First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0202V
EA/2020/0300V

Before
Judge Stephen Cragg Q.C.

Heard via the Cloud Video Platform on 8 January 2020

Between

Dr Dorian Gerhold

Appellant

-and-

The Information Commissioner
Ministry of Housing Communities and Local Government (MHCLG)

Respondent

The Appellant represented himself

The Commissioner was represented by Mr Gillow

MHCLG was represented by Mr Rainsbury

DECISION AND REASONS

DECISION

1. The appeals are dismissed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.

4. The Tribunal considered an agreed open bundle of evidence comprising 428 pages in the 0202 appeal, an agreed open bundle of evidence comprising 115 pages in the 0300 appeal, closed bundles in each case and written submissions from all the parties.

BACKGROUND

5. This decision concerns two appeals which have been linked and where there were directions that they were to be determined on the same date and by the same judge.

6. The cases are known as appeal 0202 which is dated 22 June 2020 and is against a decision notice dated 18 June 2020, and appeal 0300 which is dated 20 October 2020 and is against a decision notice dated 12 October 2020.

7. In essence, the Appellant requested minutes of meetings from a public authority. The Appellant received some, but not all, of the information requested, and he has pursued an appeal, 0202, for further of the information sought. He also made a further request for documents referred to in the minutes, and the refusal to disclose these documents led to appeal 0300. The parties have agreed that very similar issues arise in both appeals and therefore it is appropriate to deal with the appeals in one decision.

8. The Appellant's requests that form the subject of these appeals concern the siting of the Holocaust Memorial and Learning Centre (HMLC), and specifically the background to its proposed siting in Victoria Tower Gardens (VTG).

9. On 19 December 2018 the Appellant made the following request to the MHCLG:-

> "Please could you send me copies of the UKHMF [UK Holocaust Memorial Foundation] minutes since its creation."

10. The UKHMF is an advisory group set up by the MHCLG which consists of a number of people most of whom have a fairly high public profile and/or hold or have held senior positions in public life or business. The MHCLG responded on the 18 June 2019 refusing the request and referring to the exemption in section 35(1)(a) FOIA, which refers to the formulation and/or development of government policy.

11. The Appellant requested an internal review on the 20 June 2019 and the MHCLG provided it on the 20 July 2019 upholding its response.

12. The Appellant contacted the Commissioner on 2 October 2019 to complain about the refusal of his request. During the Commissioner's investigations the MHCLG stated:-

> "We have considered ICO views that if parts of a document are exempt that does not mean the whole document should be withheld. We have also considered whether there are elements of policy discussion that, because they are now part of public record, can be released because they would not put the concept of "safe space" at risk. Following this consideration, we have concluded that there are sections of the UKHMF Minutes which can be released."

13. On 14 April 2020, the Appellant then wrote to the MHCLG and requested information in the following terms:

> "Please could you send me the papers circulated to the board of the UK Holocaust Memorial Foundation for the agenda items which gave rise to the following items in the board's redacted minutes:
>
> 1. 'Memorial and Learning Centre site search', 10 November 2015;
> 2. Items 1 ('National Memorial and Learning Centre site search') and 2 ('Learning Centre ...'), 13 January 2016;
> 3. 'Learning Centre site selection', 13 April 2016;
> 4. 'Update on Victoria Tower Gardens' and 'International design competition', 13 July 2016."

14. The MHCLG responded on 13 May 2020. It refused to provide the requested information and cited s35(1)(a) FOIA once more. The Appellant requested an internal review on 13 May 2020, following which the MHCLG wrote to the Appellant on 10 July 2020 to state that it upheld its position to withhold the information. The Appellant contacted the Commissioner on 13 July 2020 to complain about the way his request for information had been handled.

15. Section 35(1)a) FOIA states that:-

> "(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,

16. If the exemption applies it is subject to a public interest test which can nevertheless lead to the disclosure of the information if the public interest in disclosure outweighs the public interest in withholding the information.

