, the question of site selection remains live policy. Moreover, if the Department was not able to proceed with the current planning proposal, it is likely that we would want to explore alternative schemes.'
28. Ultimately, it would be remiss of the Commissioner to not be guided by the First Tier Tribunal decision referred to within paragraph 9 and he is persuaded that the HMLC policy is still live.
29. Victoria Tower Gardens is clearly the preferred choice for the HMLC but this doesn't mean that other sites don't need to be considered. Whether the correct site is identified, and planning permission granted, is subject to appeal which will take into account any legal obstacles, oppositions or concerns about the site – without compromising or undermining policy work on the HMLC.
30. Since the Commissioner has decided that the DLUHC is entitled to withhold the requested information under section 35(1)(a), he doesn't need to go onto consider the DLUHC's application of section 43(2).

## Right of appeal

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31. 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)

32. 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.
33. 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

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