



Neutral citation number: [2024] UKFTT 40 (GRC)

Case Reference: EA/2023/0318.

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard on GRC - CVP

Heard on: 13 December 2023 and deliberations on 10 January 2024.

Decision given on: 17 January 2024.

Before:

Tribunal: Brian Kennedy KC, Dr. Phebe Mann and Kate Grimley Evans.

Between:

DORIAN GREHOLD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

DEPARTMENT FOR LEVELLING UP HOUSING AND COMMUNITIES

Second Respondent

Representation:

For the Appellant: Dorian Gerhold as a Litigant in Person.

For the First Respondent: Sapna Gangani, of the Information Commissioners' Office in writing in the Response dated 30 June 2022.

For the Second Respondent: Sophie Mitchell. of Counsel.

Decision: The appeal is dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") as, against the Commissioner's decision notice 29 June 2023 with reference number IC- 221307 - J7P8 (the "DN"), which is a matter of public record.

Factual Background to this Appeal:

2. Full details of the background to this appeal, the Appellants request for information and the Commissioner's decision are set out in the DN. The Appellant requested information relating to the UK Holocaust Memorial. Whilst the Freedom of Information regime is motive blind and the Tribunal do not take his motive into account, the Appellant wishes it to be noted that his objection is to the planned location of the Memorial and that he does not object to there being such a Memorial. The Department for Levelling Up, Housing and Communities ("the public authority") withheld the requested information under section 35(1)(a) (formulation or development of government policy) and section 43(2) (commercial interests).
3. The Commissioner's decision is that was entitled to rely upon section 35(1)(a) to withhold the requested information.

History and Chronology:

4. On 16 December 2022, the Appellant wrote to the public authority and requested 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 public authority 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 public authority 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 Appellant hadn't raised any concerns about section 40(2), so the Commissioner wouldn't investigate this any further.

Background information:

7. The request relates to the Government's commitment to build a UK Holocaust Memorial and Learning Centre (HMLC). The public authority has explained that the public authority: " - 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 Appellant had requested the same information on two previous requests (EA/2020/0202 & EA/2020/0300.). 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 public authority's initial response was addressed in a decision notice issued by the Commissioner on 11 January 2023. This directed the public authority to issue a new response to the Request and on 14 February 2023 it refused to provide the requested information, citing the exemption in section 35(1)(a) – formulation of government policy. The public authority's final position is that section 35(1)(a) applies to the requested information.

The Commissioners Decision:

10. 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.
11. The Appellant appealed both decisions which were heard together in January 2021 by the First-tier Tribunal (General Regulatory Chamber). The Tribunal dismissed the appeals, agreeing that that requested information related 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.
12. 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.
13. The Commissioner's guidance 'Section 35 – Government Policy 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.'

14. 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 policy processes. Section 35 only applies to central government departments, such as the DLUHC.
15. 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.
16. In line with Tribunal's 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.
17. However, the exemption will not cover information relating purely to the application or implementation of established policy. It is therefore important to identify where policy formulation or development ends and implementation begins.
18. The Commissioner understands that the Minister for Housing originally granted planning permission for the HMLC to be built on Victoria Tower Gardens ("VTG"). 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.
19. The public authority 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.'*

20. 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, i.e. where the HMLC will be built. The Appellant accepts that section 35(1)(a) is engaged and so does the Commissioner, therefore he went on to consider where the balance of the public interest lies.
21. The Commissioner then set out the arguments in favour of disclosure and in favour of maintaining the exemption (see paragraphs 20 – 24 of the DN and at Paragraphs 25 – 29 of the DN found the balance of the public interest lies in maintaining the exemption.
22. Since the Commissioner had decided that the public authority is entitled to withhold the requested information under section 35(1)(a), he didn't go onto consider the public authority's application of the exemption under section 43(2).

The Grounds of Appeal:

23. In his Grounds of Appeal ("GoA") the Appellant argues:
 - a. Not disclosing the requested information has allowed the public authority to give out misleading information;
 - b. Decision-making based on inadequate evidence resulting in the choice of a site where building the proposed HMLC would be illegal;
 - c. Incorrect application of the public interest balance;
 - d. Denial that the policy is live.
24. The Commissioner has responded to the GoA as follows;
 - a. Not disclosing the requested information has allowed DLUHC to give out misleading information;
"The Commissioner cannot see any evidence that DLUHC has given misleading information, and questions how the Appellant could know, without having

sight of the withheld information, that disclosure would 'cure' any confusion. The Commissioner also notes that the Appellant raised this argument, and the general argument that disclosure would bring much-needed transparency before the Tribunal in EA/2020/0202 & EA/2020/0300. The Commissioner notes the Tribunal considered these points in paragraphs 72 and 73 of the Judgement but ultimately decided the public interest lay in maintaining the exemption. The Commissioner contends this is still the case, and the Appellant has not raised any new grounds or factors to the contrary.

b. Decision-making based on inadequate evidence resulting in the choice of a site where building the proposed HMLC would be illegal;

"The Commissioner considers this more to be a general criticism of DLUHC rather than being about the information requested, and as such the Commissioner cannot answer the ground as it is outside the scope of the Decision Notice, and subsequently the Tribunal's jurisdiction".

c. Incorrect application of the public interest balance;

"The Commissioner notes the arguments in favour of disclosure, provided by the Appellant in his grounds have already been considered by the Commissioner during his investigation and are largely a repeat of the same arguments in the previous cases. Whilst applying some weight to these arguments the Commissioner decided the public interest in maintaining the exemption outweighs the public interest in disclosure. There are no new or compelling arguments presented by the Appellant in his grounds that upsets this balance."

d. Denial that the policy is live.

