

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

### **Decision notice**

**Date:** 12 October 2020

**Public Authority:** Ministry of Housing, Communities and Local Government

**Address:** 2 Marsham Street  
London  
SW1P 4DF

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

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1. The complainant has requested papers circulated to the board of the UK Holocaust Memorial Foundation.
2. The Commissioner's decision is that the Ministry of Housing, Communities and Local Government was entitled to rely upon section 35(1)(a) to withhold the requested information.
3. The Commissioner does not require any steps.

## Request and response

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4. On 14 April 2020, the complainant wrote to the Ministry of Housing, Communities and Local Government ('the MHCLG') and requested information in the following terms:

*"Please could you send me the papers circulated to the board of the UK Holocaust Memorial Foundation for the agenda items which gave rise to the following items in the board's redacted minutes:*

- 1. 'Memorial and Learning Centre site search', 10 November 2015;*
  - 2. Items 1 ('National Memorial and Learning Centre site search') and 2 ('Learning Centre ...'), 13 January 2016;*
  - 3. 'Learning Centre site selection', 13 April 2016;*
  - 4. 'Update on Victoria Tower Gardens' and 'International design competition', 13 July 2016"*
5. The MHCLG responded on 13 May 2020. It refused to provide the requested information. It cited the following exemption as its basis for doing so: section 35(1)(a) - formulation of government policy.
6. The complainant requested an internal review on 13 May 2020. Following an internal review the MHCLG wrote to the complainant on 10 July 2020 to state that it upheld its position to withhold then information on the basis of section 35(1)(a).

## Scope of the case

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7. The complainant contacted the Commissioner on 13 July 2020 to complain about the way his request for information had been handled. Specifically, to consider the application of section 35(1)(a) and the strong public interest in disclosure.
8. The Commissioner considers the scope of the case is to determine whether the exemption at section 35(1)(a) is engaged and where the balance of public interest lies with regard to the withholding or disclosure of the requested information.

## Background

9. The MHCLG provided the Commissioner with background information regarding the information requested.

10. It stated that the information in scope of the request relates to the Government's pledge to establish a UK Holocaust Memorial and Learning Centre ('the HMLC') in a prominent central London location as a national focal point for commemorating the six million Jewish men, women and children murdered in the Holocaust and all other victims of the Nazis and their collaborators.
11. It stated that the purpose of the HMLC will be to encourage visitors to explore the role of Parliament and democratic institutions in the Holocaust, what was done and what more we could have been done both at the time and subsequently to tackle the persecution of the Jewish people and other groups.
12. It advised that establishing the HMLC was one of the recommendations from the Prime Minister's Holocaust Commission's review of Holocaust commemoration and education which reported in January 2015<sup>1</sup>. The Government accepted the Commission's recommendations in full.
13. It confirmed that the MHCLG leads for Government on delivering the HMLC. The UK Holocaust Memorial Foundation ('the UKHMF') was set up in 2015 to provide independent advice to MHCLG 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 the development and presentation of its learning content.

*Related Decision Notice*

14. Decision notice FS50879089 is related to this request, being for copies of the UKHMF minutes, which are those minutes that are referenced in this request. During the course of that investigation the MHCLG released redacted versions of the minutes but withheld the remaining information on the basis of section 35(1)(a). The Commissioner upheld the decision to withhold which is now the subject of an appeal to the First-tier Tribunal (General Regulatory Chamber).

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/398645/Holocaust\\_Commission\\_Report\\_Britains\\_promise\\_to\\_remember.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398645/Holocaust_Commission_Report_Britains_promise_to_remember.pdf)

## Reasons for decision

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### Section 35(1)(a) of the FOIA – Formulation of Government Policy

15. Section 35 of FOIA states:

*“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to-*

*(a) The formulation or development of government policy,*

16. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
17. The Commissioner’s guidance explains that there is no standard form of government policy. Policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant minister. The key point is that policymaking can take place in a variety of ways and there is no uniform process.
18. However, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- The final decision will be made either by the Cabinet or the relevant minister;
  - The government intends to achieve a particular outcome or change in the real world; and
  - The consequences of the decision will be wide-ranging.
19. Section 35 of the FOIA is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described – in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
20. The MHCLG stated that the policy to which the information relates is the Government’s commitment to establish the HMLC. It advised that it is one of “*government policy*” as the final policy decisions relating to the delivery of the HMLC is subject to approval by the department’s ministers.

