

**Development Bureau refused to disclose information about
Antiquities and Monuments Office’s grading of a structure
(Related to Code on Access to Information)**

Investigation Report

On 3 March 2021, this Office received a complaint against the Development Bureau (“DEVB”).

The Complaint

2. On 7 January 2021, the complainant made a request under the Code on Access to Information (“the Code”) to the Antiquities and Monuments Office (“AMO”) of DEVB for the following information:

- (1) minutes of any meetings of the Antiquities Advisory Board (“AAB”) where AMO specified that “the Sham Shui Po fresh water break pressure tank at Bishop Hill fell outside the category of graded structures” and “no further action was considered required” (“Information (1)”); and
- (2) any AMO documents specifying that “the Sham Shui Po fresh water break pressure tank at Bishop Hill fell outside the category of graded structures” and “no further action was considered required” (“Information (2)”).

3. On 18 February, AMO refused the complainant’s request for information by email. Citing paragraphs 2.9(c)¹ and 2.10(b)² of the Code, AMO explained that it was considered improper to disclose the internal documents and information about the incident.

4. The complainant contended that the Sham Shui Po fresh water break pressure tank at Bishop Hill, a heritage structure, was damaged (“the Incident”) due to ineffective communication among Government departments. As the Incident raised wide public concerns, it was essential to find out more details about how the Government made the above decision. The complainant, therefore, complained to this Office against AMO for unreasonably withholding information.

Our Findings

5. On 16 March 2021, we launched a full investigation into this complaint against DEVB. Upon examining the information and explanation from DEVB of 13 May, 6

¹ Paragraph 2.9(c) of the Code: Information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department.

² Paragraph 2.10(b) of the Code: Information the disclosure of which would inhibit the frankness and candour of discussion within the Government, and advice given to the Government.

and 27 August, we completed the investigation on 1 September. Our findings are as follows.

Relevant Parts of the Code

6. Pursuant to paragraph 1.14 of the Code, departments are not obliged to provide information not in their possession.

7. Government departments are required to make available as much Government-held information as possible for the public to be well informed about 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(c): Information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department.
- (2) Paragraph 2.10(b): Information the disclosure of which would inhibit the frankness and candour of discussion within the Government, and advice given to the Government.

8. Moreover, paragraph 2.1 of the Code provides that a department may refuse to confirm or deny the existence of information in the listed categories. Paragraph 2.1.1 of the Code's Guidelines on Interpretation and Application ("the Guidelines") further elaborates that the use of this provision will not be common, and will probably be confined to sensitive information in such areas as defence, security, external affairs or law enforcement.

Response from DEVB

9. In its reply, DEVB gave the grounds for refusing the complainant's request for information. Salient points of its reply are set out below:

- (1) AMO had not consulted AAB on such issues as the ex-Sham Shui Po Service Reservoir "fell outside the category of graded structures" and "no further action was considered required". Consequently, AMO did not have Information (1) as requested by the complainant.
- (2) As for Information (2), DEVB stated that the relevant documents were emails exchanged between AMO and the Water Supplies Department ("WSD") in April 2017 regarding the ex-Sham Shui Po Service Reservoir.
- (3) In January 2021, the Government set up a working group ("Working Group") led by the Permanent Secretary for Development (Works) to review the handling of the Incident by relevant departments. Its tasks

included scrutinising all relevant documents of the departments (including AMO) in handling the Incident, and interviewing the public officers concerned. It would identify from a holistic perspective any inadequacies on the part of the departments in their internal systems and communication, with a view to putting forward improvement measures. The review was under way.

- (4) DEVB considered that disclosure of Information (1) and (2) (including whether AMO had consulted AAB on such issues as the ex-Sham Shui Po Service Reservoir “fell outside the category of graded structures” and “no further action was considered required”) would draw the public’s focus to certain details before their coming to grips with all the underlying facts. It might result in misjudgement or misunderstanding of the Incident, which would be seriously detrimental to the objective of setting up the Working Group and the effectiveness of its work.
- (5) During the assessment of buildings/structures of potential heritage value, it was particularly crucial for AMO officers to be free from hindrance in giving advice frankly, thereby obtaining professional research results. DEVB asserted that Information (2) involved the views and opinions expressed by individual AMO officers in the documents. Disclosure of the information would evidently put pressure on the officers, causing them to have concerns in future professional assessments. It would prejudice the efficient conduct of the future operations of departments, and inhibit the frankness and candour of advice given without hindrance by AMO and WSD officers, which would in turn affect their assessment or views on buildings/structures of potential heritage value.

Our Comments

Regarding Information (1)

10. Pursuant to paragraph 1.14 of the Code, departments are not obliged to provide information not in their possession (see **para. 6**). DEVB confirmed that AMO did not have Information (1) as requested by the complainant (see **para. 9(1)**). As such, DEVB should have explained the situation to the complainant in its reply of 18 February to the request for information.

11. While AMO did not have Information (1), DEVB refused to disclose to the complainant whether the information existed. Departments are allowed, under paragraph 2.1 of the Code and paragraph 2.1.1 of the Guidelines (see **para. 8**), to refuse to confirm or deny the existence of information in the listed categories. However, the use of this provision will not be common, and will probably be confined to sensitive information in such areas as defence, security, external affairs or law enforcement. We consider DEVB to have no valid justification for asserting that paragraph 2.1 of the Code was applicable to Information (1).

12. In fact, all minutes and discussion papers of AAB meetings are available on its website and thus information in the public domain. It is not difficult to find out from these public information sources whether AMO has consulted AAB on such issues as the ex-Sham Shui Po Service Reservoir “fell outside the category of graded structures” and “no further action was considered required”. In this context, we are of the view that whether disclosure of Information (1) (if existed) would lead to the situation as stated in **paragraph 9(4)** by DEVB should not be a relevant consideration.

13. In light of the above, we consider DEVB to have wrongly invoked paragraphs 2.9(c) and 2.10(b) of the Code to refuse the complainant’s request for Information (1).

Regarding Information (2)

14. As remarked by DEVB, the Government has set up the Working Group to handle and review the Incident, and its work is still in progress. In such circumstances, we agree that disclosure of Information (2) is indeed likely to affect the Working Group’s performance of its duties, inhibit the frankness and candour of discussion and advice given by AMO and WSD officers, and eventually prejudice the operations of departments. Hence, we accept DEVB’s explanation on invoking paragraphs 2.9(c) and 2.10(b) of the Code to refuse the complainant’s request for Information (2).

15. Nevertheless, DEVB, in its reply dated 18 February, could have given more details to the complainant in explaining why it refused to disclose Information (2). By doing so, this complaint might have been avoided.

Conclusion

16. Based on the analysis in **paragraphs 10 to 15**, The Ombudsman considers DEVB to have wrongly cited the relevant paragraphs of the Code in handling the complainant’s request for Information (1). This complaint, therefore, is **partially substantiated**.

Recommendation

17. The Ombudsman recommends that DEVB learn the lesson from this case and step up staff training, so as to ensure strict adherence to the Code and the Guidelines in handling future requests for information from members of the public.

Office of The Ombudsman
September 2021