THE DECISION NOTICES

17. It is worthwhile setting out the Commissioner's summary of the MHCLG's submissions to her, as set out in the decision notice relating to appeal 0202:-

> 24. The MHCLG explained that the policy to which the information relates is the Government's commitment to establish a UK Holocaust Memorial and Learning Centre (HMLC). 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. Therefore, the information requested, the minutes of the UKHMF meetings, relates to the policy in question and will inform the final policy decisions.
>
> 25. The MHCLG has told the Commissioner that 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.
>
> 26. The UKHMF has discussed and will continue to discuss a broad range of topics related to the overall delivery including by not limited to design, exhibition content, the scope and nature of the operating body and plans for raising philanthropic donations to supplement government funding.
>
> 27. The MHCLG has further said that policy decisions on the operation of HMLC will continue to be taken up until the point that it is built and functioning and it therefore considers decisions relating to the delivery of the HMLC will continue to be live policy until the HMLC is constructed and open.
>
> 28. The MHCLG has lastly stated that it understands the importance of identifying where policy formulation or

development ends and implementation begins and that whether the policy process is, specifically, in the "formulation" as opposed to the "development" stage (or vice versa) will not affect whether the exemption is engaged or not. But for the sake of clarity, the MHCLG has confirmed that it has been undertaking a period of discussion with partners and interested parties, refining analysis as the policy progresses, and final detailed decisions by Ministers have yet to be taken on the decided policy in the light of such considerations, meaning that the "formulation" stage has not yet been concluded for any of the strands of work.

18. The Commissioner concluded that the withheld information relates to government stated policy:-

> 31. …namely the creation and citing of the HMLC, verified by the fact that the government has set up the UKHMF to provide independent advice to MHCLG Ministers on a wide range of issues relating to the formulation and delivery of this policy for them to make the final policy decision.

19. The Commissioner found that section 35(1)(a) FOIA was engaged. Similar arguments were set out and accepted by the Commissioner in the decision notice relating to appeal 0300.

20. In the decision notice relating to appeal 0202 the Commissioner went on to consider the public interest test. The Commissioner set out her summary of the Appellant's arguments as follows:-

> 33. ….there is a strong public interest in knowing how the decision to build the Memorial on a public park was made, given the impact on a valued open space, the £75 million of public money involved, the almost complete lack of public information about how and why the decision was made and the misleading nature of the little information that has been made available.
>
> 34. He also considers that if there was a public interest case for the exemption at all in 2015-16, it still can not be effective, as his view

is, that the development of the proposed Memorial has ceased to be 'ongoing' except to minor technical adjustments.

35. Lastly, he does not think that there should be an expectation of confidentiality at UKHMF meetings.

21. The Commissioner then sets out that the MHCLG recognises the general public interest in the disclosure of information for the purpose of promoting transparency and accountability, and particularly recognises the public interest in disclosing information in relation to the business of government.

22. The Commissioner then describes at some length the main countervailing arguments put forward by the MHCLG which the Commissioner also summarises as follows:-

37. Weighed against the above is the generally recognised and relatively strong public interest associated with ensuring there is an appropriate degree of safe space to ensure officials are able to gather and assess information and provide advice to Ministers which will inform their eventual policy decisions.

38. Likewise, Ministers must be able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from the distraction that would likely flow if the withheld information was made public.

23. The Commissioner expressed the opinion that these considerations carry most weight where the decision on policy has yet to be taken and the formulation or development process is still 'live'.

24. The more detailed points on behalf of the MHCLG considered by the Commissioner can be described as follows:-

(a) Releasing the minutes of the UKHMF board meeting in their entirety would prejudice the provision of free and effective views resulting in less robust, well-considered or effective policy to the HMLC.

(b) The Holocaust is a sensitive subject that can provoke strong views, and it is important for Members of the advisory body to be able to debate this policy away from external interference and distraction.

(c) There was an expectation of confidentiality at these meetings and to release the minutes in their entirety may result in the lack of cooperation and participation from third parties with experience and expertise of the matters at hand, and it may also constrain the Members of the advisory group from discussing issues freely.

(d) There would therefore be a "chilling effect" on the future provision of free and frank advice and the exchange of views, and on the exploration of all relevant consideration in the formulations of policy in relation to this project, if the UKHMF's deliberations were subject to full disclosure under the FOIA.

(e) There was a planning public inquiry planned for October 2020 where the case for the MHLC is to be advanced in full, and in the public domain.

(f) There was concern that the Appellant was using disclosed information to oppose the project.

(g) These adverse effects, both on the policy process and the policy itself, were highly relevant considerations at the time of the request and are still relevant at this time.

25. Having considered all these factors the Commissioner accepted that at the time of the request, the issues were 'live' and 'ongoing', and that the public interest weight favours the continued withholding of the remaining information.

