

Complaint against Buildings Department for refusing to provide investigation reports and other relevant information about alleged defective waste water pipes on the complainant’s premises (Related to Code on Access to Information)

Investigation Report

On 18 April 2019, Ms A complained to this Office against the Buildings Department (“BD”).

The Complaint

2. Ms A previously complained to BD that her building’s common waste water pipes, after replacement, were not properly connected to the pipes of her premises. She considered that BD had failed to conduct a thorough investigation into the incident, but required her to repair the defective waste water pipes instead.

3. Subsequently, she made a request to BD under the Code on Access to Information (“the Code”)¹ for the following information:

- (1) any investigation reports, test reports, job records of the hired consultant and authorisation documents, photographs and pictures in relation to her case (“**Information I**”);
- (2) the names, post titles, professional qualifications, and experience in investigating drainage systems and building seepage of all investigators (including staff of BD and the consultant) (“**Information II**”); and
- (3) any contracts and procedural guidelines between BD and the consultant (“**Information III**”).

4. However, BD refused her request for information. She considered BD’s decision unreasonable. On 28 August, this Office received further information from her, who alleged that it was unreasonable for BD to have arranged for the civil servant responsible for her case to handle her request for information, rather than assigning the Department’s Access to Information Officer (“AI Officer”) to do so.

¹ The full text of the Code is available at: <https://www.access.gov.hk/en/codeonacctoinfo/index.html>

5. Furthermore, she alleged that BD had refused to reply to her written enquiries of 2 and 9 April 2019 concerning the location of the defective drainage pipes, and had provided her with a wrong address of the Secretariat to the Appeal Tribunal (Buildings) (“ATB”).

Investigation Process

6. Upon receiving the reply slip signed by Ms A on 6 May 2019, we commenced an inquiry with BD. Having studied the Department’s reply of 9 August 2019, we decided to conduct a full investigation on 21 August. On 15 and 21 October 2019, we received further information from BD. We completed this investigation report on 5 November after considering BD’s views and suitably incorporating its views in the report.

Our Findings

Request for Information

7. On 23 March 2019, Ms A made a request to BD under the Code for the documents concerned. On 15 April 2019, BD replied to her that the documents concerned could not be provided by citing the following provisions in the Code as the reasons for not disclosing the information:

- (a) Regarding Information I, BD cited paragraph 2.6(b) of the Code (“information related to legal proceedings”) as the reason for refusal. BD explained that it learned that Ms A served a Notice of Appeal on the ATB against the order issued by the Building Authority on 27 March 2019.
- (b) Regarding Information II, BD considered that it fell within the scope of “third party information” and “privacy of the individual”, so paragraphs 2.14(a) (“information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed”) and 2.15 (“privacy of the individual”) of the Code were applicable.
- (c) Regarding Information III, BD cited paragraph 2.16 of the Code (i.e. information including commercial, financial, scientific or technical confidences, trade secrets or intellectual property the disclosure of which

would harm the competitive or financial position of any person) as the reason for refusal.

BD's Response to the Complaint

8. In reply to our inquiry, BD gave the following responses on how the provisions of the Code as cited in **paragraph 7(a), (b) and (c)** above were applicable to this case.

Paragraph 2.6(b) of the Code – Related to Legal Proceedings

9. BD considered that the appeal proceedings might be affected by the disclosure of Information I. However, with the commencement of the appeal proceedings for Ms A's case, BD submitted to the ATB all such information (including investigation reports, contract details and the process of investigation) and provided Ms A with a copy on 5 August 2019.

Paragraph 2.14(a) of the Code – Third Party Information

10. Information II was provided by the consultant engaged by BD. BD hired professional services from the consultant through sourcing from the open market and a commercial contract to facilitate its function of maintaining building safety. Nonetheless, the consultant's staff were service providers, not civil servants. BD, therefore, considered them "third parties" under paragraph 2.14(a) of the Code.

Paragraph 2.15 of the Code – Privacy of the Individual

11. The personal qualifications of the consultant's staff and their post titles within the consultant were personal data. BD's contract required the consultant to submit the professional qualifications of its staff for prior approval to ensure their compliance with the required qualifications. Yet, the consultant's staff were not required by the contract to disclose to the public such information as their academic qualifications, and the consultant had objected to the disclosure of such information to Ms A. BD, therefore, refused to disclose Information II by citing paragraph 2.15 of the Code. Nevertheless, according to paragraph 14.7 of the contract, when conducting inspection, the staff concerned was required to carry an identification card issued by BD and show it to the public and relevant persons, and to identify himself/herself as well as to explain the purpose of inspection clearly.

Paragraph 2.16 of the Code – Business Affairs

12. BD considered that paragraph 2.16 of the Code covered its contract with the consultant and the inspection reports submitted by the consultant. Details of the contract drawn up between BD and the consultant were drafted with reference to Appendix 29 to the AACSB Handbook compiled by the Architectural and Associated Consultants Selection Board appointed by the Financial Services and the Treasury Bureau (the Handbook is available on the Architectural Services Department's website: https://www.archsd.gov.hk/media/339746/aacsb_handbook_rev_26_20_jul_2018.pdf). Apart from the above contract details, the contract also included information of the scope of duties, guidelines and service fees, professional services, investigation methods and commercial data of the consultant. The consultant also objected to the disclosure of such information to Ms A. As such, paragraph 2.16 of the Code was applicable to Information III.

13. However, as mentioned in paragraph 9 above, with the commencement of the appeal proceedings for Ms A's case, BD submitted to the ATB all such information and provided Ms A with a copy, including details of its contract with the consultant, procedural guidelines, rights and responsibilities, the process of investigation, etc.

