

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

### **Decision notice**

**Date:** 11 January 2023

**Public Authority:** Department for Levelling Up, Housing & Communities

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

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

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1. The complainant requested information about the estimated cost of the Holocaust Memorial and Learning Centre for optimism bias. The Department for Levelling Up, Housing and Communities (the DLUHC) stated that the information was already publicly accessible and as such it was exempt from disclosure under section 21 of the FOIA (information reasonably accessible to the applicant). The Commissioner's decision is that the DLUHC has incorrectly applied section 21 to the request.
2. The Commissioner requires the DLUHC to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to the request which does not cite section 21 of the FOIA.
3. The DLUHC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

#### **Request and response**

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4. On 3 May 2022, the complainant wrote to the DLUHC and requested information in the following terms:

"Please would you provide 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 responded on 27 May 2022 and confirmed it held the information requested but stated that, as the information was already reasonably available, it was considered exempt under section 21 of the FOIA. The DLUHC upheld this position in its internal review outcome dated 24 June 2022.

## **Reasons for decision**

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### **Section 21 – information accessible to applicant by other means**

6. Section 21 of the FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
7. In its initial response the DLUHC referred the complainant to four published parliamentary questions (PQs) relating to the subject of the National Holocaust Memorial and Learning Centre. The first PQ asks for identical information as the request in this case and the response provided merely states "The estimated cost has been produced in line with Green Book guidance". The second PQ asked why the information sought in respect of the first PQ had not been provided and the response to this was that "Separately identifying elements of the project appraisal would risk a misleading answer". The third PQ asked who was "conducting the independent verification of the planning mitigation relating to optimism bias" and the fourth PQ asked for the reason why separately identifying elements of the project appraisal would be misleading.
8. In its internal review, the DLUHC upheld its position that section 21 applied and as well as referring to the four PQs referenced in its initial response it also provided a link to the Green Book Guidance.
9. The Commissioner has considered the four PQs referenced by the DLUHC as containing the information requested in this case. He considers that the only one which could potentially be relevant would be the first PQ which has identical wording as the request in this case. The response referred to the Green Book Guidance and the DLUHC also provided a specific link to the Green Book Section in its internal review.
10. The complainant asserts that the Green Book Guidance sets out how to calculate/allow for optimism bias in general terms. However, their request and the PQ asked how optimism bias has been calculated in

relation to a specific case – the National Holocaust Memorial and Learning Centre.

11. The Commissioner has accessed a copy of the Green Book Guidance on Optimism Bias. He notes that it does provide for the calculation of optimism bias in projects. However the Commissioner also notes that there are many 'variables' in relation to how optimism bias is calculated. For example, it depends on the project type – eg standard buildings, non-standard buildings, Standard Civil Engineering etc. There are also mitigation factors that need to be taken into account based on five listed contributory factors such as poor contractor capabilities, design complexity etc.
12. Whilst the Commissioner accepts that the Green Book Guidance provides general information as to how optimism bias is calculated, he has been unable to locate the specific information requested by the complainant or any method as to how it would be calculated specifically in relation to the National Holocaust Memorial and Learning Centre.
13. Paragraph 19 of the Commissioner's guidance on section 21<sup>1</sup> of the FOIA references the Tribunal decision *Christopher Ames v Information Commissioner and the Cabinet Office (EA/2007/0110)*, which stated:

"The Tribunal expressed doubt that, where a public authority is asked for a very specific piece of information which it holds, it would be legitimate for the authority to tell the applicant that the information can be found on a large website (such as that of the Hutton Inquiry), even if the applicant is well informed. In other words, it is unlikely to be reasonably accessible to the applicant if a large amount of searching is required in order to locate the information. In such circumstances, the authority would be expected to provide a precise link or some other direct reference as to where the information could actually be found."
14. The Commissioner's guidance at paragraph 20 goes on to say that "information, although generally available elsewhere, is only reasonably accessible to the applicant if the public authority:
  - knows that the applicant has already found the information; or
  - is able to provide the applicant with precise directions to the information so that it can be found without difficulty."

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

15. As the DLUHC has not provided precise directions to the information, it is not clear whether any of the requested information is reasonably accessible to the complainant in this case.
16. In light of the above the Commissioner's decision is that the DLUHC has incorrectly applied section 21 of the FOIA to the request.
17. The Commissioner requires the DLUHC to provide the complainant with a fresh response to the request that does not rely on section 21. In relation to each part of the request this fresh response must confirm or deny whether the requested information is held. If the requested information is held, that information should either be disclosed to the complainant or an adequate refusal notice should be provided.

## Right of appeal

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18. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

19. 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.
20. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**