26. In the decision notice relating to the 0300 appeal the Commissioner rehearsed the MHCLG's arguments on the public interest in withholding information as set out above, but listed more fully points made by the Appellant in favour of disclosure:-

> 33. The complainant disputes that disclosure would potentially impact on the private thinking space of officials, stating that the documents requested are confined to the choice of site which was made in 2016 and therefore do not relate to any policies in development.
>
> 34. The complainant contends that there hasn't been any indication since January 2016 that any consideration would be given by the government to alternative sites. Therefore there are no live policy issues relating to the location.
>
> 35. The complainant states that there is no reason to believe disclosure would have a chilling effect on future debate as it would not have been reasonable to believe in 2016 that the evidence which gave rise to a decision to locate a major building project in a small public park would remain confidential indefinitely. Furthermore that past and present members of the UKHMF board have defended the decision publicly.
>
> 36. The complainant advised that the location it is a grade II listed park which is long established and heavily used. As such the Government should be accountable for the way the decision was made and the appropriation of a large part of the park. He contends that normally in such a major planning issue there would be public consideration and consultation prior to a decision by the local authority.
>
> 37. The complainant submits that there is strong public interest in transparency of the decision to choose Victoria Tower Gardens

('VTG') as the location for the UK Holocaust Memorial and Learning Centre:

 Over 18,000 people have signed a petition2 objecting to the chosen location, with over 800 people objecting to the planning application before it was called in by the MHCLG for a planning inquiry.

 That almost no information has been released about how the location was chosen. Furthermore that the information obtained via written parliamentary questions has been contradictory. The complainant states that, in particular, the planning application and the written parliamentary answers disagree about how the site search was carried out and when VTG was first considered.

 That there is evidence of irregularity in the site selection process. The complainant submits that available information indicates that VTG was put forward to the UKHMF board but never included in the official search process. Therefore "As far as can be ascertained, no systematic and impartial comparison of the available sites was made in January 2016 before the Government firmly committed itself to building on VTG."

27. The Commissioner found at paragraph 49 that the Appellant had 'provided compelling arguments for providing the public with information that enables further scrutiny and transparency of decisions regarding the recommended the choice of location for the HMLC'. However, the Commissioner concluded that 'it is apparent …that the issue is still live and the matter of the location has not been settled', that the planning application for the HMLC is the subject of an imminent public inquiry, and that the 'FOIA should not disrupt the process of the inquiry in any way' (paragraph 53). On that basis the Commissioner considered that the public interest weight favoured withholding the requested information.

THE APPEALS

28. In both appeals, the Appellant challenges the decision to withhold the information under s. 35(1)(a) FOIA on similar grounds. As was confirmed at the hearing of the appeals, in neither case does the Appellant challenge the finding that the information falls within the scope of s. 35(1)(a) FOIA, and the appeals are concerned with whether the Commissioner has correctly applied the balance of public interest test in concluding that MHCLG was correct to withhold the information.

29. In appeal 0202 the Appellant stated that:-

> My appeal relates only to the passages in the minutes of the UK Holocaust Memorial Foundation (UKHMF) that relate to the choice of location for the UK Holocaust Memorial and the associated Learning Centre

30. The subject matter of appeal 0300 is papers that relate to the location of the HMLC and the Appellant states that as in the earlier appeal 'I emphasise that my objection is not to the principle of a …HMLC but to the location'.

31. The Appellant argued that the Commissioner was wrong to consider the information related to 'live' government policy, because the choice of location for the HMLC is not an ongoing decision, but was made more than four years ago. The UKHMF recommended VTG as the site for the Memorial on 13 January 2016 and the Prime Minister announced this would-be the site of 27 January 2016. Government planning since January 2016 has proceeded on the basis that the learning centre will be on the same site. There has never been any indication the government was minded to reconsider that decision.

32. The Appellant argues that it is necessary to separate the high-level decision on location of the HMLC and other "policy decisions" which related to implementation would not be expected to affect the decision on location. In his written replies the Appellant argues that formulation of

policy relates to "the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs and recommendations and submissions are put to a minister who decides which option should be translated into political action" and in this case "the decision on the location of the HMLC clearly passed this stage long ago". There has not been, nor is there any prospect of, "review, improvement or adjustment" of the decision.

33. The Appellant argues that the fact that the siting of the HMLC at VTG is conditional on planning permission is irrelevant, as there is no prospect of the minister defying the wishes of the Secretary of State and Prime Minister by refusing permission in this case.

