

**Development Bureau refused to provide tenancy agreements
for two revitalisation projects of historic buildings
(Related to Code on Access to Information)**

Investigation Report

On 5 July 2019, Mr Y complained to this Office against the Development Bureau (“DEVB”).

The Complaint

2. On 10 April 2019, Mr Y, through his assistant, made a request to DEVB under the Code on Access to Information (“the Code”) for the following information:

- (1) the tenancy agreement that the Government entered into regarding the revitalisation project of the former Central Police Station Compound (i.e. the Tai Kwun Project); and
- (2) the tenancy agreement that the Government entered into regarding the revitalisation project of the former Police Married Quarters on Hollywood Road (i.e. the PMQ Project).

3. In its reply to Mr Y’s assistant on 18 April, DEVB refused to provide the above two pieces of information, citing the following paragraphs in Part 2 of the Code as the reasons for refusal (see para. 6 for details):

- Tenancy Agreement for Tai Kwun – paragraphs 2.9(a), 2.9(c) and 2.18(b)
- Tenancy Agreement for PMQ – paragraphs 2.9(a), 2.9(c), 2.16 and 2.18(b)

4. Mr Y was dissatisfied with DEVB’s decision. He contended that even though certain sensitive information in the Tenancy Agreements should not be disclosed, the remaining parts could still be released to him. He criticised DEVB for failing to comply with the Code and provide him with the disclosable parts or a summary of the Tenancy Agreements.

Our Findings

5. On 9 August 2019, we received the reply slip with “Notes for lodging a complaint” signed by Mr Y on the same day. Subsequently, we initiated an investigation against DEVB. Upon examining the relevant information and the Bureau’s explanation, we completed the investigation on 19 February 2020. Our findings are as follows.

Relevant Parts of the Code and its Guidelines on Interpretation and Application

6. Pursuant to the Code, Government departments (including DEVB) are required to make available as much Government-held information as possible for the public to adequately understand the Government and its services, unless the information falls into the categories which can be withheld under Part 2 of the Code, including:

- (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 2.9(c): Information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department;
- (3) 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; and
- (4) paragraph 2.18(b): Information the disclosure of which would constitute a breach of any obligation arising under common law or under any international agreement which applies to Hong Kong.

7. Moreover, paragraph 2.1.1 of the Guidelines on Interpretation and Application of the Code stipulates that the withholding of information under most provisions of Part 2 (including paragraphs 2.9(a), 2.9(c) and 2.16) is subject to a “harm or prejudice test”. The department concerned has to consider whether the public interest in disclosure of such information outweighs any harm or prejudice that could result from disclosure. If

there is a clear public interest in disclosure, departments may disclose information which could be withheld.

Relevant Tenancy Agreements

8. The Government entered into the Tenancy Agreements for the Tai Kwun and PMQ Projects with Company A and Company B in 2015 and 2012 respectively. The Tenancy Agreements covered the responsibilities and obligations of the Government and the two companies regarding the projects, including provisions on building usage, conservation requirements, duties of maintenance, compensation requirements, financial arrangements and responsibilities, requirements on the governing body, the Government's monitoring work, etc.

DEVB's Explanation

9. DEVB's detailed reasons for refusing to provide the requested information are as follows.

Paragraphs 2.9(a) and 2.9(c) of the Code

10. DEVB stated that the Tenancy Agreements include a number of commercial contractual clauses which involve sensitive information. For instance:

Tai Kwun

- (1) provisions for Company A to sublet Tai Kwun;
- (2) Company A's right to name the new buildings of Tai Kwun; and
- (3) financial obligations undertaken by Company A for Tai Kwun, including arrangements and requirements for liabilities.

PMQ

- (4) Company B's obligation to report to the Government on monetary transactions exceeding a certain amount;
- (5) arrangements for sharing and calculation of project surplus;

- (6) detailed clauses about the undertaking and guarantee of the donor;
- (7) arrangements for Company B to solicit donations from outside sources for the project; and
- (8) arrangements for rental concessions offered to needy designers and creative entrepreneurs.

11. DEVB considered that the Tenancy Agreements cover the responsibilities and obligations of their signatories and involve sensitive contractual clauses. Therefore, disclosing their content would likely prejudice or weaken the Government's negotiating position with other organisations in light of tenancy agreements or addition/deletion of certain clauses in the agreements for similar revitalisation projects. It would also prejudice the Government's proper and effective implementation, and continuous optimisation, of its revitalisation policy and individual projects.

Paragraph 2.16 of the Code

12. DEVB pointed out that the Tenancy Agreement for PMQ includes detailed clauses stipulating the donation from the donor and its arrangements. Disclosing such clauses may affect future donations from potential donors for the PMQ Project and prejudice its financial position and implementation, and may also affect donations from potential donors for other revitalisation projects. Besides, the Tenancy Agreement includes clauses requiring Company B to allocate a certain number of studios for lease at concessionary rents by needy designers and creative entrepreneurs. DEVB considered that disclosing such information may affect the revitalisation project's financial position and implementation.

Paragraph 2.18(b) of the Code

13. DEVB claimed that the Tenancy Agreements include clauses specific to the two revitalisation projects and sensitive commercial secrets. The signatories to the agreements did not expect the agreements to be disclosed. Pursuant to the common law, the Government owes an implied duty of confidentiality regarding the agreements.

Public Interest

14. DEVB explained that in his request for information, Mr Y's assistant had not specified the key issues of concern or the public interest in disclosure of such information. Consequently, the Bureau considered that the public interest in disclosure of such information did not outweigh the harm or prejudice that could result from disclosure (see paras. 11 and 12), and decided not to disclose such information.