"DLUHC have explained that there is an outstanding planning permission for VTG and if this is not successful then alternative locations may be considered, meaning the policy is still live, which the Appellant denies. In the FTT decision Judge Cragg, in dismissing the appeal noted the policy was live and, in terms of the public interest. "69. Comments and judgements about other potential sites,

and why they were decided not to be suitable or appropriate, is information which should not be disclosed at this point, if those sites might need to be re-considered in the light of an adverse planning decision in relation to VTG, as to do so might lessen the prospects of reaching a positive decision on an alternative site.” He went on to conclude “the need to safeguard the integrity of any future possible discussions about the location of the monument if planning permission for VTG is refused, is in my view, a stronger public interest than the need to provide transparency and accountability at this point in the process especially where there are other procedures designed to protect these important factors.” (paragraph 73) It is thus entirely reasonable to conclude that the policy is still live: DLUHC have explained why, the Commissioner agrees, and so did the FTT. The passage of time has not changed the fact the policy is still live, and in fact what Judge Cragg envisaged (the adverse planning decision) actually occurred. It appears that the Appellant’s request and appeal is an attempt to reopen or re-argue issues that he failed to achieve permission to appeal to the Upper Tribunal on.”

The Second Respondents response the Grounds of Appeal:

25. The reasons supporting the GoA were addressed in the public authority’s Response dated 24 July 2023 and are set out as follows;

26. The public authority intends to oppose this appeal. It maintains that the Commissioner was correct to state that the public authority could rely upon the class-based exemption of s.35(1)(a) of FOIA. The public authority’s position is that the s.35(1)(a) exemption applies to all of the information requested, but that if the Tribunal disagree, some of the information in the closed material bundle is commercially sensitive and ought to be redacted as the material would, or would be likely to, prejudice the commercial interests of third parties (s.43(2) FOIA). The public authority’s reasons are expanded upon further – (Similar reasons are also given in the Response dated 24 July 2023 for appeal EA/2023/0232, as much of the same reasoning applies).

27. The policy to which the information relates is the Government's commitment to establish a Holocaust Memorial and a Holocaust Learning Centre in the UK. 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.
28. The HMLC is still under development and Ministers still need to make decisions on the final policy direction. The information requested relates to the policy in question and will inform the final policy decision to be taken by Ministers.
29. Site selection and the specification of features and facilities of the Learning Centre is still a live issue. Whilst a site has been proposed, planning consent for construction of the HMLC on the preferred site has not yet been granted and this policy issue therefore remains live. If planning consent were to be refused, the development as currently planned could not proceed and Ministers would need to take major decisions about the future direction of the project. This may include changes to the proposed site and/or changes to the specification of features and facilities of the Learning Centre.
30. The Appellant ought to be aware that these matters are still a live issue because his actions have contributed to this being the case. By way of brief chronology:
- i. The original planning application for HMLC was submitted to Westminster City Council in December 2018;
 - ii. A planning inquiry was held in late 2020 so that the matter could be open for public consideration; the Appellant spoke at the inquiry;
 - iii. On 27 January 2021, judgment was handed down for the Appellant's appeal numbers EA/2020/0202 and EA/2020/0300 against DLUHC, where it was held that location of the HMLC was still live policy because, inter alia, planning permission remained outstanding;
 - iv. Planning consent was awarded in July 2021;

- v. The London Historic Parks and Gardens Trust requested a statutory review of the planning decision pursuant to s. 288 of the Town and Country Planning Act 1990. The Appellant submitted evidence to the proceedings;
- vi. In April 2022, the High Court quashed the decision by the then Minister of State for Housing to grant planning permission for the installation of the Memorial at VTG2. It was found that the London County Council Improvements Act 1900 (“1900 Act”) posed an obstacle for the planning consent because it required VTG to be maintained as a garden open to the public;
- vii. A Bill is currently at the early stages of its passage through the House of Commons, addressing the obstacle posed by the 1900 Act. Its title is: “A Bill to make provision for expenditure by the Secretary of State and the removal of restrictions in respect of certain land for or in connection with the construction of a Holocaust Memorial and Learning Centre”;
- viii. Planning consent for the current proposed site is yet to be obtained;
- ix. Consequently, the building of the HMLC has not yet – and cannot yet – begin.