34. In the In the 0202 appeal the Appellant highlighted five passages in thr minutes which may fall within the scope of his appeal, namely:

    (a) section 4 of the Minutes dated 23 July 2015 ('4. Property Sites: Progress to Date') (Extract 1);

    (b) a section on pages 1 – 2 of the Minutes dated 10 November 2015 ('Memorial and Learning Centre site search') (Extract 2);

    (c) sections 1 and 2 of the Minutes dated 13 January 2016 ('1. National Memorial and Learning Centre site search' and '2. Learning Centre [redacted]') (Extract 3);

    (d) a section on pages 1 – 2 of the Minutes dated 13 April 2016 ('Learning Centre Site Selection') (Extract 4); and

    (e) a section on pages 1 – 2 of the Minutes dated 13 July 2016 ('UPDATE ON VICTORIA TOWER GARDENS') (Extract 5).

35. Having examined the withheld material, the Tribunal agrees that these are the documents in issue, subject to the following. The MHCLG points out that section 2 of Extract 3 does not relate to the choice of location, and

therefore falls outside the scope of the appeal. Having examined section 2, I agree with that analysis. As MHCLG say, of the 89 pages of closed material in appeal 0202, the Tribunal is being asked to determine whether it was in accordance with the law to withhold disclosure of specific passages contained on 11 pages.

36. In relation to appeal 0300 the disputed information comprises as set out in the original request: 'the papers circulated to the board of the UK Holocaust Memorial Foundation for the agenda items which gave rise to the following items in the board's redacted minutes: 'Memorial and Learning Centre site search', 10 November 2015; Items 1 ('National Memorial and Learning Centre site search') and 2 ('Learning Centre...'), 13 January 2016; 'Learning Centre site selection', 13 April 2016; 'Update on Victoria Tower Gardens' and 'International design competition', 13 July 2016". These are the agenda items which gave rise to Extracts 2 – 5 (see above in appeal 0202) as well as a further passage in the Minutes dated 13 July 2016 (with the title 'International design competition').

37. The MHCLG states that there are seven documents which fall within this description (the Board Papers), and are within the withheld documentation. The MHCLG further notes that three of those seven documents are not concerned with the location of the Memorial or Learning Centre at all, namely:-

(a) A 20-page Barker Langham report ("the BL Report"). This is concerned with the concept and content of the Memorial.
(b) A 1-page cover note for the BL Report ("the Cover Note"). Similarly, this is concerned with the concept and content of the Memorial.
(c) A 2-page paper on the International Design Competition ("the Design Paper"). This is concerned with the design of the Memorial and a learning centre.

38. As set out above the appeal in 0300 is focussed on documents relating to the location of the HMLC and not on the principle of such an institution.

39. The Tribunal has considered the withheld material in appeal 0300 in the light of that and agrees that these three documents fall outside the scope of this appeal, leaving four other documents which are within scope.

THE HEARING

40. No witnesses were called at the hearing of the appeal, and it was not necessary to have a closed hearing.

41. At the hearing the Appellant read from his prepared skeleton argument, setting out many of the points recorded by the Commissioner in her decision notices and in the written appeal grounds and responses described above. As he said:-

> The principle that there should be a Holocaust Memorial and a co-located Learning Centre (HMLC) in central London is largely uncontested. What has made it deeply controversial is the decision of 2016 to appropriate a long-established public open space for that government building project.

42. The Appellant accepted that the qualified exemption in section 35(1)(a) FOIA applies to the information he seeks, in that the information requested relates to the formulation and development of government policy.

43. The Appellant stated again that the relevant policy in question to which the requests were directed was the location of the HMLC. The higher level decision as to whether there should be a HMLC had been made in January 2015 by the then prime minister.

44. The Appellant also submitted that the decision on location of the HMLC had also been made and was no longer provisional. The Appellant cited the prime minister's announcement in January 2016 that that 'Today I can tell the House that this memorial will be built in Victoria Tower Gardens', re-affirmation of that in Parliament in February 2017, the detailed design brief naming VTG, and the fact that a planning application had been made with a 20 day planning inquiry in October and November 2020. The Appellant argued that the policy had been fixed since 2017, and the Commissioner was wrong to decide that the policy was not settled.

45. The Appellant disputes the argument that the current situation is akin to the announcement of a Bill in parliament, where that Bill might be debated and amended in its passage into law so that policy issues remain live.

