



Neutral citation number: [2024] UKFTT 00039 (GRC)

Case Reference: EA/2023/0232.

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

Heard on GRC - CVP

Heard on: 13 December 2023.

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 11 April 2023 with reference number IC- 220130 – M0F1 (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. In short, the Appellant requested information associated with the cost of the Holocaust Memorial and Learning Centre. The Appellant requested information relating to the UK Holocaust Memorial. Whilst the Freedom of Information regime is motive blind and the Tribunal does 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 a Memorial. The Department for Levelling Up, Housing and Communities the Department for Levelling Up Housing and Communities, ("the public authority") refused the request, citing the exemption for formulation of government policy (section 35(1)(a)). The Commissioner's decision is that was entitled to rely upon section 35(1)(a) to withhold the requested information.

History and Chronology:

3. On 3 May 2022, the Appellant wrote to the public authority 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.”

4. The public authority's initial response was addressed in a decision notice issued by the Commissioner on 11 January 2023¹. 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:

5. 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.
6. The public authority 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.

7. In 2020 the Commissioner issued two decision notices addressing requests made to DLUHC's previous incarnation (the Ministry of Housing, UKHMF and the HMLC2. In both cases the Commissioner found that section 35(1)(a) applied to the information. 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).
8. 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 remained 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 considered that the public interest weight favours withholding the requested information.

The Grounds of Appeal:

9. On 25 April in the Grounds of Appeal ("GoA") the Appellant argues:
"The information requested relates to one aspect of the costing of the proposed Holocaust Memorial and Learning Centre (HMLC) in Victoria Tower Gardens. The grounds of appeal are (i) that the information requested does not relate to the formulation of policy and (ii) regardless of any decision on that point, the public interest test relating to s.35(1)(a) FOIA has been incorrectly applied, both by the Department and the Commissioner.
10. The Appellant expands further in the GoA under the following headings with reasons;

- (1) Decisions on allowance for optimism bias are not policy matters for the PA.
- (2) The Information requested does not relate to site selection.
- (3) Site selections is not live policy and is unlikely to become so.
- (4) No safe space is needed.
- (5) There is a strong public interest in transparency in this case.
- (6) The Commissioner has not applied the public interest test to the information actually requested.

The Appellant added that the Commissioner has also failed to take into account changing circumstances since 2020, including the cost increases and the many significant risks identified by the NAO.

The Second Respondents response the Grounds of Appeal:

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

- (1) *"When a project of this nature is proposed, a business case is required. A business case is the repository for the evidence base in support of a spending proposal. Ministers consider the evidence presented to them in a business case when making decisions on policy. Within the business case for the HMLC project lie the 'optimism bias' figures referred to. Optimism bias is "the demonstrated systematic tendency for appraisers to be over-optimistic about key project parameters, including capital costs, operating costs, project duration and benefits delivery". The aim of adjusting for optimism bias is to provide a more realistic assessment of the initial estimates of costs, benefits and time taken to implement a project. As the appraisal develops, more accurate costing of project or programme specific risk management can be undertaken, meaning adjustments for optimism bias may be reduced as more reliable estimates of specific risks are made. HM Treasury has issued supplementary guidance on the application of optimism bias and risk together with appropriate spending categories and values. In the instant matter, optimism bias has been used both to help estimate the likely costs of*

