

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 April 2024

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 from the Department for Levelling Up, Housing and Communities ("the DLUHC") information relating to the proposed Learning Centre at the Holocaust Memorial in Victoria Tower Gardens. The DLUHC withheld the requested information under section 35(1)(a) (formulation or development of government policy), and parts of it under section 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that the DLUHC is entitled to withhold the requested information under section 35(1)(a). However the DLUHC breached section 17 by failing to issue a refusal notice within the statutory time.
3. The Commissioner does not require the DLUHC to take any steps.

Request and response

4. On 30 June 2023, the complainant wrote to the DLUHC and requested information in the following terms:

"Please send me all the documents and correspondence, including emails, relating to the description and plans of the content of the proposed Learning Centre which is to be attached to the Holocaust Memorial in Victoria Tower Gardens, including the plans of the content in each room of the Learning Centre, obtained and generated by the

Department on and between the dates of 21 July 2022 and 31 July 2022.”

5. The DLUHC responded on 30 September 2023. It stated that the requested information was withheld under the exemptions provided by section 35(1)(a) and section 40(2).
6. Following an internal review, the DLUHC wrote to the complainant on 18 October 2023. It maintained its earlier response.

Scope of the case

7. The complainant contacted the Commissioner on 20 October 2023 to complain about the way their request for information had been handled, and specifically, that the DLUHC was not entitled to withhold the information under sections 35(1)(a) and 40(2).
8. The scope of this case and of the following analysis is whether the DLUHC was entitled to withhold the information.

Background

9. The request relates to the Government’s commitment to build a UK Holocaust Memorial and Learning Centre (“HMLC”).
10. The Commissioner notes that he has considered a number of cases relating to this matter, and which outline his understanding of the DLUHC’s role. These cases are cited in paragraph 29 of this notice.

Reasons for decision

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

11. 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”

12. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

13. 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 ministers. The key point is that policymaking can take place in a variety of ways and there is no uniform process.
14. 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 ministers;
 - The government intends to achieve a particular outcome or change in the real world; and
 - The consequences of the decision will be wide-ranging.
15. 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 being the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
16. The DLUHC advised that the policy to which the information relates is the government's commitment to establish a UK Holocaust Memorial and Learning Centre (referred to as "HMLC" in this decision). The DLUHC has explained that final policy decisions relating to the delivery of the HMLC, including the content of the exhibition, is subject to approval by the DLUHC's Ministers.
17. The DLUHC stated that it considers the policy to be at the formulation stage because:
 - The content of the exhibition is being formulated to fit the HMLC as it is currently envisaged, and which has been designed to fit the proposed location in Victoria Tower Gardens.
 - However, planning consent for the HMLC to be built in Victoria Tower Gardens was quashed by the High Court in April 2022 following a statutory review of the planning decision. The planning case now reverts to the designated Minister in DLUHC to consider next steps in redetermining the planning application. The application for planning consent for the HMLC to be built on the preferred site is

therefore not resolved, and the questions of site selection and design remain live policy.

- The exhibition content is therefore still under development and final decisions won't be taken until (subject to planning consent being obtained) construction of the HMLC is nearing completion and ready for fit-out, enabling the exhibition to be tested in situ and fine-tuned if required.
18. The Commissioner has reviewed the withheld information, and the arguments provided by the DLUHC. He is satisfied that the information relates to the stated policy, and at the time of the request was in the formulation or development stage.
 19. 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 effectively policies. In particular, it ensures a safe space to consider policy options in private.
 20. The Commissioner is satisfied that the withheld information relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

The public interest test

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

The public interest arguments in favour of disclosure

22. 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."
23. 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.
24. The Commissioner perceives that there is a public interest in understanding the potential content of the HMLC. DLUHC has acknowledged that the sensitivity of the subject matter means that

special care must be taken to ensure that all associated topics are given appropriate weight within the exhibition. Disclosure of the information may allow the public to understand the Government's current approach to this and facilitate public debate.

Arguments in favour of maintaining the exception

25. The DLUHC has explained that it "considers it is in the public interest that discussions of live policy and the information that inform them are kept confidential in order that Ministers and officials may conduct a 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. The purpose of applying the exemption is so we can 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 for the delivery of the project)."
26. The DLUHC further argues that "the Holocaust is a sensitive subject that can provoke strong views. The creation of the Learning Centre's exhibition is attracting considerable controversy such that releasing information at each stage of the exhibition development (without the ability to present a balanced picture) could make it difficult for Ministers to reach a view on the content of the final exhibition."
27. The Commissioner notes that 'safe space' arguments will be at their strongest when the matter is still 'live' and in this case the content design for the HMLC has not concluded and will not do so until the HMLC building is nearing completion. 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.

Balance of the public interest

28. The Commissioner has considered the DLUHC's position.
29. He has also considered the findings of previous decision notices relating to the HMLC (FS50879089¹, IC-46798-T0X1², and IC-221307-J7P8³), in

¹ <https://ico.org.uk/media/action-weve-taken/decision%20notices/2020/2617876/fs50879089.pdf>

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

which he found that related information was exempt from disclosure under section 35(1)(a). The last decision notice was considered by the First-tier Tribunal (Information Rights) in case EA/2023/0318⁴, which found that related information was exempt under section 35(1)(a).

30. Whilst those findings related to information about the location and building design of the HMLC (rather than the plan and content of the learning content within it, as in this case), the Commissioner considers that those findings are relevant here, as the content of the HMLC won't be finalised until the construction of the HMLC is nearing completion. As such, the Commissioner perceives that the content of the HMLC is dependent on the location and building design of it, and therefore represents a similarly live policy.
31. The Commissioner also accepts that the sensitivity of the subject matter will require careful consideration by Ministers when reaching a final view on the content of the HMLC. The Commissioner accepts that the disclosure of the information at this stage would erode Ministers ability to consider, and adapt as necessary, the final form of the exhibition.
32. In the Commissioner's view, the balance of the public interest therefore lies in maintaining the exemption.
33. The Commissioner's decision is that the DLUHC has correctly applied section 35(1)(a) of the FOIA to withhold the information.
34. Since the Commissioner has decided that the DLUHC is entitled to withhold the requested information under section 35(1)(a), he does not need to go onto consider the DLUHC's application of section 40(2) to some parts of the information.

Procedural matters

35. The DLUHC failed to issue a refusal notice in response to the request within the statutory time period, the Commissioner has therefore found a breach of 17(1) of FOIA.
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³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025735/ico-221307-j7p8.pdf>

⁴ <https://caselaw.nationalarchives.gov.uk/ukftt/grc/2024/40?query=EA%2F2023%2F0318>

Right of appeal

36. 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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF