

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 June 2020

Public Authority: Ministry of Housing, Communities & Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested copies of the UK Holocaust Memorial Foundation minutes. The Ministry of Housing, Communities & Local Government (the MHCLG) refused the request under section 35(1)(a) of the FOIA - formulation/ development of government policy.
2. During the Commissioner's initial investigations, the MHCLG amended its position and provided some information but maintained the exemption to the remaining information.
3. The Commissioner's decision is that section 35(1)(a) of the FOIA is engaged to the withheld information.
4. The Commissioner does not require the MHCLG to take any steps.

Request and response

5. On 19 December 2018 the complainant made the following request to the MHCLG:

“Please could you send me copies of the UKHMF minutes since its creation.”
6. The MHCLG responded on the 18 June 2019 refusing the request under section 35(1)(a) of the FOIA - formulation/ development of government policy.
7. The complainant requested an internal review on the 20 June 2019 and the MHCLG provided it on the 20 July 2019 upholding its response.

Background Information

8. The MHCLG has provided the Commissioner with some background information in order to add context to what the request relates to.
9. It has explained the Government has set out to establish a UK Holocaust Memorial and Learning Centre (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.
10. Establishing a new UK HMLC was one of the recommendations from the Prime Minister's Holocaust Commission's review of the Holocaust commemoration and educations which reported in January 2015¹. The Government accepted the Commission's recommendations in full.
11. MHCLG leads for Government on delivering the HMLC. The UK Holocaust Memorial Foundation (UKHMF) was set up in 2015 to provide independent advice to MHCLG Ministers on a wide range of issues

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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)

relating to the formulation and delivery of the policy relating to the HMLC including the design, implementation/construction and operation of the Memorial and its learning centre content.

Scope of the case

12. The complainant contacted the Commissioner 2 October 2019 to complain about the refusal of his request.

13. During the Commissioner's investigations the MHCLG stated:

"We have considered ICO views that if parts of a document are exempt that does not mean the whole document should be withheld. We have also considered whether there are elements of policy discussion that, because they are now part of public record, can be released because they would not put the concept of "safe space" at risk. Following this consideration, we have concluded that there are sections of the UKHMF Minutes which can be released."

14. It further advised the Commissioner that discussions at the UKHMF meetings continue to deal with a range of live issues relating to the Memorial that it considers should be withheld because it is policy that is still being formulated and developed and, in many cases, will continue to be so until the HMLC is built and open. It has therefore redacted discussions which pertain to the following issues apart from facts that are already in the public domain:

- Location, design and the planning application – these issues are currently the subject of a public inquiry being conducted by the Planning Inspectorate;
- Finance – the overall funding package for the project, including philanthropic donations;
- All matters relating to procurement – including contract for the construction and fit out of the HMLC;
- Exhibition content – development and production of the narrative content and the means of presenting it;
- Communications – plans and activities for building broad-based support for the project; and
- Policy on future management of the Memorial and Learning Centre – development of options for the type of operating body which will manage the HMLC in the long-term.

15. The complainant confirmed to the Commissioner, on the 25 March 2020, the receipt of the redacted version of minutes from MHCLG. He advised that he still disputes the application of section 35(1)(a) to the parts that remain redacted but does not dispute the redacted names of junior officials.
16. The complainant also made both the MHCLG and Commissioner aware that one of the meeting documents he was provided with, titled 'VTG No.15', was not correctly redacted and so he was able to view the redacted information.
17. The MHCLG asked the complainant to delete this document and it resent a correctly redacted version.
18. Commissioner considers the scope of the case is to determine whether the MHCLG can rely on section 35(1)(a) of the FOIA to withhold the remaining information.

Reasons for decision

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

19. 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,

20. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
21. 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.
22. 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
23. 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 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.
24. The MHCLG explained that the policy to which the information relates is the Government's commitment to establish a UK Holocaust Memorial and Learning Centre (HMLC). The policy 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. Therefore, the information requested, the minutes of the UKHMF meetings, relates to the policy in question and will inform the final policy decisions.
25. The MHCLG has told the Commissioner that 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.
26. The UKHMF has discussed and will continue to discuss a broad range of topics related to the overall delivery including by not limited to design, exhibition content, the scope and nature of the operating body and plans for raising philanthropic donations to supplement government funding.
27. The MHCLG has further said that policy decisions on the operation of HMLC will continue to be taken up until the point that it is built and functioning and it therefore considers decisions relating to the delivery of the HMLC will continue to be live policy until the HMLC is constructed and open.
28. The MHCLG has lastly stated that it understands the importance of identifying where policy formulation or development ends and implementation begins and that whether the policy process is, specifically, in the "*formulation*" as opposed to the "*development*" stage (or vice versa) will not affect whether the exemption is engaged or not.
29. But for the sake of clarity, the MHCLG has confirmed that it has been undertaking a period of discussion with partners and interested parties, refining analysis as the policy progresses, and final detailed decisions by Ministers have yet to be taken on the decided policy in the light of such

considerations, meaning that the "*formulation*" stage has not yet been concluded for any of the strands of work.