the HMLC project and also to inform the economic case, which assesses costs and benefits as part of an overall assessment of value for money. The information requested forms part of the HMLC business case and is therefore exempt from disclosure under s.35(1)(a) of FOIA as it relates to the formulation and development of government policy; specifically, the means by which government will fulfil its commitment (that DLUHC leads on delivering) to establish the HMLC. The policy is one of "government policy" as the final policy decisions relating to the delivery of the HMLC are subject to approval by the Department's Ministers. The Business Case relates to the HMLC being designed and built in the Victoria Tower Gardens ("VTG"). Although the Government's commitment to building a HMLC was announced in January 2015, the policy on delivering the various components of this project is still under development. Policy decisions on the operation of HMLC will continue to be taken up until the point that it is built and functioning. Decisions relating in particular to the delivery and site selection of the HMLC will continue to be live policy until all necessary consents for the selected site have been awarded and construction is underway. The purpose of using optimism bias and putting a business case together is to inform policy decisions. The Appellant clearly has a mistaken view that optimism bias is approached in a mechanistic manner with reference to numbers only, by taking figures from Treasury Guidance, applying them to the project, and that it is simply a matter of providing those figures from the business case to the Appellant. When in fact, a lot of carefully considered and debated judgement is required at each stage of the decision-making process in order to formulate the business case, and in order to inform the wider decision-making process about the design and build of the HMLC. The application of HMT's guidance on optimism bias to the estimates of construction costs require judgements to be made in relation to the degree of risk associated with construction of a particular design on a particular site. When applied to the economic case, the application of optimism bias estimates requires judgements to be made in relation to a wide range of factors including the degree of confidence in responses to opinion surveys. Those considerations are not capable of mechanistic extraction without providing very large sections or even the whole of the business case to give context to the figures. In order to answer the Appellant's FOIA request, therefore, figures alone cannot be provided as they will not make sense. The whole business case, or very large parts of it, would need to be given. In doing so, this would expose a

huge amount of 'thinking' about where Ministers are with the project, the options they have been looking at, what needs to be delivered to the public, how, timescales, cost estimates, to provide context, which takes them straight into the territory of s.35 that caters for situations where policy is still under development.

(2) All of the information requested is wrapped up in the business case for this project.

The HMLC is still under development and Ministers still need to make decisions on the final policy direction. Therefore, the information requested, being the business case for development of the site, relates to the policy in question and will inform the final policy decision to be taken by Ministers. Site selection, in particular, 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 proposed in the business case, could not proceed and Ministers would need to take major decisions about the future direction of the project. 23. The Appellant is likely to be fully aware that site selection is still a live issue because his actions have contributed to this being the case. By way of brief chronology:

Depending on the Bill's course and on whether planning consent is obtained, the issue of where a new site may be, and when the HMLC will be constructed, may be on the agenda once again. It is inaccurate to argue that information in the current business case would not be relevant to a new decision:

- i. 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;*
- ii. In any event, HMLC is not merely a construction project. There are more issues at play than the construction of the Memorial and Learning Centre. The business case for HMLC also applies to the HMLC proposals for use, such as its exhibition and learning programme content (as it is a learning centre as well as a memorial). For instance, issues such as following are being considered: how will the exhibition explain the relevance of the Holocaust to Britain? Should it refer to*

other genocides around the world? If so, which? Or should it focus solely on the Holocaust? 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. The business case considerations in relation to the exhibition and the learning programme content would carry forward to any proposed site.

(3) The Appellant incorrectly assumes that optimism bias figures are capable of mechanistic extraction without providing the whole business case or very large parts to give context and explanation to the figures, which are part of a series of value judgements. Release of the information requested would likely impact on the private thinking space in which officials and advisers are able to assess information and provide advice to Ministers which will inform their eventual policy decisions. Ministers must feel able to consider the information and advice before them and be able to reach objective, fully informed decisions, without the risk of premature disclosure of the advice which informed those decisions. The purpose of applying this class-based exemption is so the DLUHC 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 on delivery of the project). Releasing the business case would prejudice the provision of free and frank exchange of views resulting in less robust, well-considered or effective policy in relation to the HMLC. This is particularly important given the current uncertainties in relation to the project (as stated, depending on the Bill’s course and on whether planning consent is obtained, the issue of where a new site may be, and when the HMLC will be constructed, may be on the agenda once again). There would be a serious threat to the future provision of free and frank advice and the exchange of views, and on the exploration of all relevant considerations in the formulation of policy in relation to this project, if the business case was subject to full disclosure under the FOIA before it has been finalised and a suitable stage has been reached for it to be made public albeit with necessary redactions. First, the commercial negotiating position in relation to the build would be at risk of being undermined. Second, the project has generated wide ranging political views, so if every single decision in relation to it was open to challenge, requiring the need to constantly defend decisions, the project would likely be stalled, and those delays could generate further costs. Finally, the expectation that advice would be published before decisions have

been made may undermine the confidence of Ministers that advice has been prepared fully objectively to support their decision-making rather than with an eye to a wider audience. While recognising the general public interest in openness in Government, the Department considers it is in the public interest that the business case for the HMLC, that informs internal discussions, is 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. This relates to optimism bias particularly because as the project develops, more accurate costing of project or programme specific risk management can be undertaken. The optimism bias assessment relates specifically to the planned HMLC at this point in time, including the current market prices and delivery timeline. Releasing figures at a particular point in time would only provide a snapshot that did not reflect the fact that adjustments for optimism bias may be reduced as more reliable estimates of specific risks are made.

