

**Complaint of delay and excessive masking in providing
a report on traffic and transport impact assessment
(Related to Code on Access to Information)**

Investigation Report

On 24 March 2019, Mr X complained to this Office against the Civil Engineering and Development Department (“CEDD”).

The Complaint

2. On 17 January 2019, Mr X sent an email to the enquiry email address of the Government Telephone Directory, requesting under the Code on Access to Information (“the Code”) a copy of the report on the Preliminary Traffic and Transport Impact Assessment under the Technical Study on Transport Infrastructure at Kennedy Town for Connecting to East Lantau Metropolis (“ELM”) (“the Report”). Mr X’s email was subsequently referred to CEDD on 21 January for handling. On 30 January, CEDD sent an acknowledgment email to Mr X, telling him that it would inform him of the latest progress on or before 10 February. On 8 and 22 February, CEDD emailed Mr X, explaining that, before it could release the Report to the public, it had to review the text and hide the commercial or sensitive information therein in accordance with the requirements of the Code. To this end, CEDD needed to consult the relevant technical departments and coordinate their inputs/comments. More time was therefore required for it to process his information request.

3. On 12 March, CEDD wrote to inform Mr X that a copy of the Report, with contents masked in accordance with the requirements of paragraphs 2.9 (“management and operation of public service”), 2.12 (“improper gain or advantage”), 2.13 (“research, statistics and analysis”) and 2.16 (“business affairs”) of the Code, was ready for his inspection. On 14 March, Mr X read the copy of the Report and found CEDD to have heavily masked the Report, including masking texts on the sections of “Traffic Forecast” and “Summary and Recommendation”, and 24 figures that included forecast traffic flows, such that the masked Report was, in his view, virtually meaningless. On 15 March, Mr X wrote to CEDD raising his concern and requesting a review of its decision. Meanwhile, he also lodged a complaint with this Office.

4. Mr X complained against CEDD for:

- (1) excessive masking of the Report for his viewing which, contrary to what CEDD claimed (*paragraph 3 above*), exceeded the requirements of the Code. He also doubted if the masked information was commercially sensitive; and
- (2) delay in handling his information request. He took the view that CEDD had, instead of giving him a reply as soon as practicable, worked to the full extent of the target response times allowed in the Code when handling his information request.

Our Findings

5. Having examined the information and explanation provided by CEDD, including the full version of the Report and the versions made available to Mr X (*paragraphs 3 above and 9 and 14 below*), we completed our investigation on 23 September 2019. Our findings follow.

The Code and its Guidelines on Interpretation and Application (“the Guidelines”)

6. The Code authorises and requires civil servants, routinely or on request, to provide information unless there are specific reasons set out in Part 2 for not doing so. Such reasons include:

- (1) Paragraph 2.9(a): Information the disclosure of which would harm or prejudice negotiations, commercial or contractual activities, or the awarding of discretionary grants and ex-gratia payments by a department.
- (2) Paragraph 2.12: Information the disclosure of which could lead to improper gain or advantage.
- (3) Paragraph 2.13(a): Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the department or any other person of priority of publication or commercial value.

Paragraph 2.13.2 of the Guidelines states that the provision in paragraph 2.13(a) of the Code recognises that departments may withhold information

relating to incomplete analysis, research or statistics where the incompleteness could produce a misleading impression. Departments may however decide to release this type of information if it is possible for the information to be accompanied by an explanatory note explaining the ways in which it is defective.

- (4) Paragraph 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. However such information may be disclosed with the third party's consent, or if the public interest in disclosure outweighs any harm or prejudice that would result.
- (5) Paragraph 2.16: 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.

7. With regard to the target response times for an information request, the Code states that:

- (1) Paragraph 1.16: Where possible, information will be made available within ten 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.
- (2) Paragraph 1.18: Response may be deferred beyond 21 days only in exceptional circumstances, which should be explained to the applicant. Any deferral should not normally exceed a further 30 days (i.e. 51 days from receipt of the request).

The Report and CEDD's Handling of Mr X's Request

8. The Report covers the existing traffic and transport arrangement of west Hong Kong Island, traffic modelling approach and the assumptions (such as toll level assumptions, population and employment of ELM and highway infrastructure) adopted to forecast traffic flows and the results and recommendations of the assessment. It consists of over 100 pages with 6 sections, including 48 tables, 42 figures and 4 appendices.

9. In response to Mr X's information request, CEDD provided a masked Report ("the first masked Report") for Mr X's viewing. In the first masked Report, information, in particular that about forecast traffic flows, was substantially masked.