Other Complaints

14. In response to Ms A's enquiries of April (see paragraph 5 above), BD answered her questions in its reply of 12 April and attached a sketch of the relevant drain pipes. In addition, BD telephoned Ms A on 16 April to invite her for a joint inspection of the drain pipes, but she refused.

15. As for Ms A's allegation that BD had provided a wrong address of the Secretariat to the ATB, BD stated that although the notes in its reply letter of 7 March attaching the repair order had provided the Secretariat's new address, the notes in the repair order itself had not been updated yet. BD admitted its inadequacies and apologised to Ms A.

Our Comments

16. Overall, the information requested by Ms A from BD was entirely related to her appeal lodged with the ATB. However, refusing disclosure of information based on paragraph 2.6(b) of the Code, BD should justify how the disclosure of such information

would harm or prejudice the conduct or impartial adjudication of the above appeal proceedings. BD did not provide any justification in this regard. On the other hand, with the commencement of the appeal proceedings, BD provided Ms A with all such information (see paragraph 9 above). Notably, BD could not demonstrate sufficient grounds for having refused disclosure of Information I based on paragraph 2.6(b) of the Code.

17. Meanwhile, paragraph 1.2 of the Code stipulates that the existing legal rules governing disclosure of information in the context of proceedings before courts, tribunals and inquiries are not affected by the Code. Moreover, paragraph 1.2.1 of the Code's Guidelines on Interpretation and Application ("the Guidelines") stipulates that paragraph 1.2 of the Code aims to ensure that the existing rules governing the disclosure of information in the context of legal proceedings are not disturbed; those rules provide for documents to be produced and enquiries answered during the issue of proceedings. Therefore, the issues of whether and how Information I should be disclosed are to be determined according to the relevant rules in the legal proceedings.

18. Regarding Information II, undoubtedly the names of the consultant's staff and their professional and academic qualifications involved privacy of relevant individuals and third-party information. However, the consultant was engaged by BD to perform duties for the Department, and public officers, when performing official duties, are obliged to disclose their names and post titles upon request from members of the public. As the consultant was engaged by BD to perform official duties, the same obligation should be applicable. As a matter of fact and as far as this case is concerned, the consultant's staff, when performing duties for BD, were required to disclose their identities to the management company of the estate and/or the property owners concerned before entering their premises. If in doubt about their identities, the owners were entitled to clarify with them. In fact, a similar requirement was stipulated in paragraph 14.7 of BD's contract (see paragraph 11 above). As such, we find it inexplicable that, when Ms A subsequently asked BD for the identities of the staff who performed duties on the day of inspection, BD refused to provide the information. In the light of the above, we consider it inappropriate for BD to have withheld the names and post titles of the consultant's staff based on paragraphs 2.14(a) and 2.15 of the Code. Meanwhile, Ms A queried whether the consultant's staff were professionally qualified to follow up on her case, and requested BD to provide their professional qualifications. Since no such requirement was stipulated in the contract between BD and the consultant, and the professional qualifications of the consultant's staff had been vetted by BD (see paragraph 11 above), it is not unreasonable for BD to have withheld such information.

19. As regards Information III (i.e. details of the contract drawn up between BD and the consultant), after scrutinising the relevant contract template (see paragraph 12 above), we cannot see how the disclosure of such information would harm the competitive or financial position of the consultant. For those parts considered to be sensitive by BD (such as payroll information), BD could simply obliterate such data when disclosing Information III to Ms A. Therefore, paragraph 2.16 of the Code is not applicable, either.

Other Provisions Related to the Code

20. Paragraph 1.16 of the Code stipulates that where possible, information will be made available within ten calendar days of receipt of a written request; if that is not possible, the applicant will be so advised by an interim reply within ten days of receipt of the request. The target response time will then be 21 days from receipt of the request. Paragraph 1.18 of the Code stipulates that response may be deferred beyond 21 days only in exceptional circumstances, which should be explained to the applicant.

21. Ms A made the request for information on 23 March 2019. BD took 23 days to give her a reply on 15 April 2019 (see paragraph 7 above), which was largely compliant with the stipulated time limit under the Code. Also in compliance with the Code was BD's advice given to her on the review and complaint channels via its reply to Ms A.

22. Ms A alleged that it was unreasonable for BD to have arranged for the civil servant involved in the incident to handle her request for information, rather than assigning the departmental AI Officer to do so. In this regard, BD further clarified that it generally assigned the officer in possession of relevant information to handle requests for information. The role of its AI Officer was mainly to provide other staff with advisory service in this area and to handle review cases. Indeed, paragraph 1.8 of the Code states that each department will designate an AI Officer, but paragraph 1.8.1 of the Guidelines states that this will not in most cases be a separately established post. BD's arrangement, therefore, did not deviate from the spirit of the Code.

Other Complaints

23. Ms A alleged that BD had failed to respond to her written enquiries of 2 and 9 April about the location of the defective drain pipes. BD stated that its reply of 12

April, which attached a sketch of the relevant drain pipes, already addressed Ms A's enquiries (see paragraph 14 above). After scrutinising the relevant reply, we consider BD to have properly replied to Ms A. As regards Ms A's allegation that BD had provided her with a wrong address of the Secretariat to the ATB, BD admitted its inadequacies and apologised to Ms A (see paragraph 15 above). We urge BD to take reference from this case and avoid recurrence of similar incidents.

Our Final Remarks

24. In the light of the above, we consider the incident to have reflected BD's insufficient understanding about the Code in handling requests for information from the public. Ms A's complaint against BD is, therefore, **partially substantiated**.

Recommendation

25. In this regard, The Ombudsman recommends that BD enhance staff training to ensure their strict compliance with the Code and the Guidelines in handling requests for information from the public.

26. This Office will continue to follow up with BD on the implementation of the above recommendation.

Office of The Ombudsman
November 2019