31. The public authority’s position is that the Department has been undertaking a period of discussion with partners and interested parties, refining analysis as the policy process progresses, and final detailed decisions by Ministers have yet to be taken on the decided policy in the light of such considerations, meaning the “*formulation*” stage has not yet been concluded for any of the strands of work - design, implementation and operation of the Memorial and its Learning Centre content.

32. If the Department was not able to proceed with the current planning proposal, it is likely that it would want to explore alternative schemes at the same site. But

depending on the Bill's course and on whether planning consent is obtained, the issue of where a new site may be, when the HMLC will be constructed and the design specification for both the Learning Centre and the Memorial, may be on the agenda once again.

33. Further, the information requested about the 'specification of features and facilities of the Learning Centre' would carry forward to any proposed site. The HMLC is not merely a construction project; live policy issues go beyond where the Memorial and Learning Centre are located. The proposals for its use are likely to be highly contentious, such as its exhibition and learning programme content. For instance, issues such as the following are being considered: how will the exhibition explain the relevance of the Holocaust to Britain? How should it refer to other genocides around the world? Which other genocides? How should it address antisemitism in the modern world? These are matters on which decisions will be needed even after construction of the HMLC commences, quite probably until the point at which the HMLC opens to the public.
34. The public authority continues in its Response to the GoA at length to consider the Appellants' Previous Requests for Information and the overlap issues with compelling submissions from paragraphs 21 to 31 and on further grounds for opposition of the Appellants case from paragraph 32 to 62 of their Response supporting the application of the s35(1)(a) exemption and the public interest test weighing in favour of withholding the requested information. The Tribunal are persuaded by and accept these arguments.
35. The Tribunal recognise that each case must be determined on its merits. Having considered the evidence before us afresh we are persuaded that s35 is engaged for the following reasons:
36. The time of refusal of the relevant request was 19 January 2023. At that time there was no planning consent in place. It is the time of refusal that is relevant and not the time of the request as originally asserted by the public authority.

37. The time of refusal is what is strictly relevant but even at the time of the hearing we find the section 35 exemption was engaged because at the time of the hearing The Holocaust Memorial Bill had not received Royal Assent and further in any event it would not remove the requirement for planning consent and the situation at the date of the hearing is that still no planning permission was in place. See: Upper Tribunal's written Refusal Decision in *Montague v the Information Commissioner and Department for International Trade* 2022 UKUT 104 AAC.
38. This request was made on 16 December 2022 and most information requested had been requested previously and considered by the Tribunal already see: - FTT decision on 27 January 2021 and Appeal Refusal decision by Upper Tribunal (Judge Edward Jacobs) on 27 August 2021. Irrespective of this authority, we reach the same conclusion. It is clear on the evidence before us that there was no planning permission at the time of refusal of the request (and this remains the position at the time of hearing) and accordingly the policy remains live. If policy is still live until planning permission is granted the Appellant's arguments cannot in our view alter that position. Essentially, the Appellant's first ground regarding failure to consider change of circumstances, is in our view entirely academic and his other grounds for the same reasons are redundant and he has failed to persuade us otherwise.

The Public Interest:

39. It is common ground that section 35(1)(a) is engaged so the substantive issue for the Tribunal are in the public interest assessment. The need for a safe space is inherently acknowledged by the existence of section 35. We agree with the UT analysis at OB D272 as quoted on page 16 of the public authority's' skeleton argument updated on 12 December 2023 ;- "*As the Upper Tribunal's Refusal Decision held [19] [D272]: "the tribunal decided that if a new location had to be found, it would hamper policy making if the opinions already expressed about other sites that had been*

considered had been made public. This outweighed the public interest in favour of disclosing the information... That seems to me a proper and permissible analysis and judgment" – on this basis, we also find the public interest favours non-disclosure.

40. The Tribunal have_z before us_z evidence of a large volume of information about the choice of location already in the public domain. We agree that the main public interest is in the location and not the process leading to the choice of location and that the public interest will be entirely satisfied when the location is confirmed by the grant of planning permission whether for the current proposed site or another one. The application of section 35(1)(a) during the policy formulation phase does not prevent disclosure at a later date once the policy formulation phase is over.

Conclusions:

41. For all the above reasons the Tribunal find;
- a) There is no significant change in circumstances since the circumstances which were evaluated in the judgment of 27 January 2021
 - b) That the information requested falls within the exemption of Article 35(1)(a) – remains undisputed and the exemption is engaged. This is a class-based exemption, and the withheld information clearly relates to policy formulation or development.
 - c) The public interest test concerns what the public interest requires and what the public interest requires must be assessed based on the date on which the request was refused.
 - d) The "Policy" was still live when the request was refused.
 - e) Planning permission remains outstanding at the time of this appeal.
 - f) Specification of the Learning Centre would carry forward to any proposed site.
 - g) The live nature of the policy making carries significant weight in favour of non-disclosure including; - 'safe space' "the chilling effect" etc.–
 - h) The minutes are not "*factual information*" within the definition in s.35(4) FOIA.

42. In light of the above the Tribunal do not need to cover section 43 as it would be entirely academic.
43. For all the above reasons we must dismiss this appeal.

Brian Kennedy KC

10 January 2024.