Our Comments

Paragraphs 2.9(a), 2.9(c) and 2.16 of the Code

15. In paragraphs 10 and 12 above, DEVB cited a number of clauses from the Tenancy Agreements, claiming that they constituted sensitive contractual clauses and/or commercial secrets, and the disclosure of which could result in the harm or prejudice specified in paragraphs 2.9(a), 2.9(c) and/or 2.16 of the Code. However, we note that many details of those clauses were already disclosed, including:

Tai Kwun

- (1) The clauses about Tai Kwun's financial responsibilities were disclosed by DEVB to the Legislative Council ("LegCo") in the LegCo Brief submitted in October 2010, and in a press release issued by the Government on 11 October 2010. In particular, a charities trust related to Company A would fund all the revitalisation works and all operational deficits during the term of the Tenancy Agreement until the operation of the compound is financially self-sustainable. Any surplus income arising from the operation of the compound would be used for heritage conservation in Hong Kong (*see para. 10(3)*).
- (2) The LegCo Brief also disclosed that the budget for the Tai Kwun Project was HK\$1.8 billion (*see para. 10(3)*).

PMQ

- (3) In the document submitted to the LegCo Public Works Subcommittee in July 2011, DEVB disclosed the arrangement for sharing the PMQ Project's surplus between the Government and the donor. In particular,

any surplus would be shared between the two parties every five years on a 50/50 basis. The Government's portion would be returned to the General Revenue Account whereas the donor would fully re-invest its portion into the PMQ Project (*see para. 10(5)*).

- (4) The above document also disclosed the financial commitment undertaken by the donor for the PMQ Project, namely a capital contribution of HK\$110 million, not to be recovered in any form, to fund the revitalisation and operation of PMQ. Moreover, the cost for transformation works of the PMQ Project would be partially funded by the above capital contribution at HK\$17 million (*see paras. 10(6) and 12*).
- (5) Regarding the arrangements for rental concessions, it is stated on the website of the Commissioner for Heritage's Office under DEVB that key terms of the PMQ Project's proposal included "dedicated space for start-up creative industry establishments at concessionary rents". Besides, in DEVB's reply to a LegCo question on 7 May 2014, and a press release published on the Information Services Department's website on 13 July 2014, it was revealed that Company B would offer 20% to 50% rental discount to creative talent for leasing the studios (*see paras. 10(8) and 12*).

16. Furthermore, the venues and stores of Tai Kwun are offered for lease via its website on an on-going basis, and the compound's two new buildings are named partly after Company A. In such circumstances, the fact that the Tenancy Agreement for Tai Kwun provided for Company A to sublet the venues and its right to name the new buildings of Tai Kwun (*see paras. 10(1) and (2)*) is actually well known and should not be considered as commercial secrets.

17. Regarding Mr Y's request for information, we can hardly see any harm or prejudice that would result if DEVB provided him with the content of the Tenancy Agreements which is already in the public domain. Nor would it weaken the Government's negotiating position, affect the implementation of the revitalisation projects or jeopardise the financial position of the relevant revitalisation projects (*see paras. 11 and 12*). Hence, it was improper for DEVB to invoke paragraphs 2.9(a), 2.9(c) and/or 2.16 of the Code in refusing to provide the above clauses in their entirety.

18. Nevertheless, the above clauses also include certain information that has never been released before. Disclosing such information might indeed prejudice the

Government's negotiating position, or the financial position and operation of the revitalisation projects. We consider it not unreasonable for DEVB to refuse disclosure of such information.

Paragraph 2.18(b) of the Code

19. We note that the Tenancy Agreements both stipulate that the Government has the right to disclose information in those agreements to other parties concerned, including but not limited to such circumstances as answering questions by LegCo.

20. Given the above clauses, we consider that Company A and Company B should have reasonably expected that the Government, on occasions, would disclose the information and content in the Tenancy Agreements to external parties. As such, we do not agree that the Government owes an absolute duty of confidentiality with regard to the Tenancy Agreements.

Overall Comments

21. As the Tenancy Agreements are commercial contracts in nature, there is an instinctive presumption that information therein is commercial secrets and should not be disclosed. However, the fact is that the content of tenancy agreements is not unequivocally barred from disclosure.

22. First, the Tenancy Agreements involve respectively two major revitalisation projects. Some of the major clauses, which were already disclosed by the Government to LegCo and the public, are no longer confidential. Our analysis in paragraphs 15 and 16 above need not be repeated here.

23. Second, the Tenancy Agreements include many clauses covering the general duties commonly associated with tenancy matters, such as the tenant's duties to pay rent when due, to ensure proper maintenance of the property, etc. As such clauses are not specific or sensitive commercial information, disclosing them would hardly cause any harm or prejudice.

24. Meanwhile, the two revitalisation projects in question have attracted concerns widely in the community. There is a clear public interest in disclosing the content of the Tenancy Agreements to facilitate public understanding and monitoring of the Government's implementation of the projects.

Conclusion and Recommendation

25. In light of the analysis in paragraphs 15 to 24 above, we consider that the Tenancy Agreements for Tai Kwun and PMQ are not completely barred from disclosure. Hence, DEVB's decision of withholding all the content in the Tenancy Agreements from Mr Y (acting through his assistant) was inappropriate. Therefore, this complaint is **substantiated**.

26. The Ombudsman recommends that DEVB carefully reconsider, according to the Code, which parts of the Tenancy Agreements should be withheld, and provide Mr Y with the remaining parts thereof.

DEVB's Feedback on Our Recommendation

27. DEVB has accepted our recommendation and agreed to review the content in the Tenancy Agreements. Upon seeking legal advice and the views of Company A and Company B, it will provide Mr Y with a copy of each of the Tenancy Agreements after obliterating the parts that should be withheld.

Office of The Ombudsman
February 2020