46. The Appellant argues that:-

> '…the submission of a planning application is proof that a decision *has* been made on the location. You do not undertake the expensive preparatory work to submit a planning application for a building specific to one site, with all the detailed documents and drawings required, if you are still pondering where to locate your development. Furthermore, the whole point of the planning process is that there should be a separate decision on whether the proposed development is consistent with planning policy; planning permission is not, or ought not to be, merely a continuation of the Government's policy development process.'

47. The Appellant submits that if planning permission is refused then finding a new location will be a new policy to be developed in relation to the location of the HMLC, and the relevance of the requested documents would be doubtful in those circumstances. He argues that subsequent plans and developments do not and will not affect the decision on location, and constitute a different level of decision making.

48. In relation to the public interest factors in favour of disclosure, most of the Appellant's points have been set out above and I do not repeat them here. He says the point that the Holocaust is a subject which can provoke strong views is irrelevant when the only issue is the location of the HMLC. He repeats his point that if the issue of location is re-opened after the planning inquiry then any documents relating to VTG will be irrelevant.

49. The Appellant denies that disclosure would have a possible future 'chilling effect' on the UKHMF members who had an expectation of confidentiality in relation to their deliberations. He points to the Commissioner's guidance on s35 FOIA to the effect that (at paragraph 89) 'generic chilling effect arguments about unspecified future policy debates are unlikely to be convincing, especially if the information in question is not particularly recent'.

50. The Appellant expresses the overall public interest argument in favour of disclosure as follows:-

> Building the Memorial and Learning Centre in Victoria Tower Gardens, when other sites are available, would not only wreck this particular park, but would set a precedent, encouraging both national and local government to appropriate open spaces for building projects claimed to be of public benefit. In addition, the Government has committed a substantial sum of public money to the project (£75 million). Therefore, not only is the public interested, but there is a strong public interest in knowing how and why this decision was made.

51. He also has concerns about the nature of the decision-making process in 2015-2016 which led to the choice of VTG as the site, which he thinks will be illuminated further than at present by disclosure of the withheld documents. There is a point raised about lack of consultation on the

location before the announcement made by the prime minister. The Appellant concludes:-

> …the decision to choose Victoria Tower Gardens as the location …was a distinct policy; the decision on that policy was made long before I submitted my two FOI requests and has not been subject to any further formulation or development; no safe space for discussion was needed then or is needed now and any chilling effect is likely to be weak or non-existent; the public interest in the matter is strong, the available information is patchy and contradictory, and there is clear evidence of a flawed decision-making process; so the public interest is strongly in favour of disclosing the documents.

52. For the Commissioner, Mr Gillow argued that it did not matter how the policy decisions were divided because the question of location was still live at the time of the requests because of the pending planning enquiry; and even if that question was not live at that point it was important to note that it might become live later. This might happen either if the planning decision was against VTG as the location or if the government heard evidence at the inquiry which made it change its mind on the question of location.

53. Mr Gillow argued that the important thing to focus on was the possibility that further discussion on location by the UKHMF might be necessary in the future.

54. For the MHCLG, Mr Rainsbury addressed the main points made by the Appellant. He said that the decision on location was part of a wider policy, but even if that was no the case then the policy relating to location was not definitely settled as it was subject to the planning process. He

pointed out that although the location may have been announced in parliament, there were other subsequent documents which made clear reference to the fact that the building was subject to the planning process.

55. The public interest in disclosure was not great because the location issues would be explored at the planning inquiry, and little would be added by the disclosure of the information.

56. Mr Rainsbury emphasised the chilling effect that disclosure would have to the members of UKHMF in any further discussions, who were taking part in meetings on the understanding that their work was confidential. He relied on the Upper Tribunal case of *Department of Health and Social Care v Information Commissioner* [2020] UKUT 299 (AAC) where the Chamber President commented that:-

> 28. The case law refers to the "chilling effect" on candour among officials that would be caused if internal discussions on the formulation and development of policy were not exempt from publication. In any particular case, the chilling effect need not be proved by evidence (Department of Work and Pensions v Information Commissioner, JS and TC [2015] UKUT 0535 (AAC), para 13). The phrase "chilling effect" helps to express (in shorthand form) the objective of the exemption– which is to avoid inhibitions on imagination and innovation in thinking about public policy issues.
>
> 29. In different language, contained in the Commissioner's published policy documents, it is in the public interest that civil servants and officials involved in policy-making should have a "safe space" in which to do so. I accept that the free and uninhibited flow of ideas between civil servants plays an important part within the United Kingdom's constitutional arrangements

57. Both the Commissioner and MHCLG referred to the case of *Amin v IC & DECC* [2015] UKUT 0527 (AAC) which makes it clear that there might be circumstances where prejudice is caused because there may be a need to revisit a policy in the future, even though it is not 'live' at the moment. The

Upper Tribunal indicated at paragraph 102 that that could be prejudice upon which the public authority could rely when considering the public interest in non-disclosure.