Complaint Point (1): Excessive Masking of the Report

CEDD's Explanation

10. CEDD has explained to us that, on receiving Mr X's information request (paragraph 2 above), it sought the advice of the relevant bureaux/departments ("B/Ds"), including the Development Bureau ("DEVB"), Transport and Housing Bureau, Transport Department, Highways Department and Planning Department, which had provided information to CEDD during the course of the Technical Study on Transport Infrastructure at Kennedy Town for Connecting to ELM ("the Technical Study") on identifying information to be masked in the Report and the reasons under the Code for masking. When approaching those B/Ds, CEDD reminded them to minimise the extent of masking. With inputs provided by those B/Ds, CEDD reviewed the contents of the Report proposed to be masked to consolidate the first masked Report. CEDD, therefore, considered the extent of the contents of the Report to be masked a collective decision of all the B/Ds concerned, including the Department itself.

11. CEDD has also explained to us that the Report contained various planning data, parameters, assumptions adopted in forecasting the traffic and transport condition of year 2041 as well as the corresponding forecast results under the Technical Study which were obsolete, outdated, relating to incomplete analysis/research or no longer applicable. Examples of such information included toll level assumptions, traffic forecast data, territory-wide population adopted from the Enhanced 2011-based Territorial Population and Employment Data Matrix, highway and railway networks proposed under the "Hong Kong 2030+: Towards a Planning, Vision and Strategy Transcending 2030" promulgated in 2016 and the percentage of public housing assumed in ELM. CEDD considered paragraph 2.13(a) of the Code (*paragraph 6(3) above*) applicable and this was the main reason why the Report provided to Mr X for viewing was masked.

12. Apart from paragraph 2.13(a) of the Code, CEDD considered paragraphs 2.9(a), 2.12 and 2.16 of the Code also applicable. It took the view that disclosure of some planning data, parameters and assumptions such as:

- (1) information about highway network and reclamation extent around Kau Yi Chau might harm or prejudice the Government's negotiations with stakeholders such as fishermen and the award of discretionary grant or ex-gratia payments (paragraph 2.9(a) of the Code, *paragraph 6(1) above*);
- (2) information about toll level assumptions and land use options could lead to improper gain or advantage by potential transport operators or land developers, who possess the information (possibly earlier than others), when they plan or look for new business opportunities on a new route or development, or persuade others to invest (paragraph 2.12 of the Code, *paragraph 6(2) above*); and
- (3) air traffic/cargo data related to the Hong Kong International Airport ("HKIA") might harm the competitive or financial position of a home-based carrier (paragraph 2.16 of the Code, *paragraph 6(5) above*). This is because transit and transfer passengers as well as transshipment cargoes ("T/T") are mostly handled by that home-based carrier. The figures on T/T, which might be considered useful and valuable in the eyes of other airlines in enhancing their competitiveness against that carrier, could be worked out, if one possesses the air traffic/cargo data in the Report, by comparing the data available on the website of the Airport Authority Hong Kong ("AAHK").

Subsequent Development

13. In handling Mr X's request for review (*paragraph 3 above*), CEDD sought advice from the Legal Advisory Division (Works) ("LAD(W)") of DEVB. LAD(W) advised that paragraphs 2.9(a), 2.12 and 2.13(a) of the Code might be relied on if the proponent departments could justify that the disclosure of information might hamper a department's negotiating position, leading to improper gain or advantage, or produce a misleading impression. Besides, LAD(W) reminded that CEDD might decide to release the type of information masked under paragraph 2.13(a) of the Code if it was possible for the information to be accompanied by an explanatory note explaining the ways in which it was defective and thereby eliminating the misleading impression pursuant to paragraph 2.13.2 of the Guidelines (*paragraph 6(3) above*). In parallel, CEDD asked the B/Ds concerned to review the extent of masking of the Report and was confirmed by those B/Ds that no change was to be made.

14. Notwithstanding the above stance of the B/Ds concerned, taking into account LAD(W)'s advice and the growing public concern on the content of the Report, CEDD initiated discussion with those B/Ds about its suggestion to conduct a further review on whether it would be possible to release the information initially masked together with explanatory notes explaining the ways in which the information was defective, thereby eliminating any misleading impression that such information might produce. CEDD then drafted the explanatory notes and invited the B/Ds concerned to comment. On 3 May 2019 (we have commenced our investigation then), CEDD, provided a copy of the Report, with explanatory notes, to Mr X. In that Report, the air traffic/cargo data related to HKIA remained masked (*paragraph 12(3) above*). All other information previously masked was disclosed.

15. On 5 May, Mr X emailed CEDD, asking the Department to explain why the air traffic/cargo data related to HKIA remained masked. On 8 May, CEDD wrote to Mr X, explaining that the said data was considered to be commercially sensitive and the owner of the data (i.e. AAHK) did not consent to its disclosure. Hence, CEDD cited paragraphs 2.16 (*paragraph 6(5) above*) and 2.14(a) (*paragraph 6(4) above*) of the Code to account for its decision of non-disclosure.

Our Comments

16. The Code requires Government departments to make available information to the public unless there are specific reasons under Part 2 of the Code for not doing so (*paragraph 6 above*).