30. The complainant has stated (with regards to incorrectly redacted document that was sent to him) that the information he saw that was supposed to be redacted goes beyond the exemption.
31. The Commissioner has viewed this document and the remaining withheld information and is satisfied that the information relates to a government sated policy, namely the creation and citing of the HMLC, verified by the fact that the government has set up the UKHMF to provide independent advice to MHCLG Ministers on a wide range of issues relating to the formulation and delivery of this policy for them to make the final policy decision.
32. Therefore, the Commissioner finds that section 35(1)(a) of the FOIA is engaged. She must now go on to consider whether the public interest favours its disclosure or its continued withholding.

The public interest test

33. The complainant has argued that there is a strong public interest in knowing how the decision to build the Memorial on a public park was made, given the impact on a valued open space, the £75 million of public money involved, the almost complete lack of public information about how and why the decision was made and the misleading nature of the little information that has been made available.
34. He also considers that if there was a public interest case for the exemption at all in 2015-16, it still can not be effective, as his view is, that the development of the proposed Memorial has ceased to be 'ongoing' except to minor technical adjustments.
35. Lastly, he does not think that there should be an expectation of confidentiality at UKHMF meetings.
36. The MHCLG recognises the general public interest in the disclosure of information for the purpose of promoting transparency and accountability, and particularly recognises the public interest in disclosing information in relation to the business of government. It accepts that such disclosure of information allows the Government to be accountable and open to the electorate and increases public trust and confidence in the workings of government.
37. Weighed against the above is the generally recognised and relatively strong public interest associated with ensuring there is an appropriate degree of safe space to ensure officials are able to gather and assess

information and provide advice to Ministers which will inform their eventual policy decisions.

38. Likewise, Ministers must be able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from the distraction that would likely flow if the withheld information was made public.
39. The need for 'safe space' is widely accepted in order to maximise the effectiveness of the formulation and development of the relevant government policy.
40. In the Commissioner's opinion, these considerations carry most weight where the decision on policy has yet to be taken and the formulation or development process is still 'live'.
41. In its submissions to the Commissioner, the MHCLG advised her of its belief that the need for safe space around the advice and final decisions on policy detail still prevail at this time. It has stated to the Commissioner:

"The UKHMF was set up specifically to provide independent advice to Ministers on Holocaust commemoration and education, and to ensure that the Government implements the recommendations for the Holocaust Commission's report, including establishing the HMLC. We therefore consider that the "safe space" argument extends to the UKHMF discussions and that releasing the minutes of the UKHMF board meeting in their entirety would prejudice the provision of free and effective views resulting in less robust, well-considered or effective policy to the HMLC."

42. The MHCLG points out that, from considering the Commissioner's view, it has released sections on the UKHMF minutes to the complainant that have since become part of public record, as they sections no longer put the concept of "safe space" at risk.
43. However, the MHCLG states 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.
44. It further argues that to release the minutes of the meetings in their entirety would be counterproductive as it would disrupt the evaluation process and potentially influence decisions. Also, the MHCLG has told the Commissioner that there was an expectation of confidentiality at these meetings and, again, to release the minutes in their entirety may result in the lack of cooperation and participation from third parties with

experience and expertise of the matters at hand. Resulting in Ministers receiving less informative and candid advice, which the MHCLG argues would not be in the public interest.

45. The MHCLG has also told the Commissioner that the HMLC has not yet received planning permission approval, and the planning application was to be the subject of a public inquiry in May this year (which the complainant has since told the Commissioner has now been rescheduled to October). The case for the MHLC is to be advanced in full, in the public domain, at the inquiry.
46. The MHCLG has explained to the Commissioner that information provided by the complainant is being relied upon to support objections to the application. Those opposing the project would potentially benefit from having access to records of the UKHMF discussions, and 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.
47. The MHCLG considers that there would therefore 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 consideration in the formulations of policy in relation to this project, if the UKHMF's deliberations were subject to full disclosure under the FOIA.
48. It therefore concludes that in it is in the public interest that discussions of live policy are kept confidential in order that Ministers and officials may conduct a full and frank discussion of the issues at hand, in the knowledge they will remain confidential during that period and will not be subject to premature disclosure.
49. These adverse effects, both on the policy process and the policy itself, were highly relevant considerations at the time of the request and are still relevant at this time. Public interest around information that has informed Ministers considerations will be served by there being transparency and accountability when policy has been decided and is no longer live.
50. The Commissioner has to consider the arguments for maintaining the exemption at the time the request was made, although she notes the MHCLG has released parts of the minutes to the complainant during her investigation.

51. The Commissioner has examined the information which the MHCLG is withholding from the complainant. She has also considered the complainant's arguments against and the Department's representations in support of its position.
52. The Commissioner accepts that, at the time of the request, this was 'live' and 'ongoing'. On balance the Commissioner considers that the public interest weight favours the continued withholding of the remaining information. 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 formulation/development process.
53. The Commissioner's decision is that the MHCLG has correctly applied section 35(1)(a) of the FOIA to withhold the information it has.

Right of appeal

54. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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
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