58. The MHCLG also disputed the Appellant's claim that there was a public interest in disclosure because of a flawed decision process by the UKHMF which led to the location decision that was made. There was no evidence of a flawed decision-making process and the process followed had been explained candidly in the recent planning inquiry.

DISCUSSION

59. The Commissioner has issued guidance on the application of section 35 FOIA[1] which explains that:-

> 37. ….the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007) at paragraph 75(v), and *DWP v Information Commissioner* (EA/2006/0040, 5 March 2007) at paragraph 56.

60. Thus it would be possible to analyse this case as one where there are discrete stages, for example, considering the concept of a HMLC first of all (where the policy is clearly already fixed); the policy in relation to location (which the Appellant argues has been determined); and later stages involving further policy choices in relation to the HMLC.

[1] https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf

61. However, I accept the Respondents' approach to this case that it does not really matter whether the policy formulation and development in relation to the HMLC is considered as a single policy or whether the location is a separate policy which has now been determined subject only to the planning process.

62. Applying the approach in the *Amin* case as set out above, whatever the position, when considering the public interest for and against disclosure (which is the only issue in this case), the practical and factual aspects of this case need to be considered, bearing in mind, of course, that the Appellant has only sought information about the location of the HMLC.

63. MHCLG and the Commissioner both argue that the real issue is that the question of location is subject to the ongoing planning process which might lead to a need to reconsider the location in the future. It seems to me that must be right. Although the Appellant is very dubious that there is a possibility that the planning process will go against MHCLG I cannot form a view on that. I have to assume that it is one of the possible outcomes to the planning process.

64. The question is whether the possibility of an adverse result in the planning inquiry for MHCLG and the subsequent need to reconsider the issue of location is prejudicial to the public interest to the extent, when considered with other factors, that the information should not be disclosed.

65. It seems to me that there is force in the Appellant's point that if the planning process ends with planning permission being refused for the HMLC being placed in VTG, that is in effect the end of the policy relating to VTG, and there will need to be a new process engaged in to find a suitable location.

66. However, the information sought by the Appellant is not limited to information about the choice of VTG as the site for the Memorial. What he has sought, in this appeal, is information relating to the location on a general basis, and the documents in scope discuss a number of possible locations, as well as VTG, and their relative merits and demerits.

67. It seems to me that if the question of location were to come live again, as it might, then the information withheld about all these potential sites might become relevant. It might even be the case that a revised scheme relating to VTG (depending on what the planning process concludes) could be under consideration.

68. In relation to any future deliberations about location, if the discussions and papers to date are disclosed, there does seem to me to a danger that the members of the UKHMF will feel inhibited in their candid discussions about location, if it turns out that their previous deliberations on a number of potential sites, for which they hoped and expected confidentiality, had been prematurely disclosed before the issue of location was finalised.

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.

70. In my view these are weighty issues to put in the balance against disclosure at this stage.

71. In favour of disclosure are those points which have been put forward by the Appellant and considered by the Commissioner. The Appellant refers to the lack of public information about how and why the decision was

made in favour of VTG. There is, indeed, a strong public interest in knowing how the decision to build the HMLC on a public park was made, given the impact on a valued open space, and the large amount of public money involved. There is also the general public interest in the disclosure of information for the purpose of promoting transparency and accountability, and particularly the public interest in disclosing information in relation to the business of government.

72. In relation to the alleged evidence of a flawed decision-making process, though, there is nothing in the closed bundle that I have seen which indicates any untoward procedures. In general, as I understand has happened in this case, the procedure for examining the appropriateness of policies such as the location of a monument, will be through the planning inquiry process.

73. On that basis, 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.

74. The balance of the public interest is therefore in favour of non-disclosure of the information at issue in these appeals and both appeals 0202 and 0300 are dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 January 2021

Date Promulgated: 01 February 2021