- (4) The DLUHC has already made a large amount of information about the plans and the proposed design publicly available. Before submitting a planning application, the DLUHC consulted widely on the proposed design. Two public exhibitions were held in Westminster in September and December 2018 and the project team met with a wide range of stakeholders, including faith leaders, residents' groups, and survivors. All information relevant to the planning application for the site was previously available for inspection on Westminster City Council's planning portal and continues to be available there. The fact that NAO were able to report to the public about the project shows that it has been a transparent process. Transparency does not remove the need for ministers to have a safe space when making policy decisions that are still being formulated.*
- (5) The public interest generally said to be embraced by this head of exemption is that disclosure of the deliberative process whilst it is being undertaken will cramp the ability of those engaging in it to freely explore the full range of options. Since the decisions of the First-Tier Tribunal (Information Rights) in 2020 referred to in paragraph 11 of the Commissioner's Decision Notice dated 11 April*

2023, the DLUHC is still continuing discussion with partners and interested parties, and final detailed decisions by Ministers have yet to be taken on the decided policy. Thus, the “formulation” stage has not yet been concluded for any of the strands of work: site selection, design, implementation and operation of both the Memorial and its Learning Centre content. Those former decisions therefore still apply. The s.35 class-based exemption is clearly engaged and applies. The Commissioner has effectively applied the public interest test and correctly determined that the balance of public interest is therefore not in favour of disclosure.”

12. In so far as the Appellant made further submissions in his GoA whereby, he argues that the Commissioner has also failed to take into account changing circumstances since 2020, including the cost increases and the many significant risks identified by the NAO. The Tribunal considers the relevant time for consideration being the time of refusal, negates this argument.

13. The Appellant has provided the Tribunal with further arguments in response to the second respondents response to the GoA which are as follows;

(1) “Assessing optimism bias obviously involves judgment rather than being a mechanistic assessment, but that does not make it a policy matter for the Department, which is constrained by the Treasury’s Green Book guidance.

If it is judged that assessing optimism bias is sufficiently related to formulating policy to engage the s.35 exemption, the tangential nature of that link must have an impact on the public interest balance.

Disclosure of the figures on their own would indicate whether the assessment of optimism bias is broadly within Treasury guidelines or not. The Department may decide that it wishes to add some sort of context, but it is not credible that that would require publication of the whole of the business case.

- (2) *The assessment of optimism bias is specific to the current site and the current design. It would not be directly relevant even in the entirely implausible case that the Government abandoned the current proposal but brought forward a new one for the same site (para 25.i), as a new assessment would be required. Para 25.ii assumes that I have requested the whole business case, which is not correct.*
- (3) *There can be no doubt that site selection is not currently a live issue. I continue to maintain that it is highly unlikely that it will become so, and can enlarge upon this if necessary. As argued above, the information requested does not relate to site selection anyway.*
- (4) *Most of the Department's wording here is generic, and it assumes that the whole of the business case has been requested, which is incorrect. There is nothing in the Department's response explaining how releasing the information actually requested would impinge on any 'safe space' needed. Instead, in para 31, the Department expresses a more general view that 'if every single decision in relation to [the project] was open to challenge, requiring the need to constantly defend decisions, the project would likely be stalled'. In reality the Department has constantly been challenged but has virtually never (except in the public inquiry) felt it necessary to defend its decisions on the project. The suggestion that, if it had to, the project would be stalled is absurd. The concept of a safe space must involve a balance. Too much of a safe space allows badly planned projects to proceed without adequate scrutiny, as in the present case.*
- (5) *The Department has from the start been far from transparent over this project, especially as regards costs. There could hardly be a stronger argument for transparency than the fact that, since the NAO reported in March 2022, the estimated cost of the Holocaust Memorial and Learning Centre has increased by 35%, to £138.9 million plus contingencies.*

(6) The Department's reply does not engage with the argument in my grounds of appeal. The Department's first response to the FOI request was to claim the exemption that the information requested was already available, referring me to a parliamentary written answer in which the same information was requested but the Department refused to provide it. This demonstrates (i) the Department's hostility to transparency and (ii) its lack of confidence that the s.35 exemption would be defensible. The Commissioner required the Department to issue a fresh response (Decision notice IC-177874-G8K2).

