

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 April 2023

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information associated with the cost of the Holocaust Memorial and Learning Centre. The Department for Levelling Up, Housing and Communities refused the request, citing the exemption for formulation of government policy (section 35(1)(a)).
2. The Commissioner's decision is that the Department for Levelling Up, Housing and Communities 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

4. On 3 May 2022, the complainant wrote to the Department for Levelling Up, Housing and Communities (DLUHC) and requested the following information:

"What allowance has been made in the estimated cost of the Holocaust Memorial and Learning Centre for optimism bias, in percentage terms, and in particular, what (a) category of project, (b) mitigation factor and (c) optimism bias factor were used."
5. The DLUHC's initial response was addressed in a decision notice issued by the Commissioner on 11 January 2023¹. This directed the DLUHC to issue a new response to the request.
6. The DLUHC issued a new response to the complainant on 14 February 2023. It refused to provide the requested information, citing the exemption in section 35(1)(a) - formulation of government policy.
7. The DLUHC's final position is that section 35(1)(a) applies to the requested information.

Reasons for decision

8. The Commissioner has previously considered complaints which relate to requests for information about the Government's pledge to establish a UK Holocaust Memorial and Learning Centre ("HMLC") in a central London location.
9. DLUHC has explained that it is the lead for Government on delivering the HMLC. It confirmed that The UK Holocaust Memorial Foundation (UKHMF) was set up in 2015 to provide independent advice to 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.
10. In 2020 the Commissioner issued two decision notice addressing requests made to DLUHC's previous incarnation (the Ministry of Housing, Communities and Local Government) for information associated with the

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023575/ic-177874-g8k2.pdf>

UKHMF and the HMLC². In both cases the Commissioner found that section 35(1)(a) applied to the information.

11. The Commissioner's decisions in these cases were subsequently appealed and considered by the First-Tier Tribunal (Information Rights) – the "Information Tribunal". The Information Tribunal concluded that the Commissioner had correctly determined that the information was subject to the exemption in section 35(1)(a)³.
12. In order for section 35(1) of the FOIA to be engaged, information must relate to:

“(a) The formulation or development of government policy, 16.
13. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
14. DLUHC has confirmed that, in relation to the HMLC, it is continuing discussion with partners and interested parties and final detailed decisions by Ministers have yet to be taken on the decided policy in the light of such considerations. DLUHC considers that the “formulation” stage has, therefore, not yet been concluded for any of the strands of work – site selection, design, implementation and operation of the Memorial and its Learning Centre content.
15. DLUHC has explained that, whilst 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. Policy decisions on the operation of the HMLC will continue to be taken up until the point that it is built and functioning and decisions relating to the delivery and site selection of the HMLC will continue to be live policy until the HMLC is constructed and open.
16. The Commissioner has considered DLUHC's submissions and referred to the decision notices and the Information Tribunal decision cited above. He accepts that the requested information relates to the formulation of

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617876/fs50879089.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618432/ic-46798-t0x1.pdf>

³

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2765/Gerhold,%20Dr%20Dorian%20\(EA.2020.0202%20&%20EA.2020.0300\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2765/Gerhold,%20Dr%20Dorian%20(EA.2020.0202%20&%20EA.2020.0300)%20Dismissed.pdf)

government policy. He is mindful that, with the passage of time, circumstances can change and that this has a direct impact on the relevance of exemptions and on associated public interest arguments.

17. Whilst the decisions reached by the Commissioner and the Information Tribunal in relation to this matter date from 2020, it is clear that, at the time of this request, the policy relating to the HMLC remained in the process of formulation. It follows that the rationale for applying the exemption and the associated public interest balance remain the same.
18. The Commissioner, therefore, considers that the arguments and conclusions set out in the previously issued decision notices and in the Information Tribunal decision set out above are transposable to this case.
19. In short, the Commissioner accepts that, at the time of the request, the policy process in relation to the HMLC 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.
20. The Commissioner's decision is that the DLUHC has correctly applied section 35(1)(a) of the FOIA to withhold the information.

Right of appeal

21. 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

22. 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.
23. 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

Christopher Williams
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