17. CEDD mainly relied on paragraph 2.13(a) of the Code to justify its masking of information in the Report that was obsolete, outdated, relating to incomplete analysis/research or no longer applicable (*paragraph 11 above*). However, paragraph 2.13.2 of the Guidelines states that departments may decide to release information relating to incomplete analysis, research or statistics if it is possible for the information to be accompanied by an explanatory note explaining the ways in which it is defective (*paragraph 6(3) above*). CEDD did not adopt this approach when providing Mr X with the first masked Report, not until at the review stage when CEDD released most of the previously masked information, with explanatory notes added (*paragraph 14 above*). We consider the Department's initial reliance on paragraph 2.13(a) for heavily masking the Report not justified.

18. Regarding CEDD's invoking paragraph 2.9 of the Code to deny, initially, Mr X's access to information about highway network and reclamation extent around Kau Yi Chau (*paragraph 12(1) above*), we note the preliminary concepts for ELM, including the construction of artificial islands around Kau Yi Chau which were to be served by a highway and railway system, were made known to the public as early as in January 2016 in the public consultation materials for the developments of Lantau Island. In July 2016, there were also media reports about the proposed extent of reclamation around Kau Yi Chau. Besides, a model showing the proposed developments of Lantau Island, including the reclamation extent of Kau Yi Chau, was available for public viewing in CEDD's office. Since information about the reclamation works around Kau Yi Chau and the provision of highways at the artificial islands so created had already been available to the public at the time when Mr X made his information request, we do not see how the disclosure of such information might harm or prejudice the Government's negotiations with stakeholders and the award of discretionary grant or ex-gratia payments. We note that CEDD did subsequently release such information to Mr X (*paragraph 14 above*).

19. As for CEDD's reliance on paragraph 2.12 of the Code to account for its initial decision of non-disclosure of information about toll level assumptions and land use options (*paragraph 12(2) above*), CEDD's concern about potential transport operators or land developers who possess the information would have improper gain or advantage could be addressed by releasing the information in question with explanatory notes. As such, we consider CEDD's initial masking of those pieces of information also not justified. We note that CEDD did subsequently release those pieces of information to Mr X (*paragraph 14 above*).

20. With regard to CEDD's citation of paragraphs 2.16 and/or 2.14(a) of the Code in refusing disclosure of the air traffic/cargo data related to HKIA (*paragraphs 12(3) and 15 above*), we accept that the information was commercially sensitive. We also note that the information was provided to CEDD by a third party, i.e. AAHK, which refused to have it disclosed (*paragraph 15 above*). In the context of this case, we see no overriding public interest in disclosing such information that outweighs any harm or prejudice that may result to the carrier mentioned in paragraph 12(3) above. As such, we consider it not unreasonable for CEDD to withhold this information.

21. We note that, regarding the first masked Report, CEDD considered the extent of the contents of the Report to be masked a collective decision of all the B/Ds concerned, including CEDD itself, and that it had reminded the B/Ds to minimise the

extent of masking (*paragraph 10 above*). Notwithstanding this, the final decision on whether or not information in the Report shall be masked as proposed by the B/Ds concerned rested with CEDD.

22. In light of the above analysis, The Ombudsman considers Complaint Point (1) substantiated.

Complaint Point (2): Delay in Handling Mr X's Information Request

CEDD's Explanation

23. On receiving Mr X's information request on 21 January (*paragraph 2 above*), CEDD had, between 24 January and 8 February, sought and obtained the advice of the B/Ds concerned, which had provided information to CEDD during the course of the Technical Study, on identifying information to be masked in the Report and the reasons under the Code for masking (*paragraph 10 above*).

24. Between 8 February and 12 March, CEDD reviewed the contents of the proposed masking to consolidate the masked Report. In considering which parts of the Report should be masked, CEDD had to go through the whole Report (including text, tables, figures and appendices) and ensure that the same kind of information would be masked throughout. Besides, it had to carefully consider each piece of information proposed to be masked and whether there was justifiable ground for its masking or disclosure under the Code.

25. CEDD considered the above process inevitably time-consuming and laborious, involving extensive coordination with the B/Ds concerned. In the interim, CEDD kept Mr X posted of the progress of his information request by sending him interim replies on 30 January, and 8 and 22 February 2019 respectively (*paragraph 2 above*). On 12 March, CEDD gave a substantive reply to Mr X (*paragraph 3 above*), i.e. 50 days from receipt of Mr X's information request.

Our Comments

26. It is noted that CEDD met the target response times stipulated by the Code (*paragraph 7 above*) when handling Mr X's information request. Having examined the time sequence and the relevant records of CEDD's handling of Mr X information

request, we do not find CEDD to have delayed handling the request. Complaint Point (2) is unsubstantiated.

Conclusion

27. Overall, The Ombudsman considers this complaint **partially substantiated**.

Recommendation

28. The Ombudsman recommends CEDD to take reference from this case and enhance staff training for appropriate application of the Code.

Office of The Ombudsman
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