The Relevant exemption:

14. In order for section 35(1)(a) of the FOIA to be engaged, information must relate to: "(a) The formulation or development of government policy.

15. S.35 of FOIA states:

"(1) Information held by a government department or by [F1 the Welsh Assembly Government] is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information

used to provide an informed background to the taking of the decision is not to be regarded—(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1). (4) In making any determination required by section 2(1)(b) or

(2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of [F2the Welsh Assembly Government]..."

Conclusions:

- 16.** The Tribunal recognise that each case must be decided on its merits and on the evidence and submissions before us make the following findings.
- 17.** The Tribunal have considered whether the whole business case is even within the scope of the request and conclude that only some of the business case is in scope given the limited wording of the request. The Tribunal's consideration has to be limited to the information which was actually sought and that appears to be some elements of the business case. The Appellant did not ask for disclosure of the full business case, and we find that parts of the full business case are not within the scope of the request. The Tribunal are of the view that the entire business case is in any event information which relates to the formation or development of government policy.
- 18.** The Tribunal have considered whether the optimism bias information can be separated from the other information in the business case. The public authority argue that the business case is covered by section 35 so the optimism bias information must be covered too. They submit it is information which relates to the formulation and development of policy. The Appellant argues it is not policy information. The Tribunal find that it does not need to be policy information; - it just needs to "**relate to**" (our

emphasis) the formulation and development of policy. We find that it does 'relate to' the formulation and development of policy.

19. The public authority in their submissions at paragraph 12(1) of their updated skeleton dated 12 December 2023 say: *"Indeed the whole purpose of using optimism bias and putting a business case together is to inform policy decisions."* Similarly, the public authority argue at paragraph 12(9) of that skeleton that any part of the business case which could be factual information is inextricably linked to deliberative material. The focus there is on section 35(4) which the Appellant says he is not arguing but we find the point is relevant to the question of 'relates to'. If the optimism bias information is inextricably linked as part and parcel of the business case, then the Tribunal consider it must fall well within the concept of 'relates to'.
20. The Tribunal have the witness statement of Paul Downie, (OB pC99) dated 8 November 2023. Mr Downie is the Programme Director for the Holocaust Memorial programme responsible for day-to-day management of the programme, reporting to the Senior Responsible Owner (SRO) and through him to the Department's Accounting Officer and ultimately to the Secretary of State. In his statement of evidence, he;
 - a. identifies the documents within the Department's possession that fall within the scope of the Appellant's information request;
 - b. provides an overview of the nature of those documents;
 - c. addresses the public interest in the disclosure of those documents;
 - d. explains the commercial interests that would be harmed if the documents were disclosed.
21. The Tribunal find this evidence compelling both in terms of persuading us on the engagement of s35(1)(a) and in the balance of the Public Interest Test

being in favour of withholding the requested information from disclosure to the world at large.

- 22.** 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. Requested information can be withheld under section 35(1)(a) FOIA see: (p280 Upper Tribunal Case No: GIA/0355/2021). –
- 23.** The Tribunal find that the requested information can be withheld under section 35(1)(a) FOIA which we find is engaged. We find here it is still a live policy as the Planning was quashed. – we note in circumstances where especially pertaining to the location and where no construction work had been started.
- 24.** In relation to the public interest assessment, the Tribunal find that the public interest in this very specific information is quite limited. There is nothing to be gained by the publication of this during the live policy phase when the safe space arguments are strong. There will of course be a public interest in the costs of the project (which information has been published by the National Audit Office) but that is quite different from the detail of how optimism bias features as part of the policy formulation and decision-making process. Our unanimous finding is that the public interest lies strongly in favour of withholding the requested information.
- 25.** For all the above reasons we must dismiss this appeal.