21. The MHCLG advised that the policy on delivering the various components of the HMLC is ongoing as it is a major project which is still under development. The UKHMF continue to discuss a broad range of topics related to the overall delivery including design, exhibition content, the scope and nature of the operating body and plans for raising philanthropic donations to supplement Government funding.
22. It stated that policy decisions on the operation of HMLC will continue to be taken up until the point that it is built and functioning. The MHCLG therefore consider decisions relating to the delivery of the HMLC will continue to be live policy until the HMLC is constructed and open.
23. The MHCLG confirmed that it understands it is important to identify where policy formulation or development ends and implementation begins and that whether the policy process is, specifically, in the "*formulation*" as opposed to "*development*" stage (or vice versa) will not affect the fact of whether the exemption is engaged or not.
24. However, for clarity it stated that it considers that the MHCLG has been undertaking a period of discussion with partners and interested parties, and refining analysis as the policy process progresses. The final detailed decisions by ministers have yet to be taken on the decided policy and therefore the "*formulation*" stage has not yet been concluded for any of the strands of work, being the design, implementation and operation of the Memorial and its Learning Centre content.
25. It advised that information has been made public regarding plans and the proposed design. It had, prior to submitting the planning application, held two public exhibitions in Westminster in September and December 2018 and the project team met with a wide range of stakeholders, including faith leaders, residents' groups and survivors. Furthermore, all information relevant to the planning application has been available for inspection since January 2019 on Westminster City Council's planning portal and the requester is able to view all of that information freely.
26. There is a planning inquiry in respect of the called-in planning application which will take place in the public domain, being held in October and November this year (2020). Following which, the Inspector will determine whether to recommend the grant of planning permission in relation to the HMLC.
27. The MHCLG advised that the policy formulation or development stage for the HMLC has not yet been completed as the HMLC is still under development and ministers need to make decisions on the final policy direction.

28. The MHCLG explained that the UKHMF's advice will form part of the ministerial decision making process. Therefore, the information requested, being the papers referred to in the minutes of the UKHMF meetings, formed the basis of discussion at those meetings. As such the papers relate to the policy in question and will inform the final policy decisions to be taken by ministers. It concluded that policy decisions had not, and have not, been taken and remain outstanding.
29. The Commissioner acknowledges that it is not only ministers who are involved in making government policy, she therefore recognises that the UKHMF was set up to provide independent advice to the Government regarding various aspects of the policy decisions.
30. Having viewed the withheld information the Commissioner is satisfied that the information circulated to the board of the UKHMF relates to the Government's policy to establish the HMLC, and that the final policy decisions relating to the delivery of HMLC are subject to approval by ministers.
31. Consequently, the Commissioner finds that the MHCLG was entitled to engage the exemption in section 35(1)(a).

*Public interest test*

32. Section 35(1)(a) is a qualified exemption and therefore subject to the public interest test. The Commissioner has considered the arguments provided by the complainant and the MHCLG in order to determine whether the public interest in maintaining the exemption outweighs the public interest in favour of disclosure of the information.

*Public interest in favour of disclosing the withheld information*

33. The complainant disputes that disclosure would potentially impact on the private thinking space of officials, stating that the the documents requested are confined to the choice of site which was made in 2016 and therefore do not relate to any policies in development.
34. The complainant contends that there hasn't been any indication since January 2016 that any consideration would be given by the government to alternative sites. Therefore there are no live policy issues relating to the location.
35. The complainant states that there is no reason to believe disclosure would have a chilling effect on future debate as it it would not have been reasonable to believe in 2016 that the evidence which gave rise to a decision to locate a major building project in a small public park would

remain confidential indefinitely. Furthermore that past and present members of the UKHMF board have defended the decision publicly.

36. The complainant advised that the location it is a grade II listed park which is long established and heavily used. As such the Government should be accountable for the way the decision was made and the appropriation of a large part of the park. He contends that normally in such a major planning issue there would be public consideration and consultation prior to a decision by the local authority.
37. The complainant submits that there is strong public interest in transparency of the decision to choose Victoria Tower Gardens ('VTG') as the location for the UK Holocaust Memorial and Learning Centre:
- Over 18,000 people have signed a petition<sup>22</sup> objecting to the chosen location, with over 800 people objecting to the planning application before it was called in by the MHCLG for a planning inquiry.
  - That almost no information has been released about how the location was chosen. Furthermore that the information obtained via written parliamentary questions has been contradictory. The complainant states that, in particular, the planning application and the written parliamentary answers disagree about how the site search was carried out and when VTG was first considered.
  - That there is evidence of irregularity in the site selection process. The complainant submits that available information indicates that VTG was put forward to the UKHMF board but never included in the official search process. Therefore *"As far as can be ascertained, no systematic and impartial comparison of the available sites was made in January 2016 before the Government firmly committed itself to building on VTG."*
38. The MHCLG recognises that in general the public interest in making information available as it increases public participation and decision making and aids transparency and accountability, which may increase public trust and confidence in policy decisions made. It also recognises that there is a degree of public interest in learning how decisions concerning the construction of the UKHMLC are arrived at due to some

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<sup>22</sup> <https://www.change.org/p/save-victoria-tower-gardens-no-building-in-this-precious-london-park/u/21917656>

local opposition to the proposed location in VTG. However, it argues there is greater public interest in favour of maintaining the exemption as outlined below.

*Public interest in favour of maintaining the exemption*

39. The MHCLG considers that there would be an 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 advice which informed those decisions.
40. The MHCLG stated that it needed to protect a "safe space" in which ministers and officials can consider issues relating to how the HMLC is planned and delivered without undue concern about public scrutiny (and consequential implications on delivery of the project).
41. It stated that the safe space arguments extend to UKHMF, which was set up specifically to provide independent advice to ministers regarding establishing the HMLC. It considers that releasing papers referred to in the UKHMF board meeting minutes would prejudice the provision of free and frank exchange of views resulting in less robust, well-considered or effective policy in relation to the HMLC.
42. The MHCLG stated that *"the Holocaust is a sensitive subject that can provoke strong views, and it is important for Members of the advisory body to be able to debate this policy away from external interference and distraction. To release these particular meeting papers would be counterproductive as it would disrupt the evaluation process and potentially influence observations and decisions."*
43. The MHCLG advised that the planning application is the subject of a public inquiry ('the Inquiry') in October and November 2020, with the case for the Memorial and Learning Centre being advanced in full in the public domain at the Inquiry. The Secretary of State as Applicant for the planning permission for the HMLC has already submitted 'Proofs of Evidence' to the Planning Inspector and parties to the Inquiry.
44. The MHCLG submits that releasing the information would mean that parties to the Inquiry opposing the project would potentially benefit from having access to papers which formed the basis of the UKHMF discussions. It also states *"Access to that information runs the risk of constraint on members of the UKHMF feeling free to discuss policy formulation around the planning application to assist the Inquiry, and fulfilling their role of discussing ideas about how to progress that policy ahead of advising Ministers."*



45. The MHCLG argue that if the UKHMF's deliberations were subject to full disclosure under the FOIA there would be a chilling effect on the future provision of free and frank advice and the exchange of views, and on the exploration of all relevant considerations in the formulation of policy in relation to this project.
46. The MHCLG contend that the public interest regarding information that has informed ministers considerations will be best served by there being transparency and accountability when policy has been decided and is no longer live.
47. The MHCLG argues that the adverse effect of disclosure would impact both the policy process and the policy itself. As such it is in the public interest that discussions of live policy and the papers that inform those discussions are kept confidential to enable full and frank discussion of the issues at hand, in the knowledge that their discussions will remain confidential during that period and will not be subject to premature disclosure.

*Balance of the public interest*

48. The Commissioner considers that in general, there is often likely to be significant public interest in disclosure of policy information, as it can promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.
49. In this case, the complainant has provided compelling arguments for providing the public with information that enables further scrutiny and transparency of decisions regarding the recommended the choice of location for the HMLC.
50. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request is therefore an important factor.
51. The government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.
52. The complainant makes the case that the location decision was made in 2016 and therefore the issue is no longer live. However, it is apparent to

the Commissioner that the issue is still live and the matter of the location has not been settled.

53. Furthermore, the planning application for the HMLC is the subject of an imminent public inquiry. The Commissioner considers that the FOIA should not disrupt the process of the inquiry in any way.
54. The Commissioner concurs that it is possible that disclosure at this stage could cause a chilling effect on the future deliberations of the UKHMF.
55. The Commissioner is mindful of the complainant's opposing view that disclosure has already happened as members of the UKHMF board have defended the decision publicly. However, she considers such a disclosure by some members is not the same as releasing all of the information relating to the debate.
56. The Commissioner accepts that, at the time of the request, the policy process was still ongoing. In the Commissioner's opinion there remains a need for an appropriate degree of safe space within which to consider live policy issues away from external interference and distraction and to protect the policy and the process of its formulation and development. Therefore, on balance the Commissioner considers that the public interest weight favours withholding the requested information.
57. The Commissioner's decision is that the MHCLG has correctly applied section 35(1)(a) of the FOIA to withhold the information.

## Right of appeal

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58. 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: 0300 1234504

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)

59. 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.
60. 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** .....

**Andrew White**  
**Head of FOI Complaints and Appeals**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
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**SK9 5AF**