

**Department of Health refused to disclose the voting results and advice of
its two Scientific Committees and Government’s Expert Advisory Panel on
COVID-19 vaccine procurement by Government
(Related to Code on Access to Information)**

Investigation Report

The complainant complained to this Office against the Department of Health (“DH”).

The Complaint

2. The complainant alleged that DH’s refusal to provide two items of information was in breach of the Code on Access to Information (“the Code”). The information requested by the complainant was as follows:

- (1) the voting results of the Scientific Committee on Emerging and Zoonotic Diseases and the Scientific Committee on Vaccine Preventable Diseases (jointly referred to as “JSC”) and the Government’s four-member Expert Advisory Panel (“EAP”) on the Government’s advance purchase of three vaccines against COVID-19, i.e. the number of votes that supported the procurement of each of the three vaccines (“Information I”); and
- (2) the advice on each of the three COVID-19 vaccines given by JSC and EAP (“Information II”).

Our Findings

Relevant Provisions of the Code

3. The Code stipulates that Government departments should accede to requests for information from members of the public, unless there are valid reasons under Part 2 of the Code to withhold the information. According to paragraph 2.1.2 of the Guidelines on Interpretation and Application of the Code (“the Guidelines”), when a request for information is to be refused or partially refused, the applicant concerned must be informed of the reasons for refusal quoting all the relevant paragraph(s) in Part 2 of the Code on which the refusal is based with appropriate elaboration to justify invoking the relevant paragraph(s) (where applicable).

4. In this case, DH invoked the following paragraphs in Part 2 of the Code to refuse the complainant’s request for information:

- 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. Such information may include -

- (i) records of discussion at any internal government meeting, or at any meeting of a government advisory body;*
- (ii) opinions, advice, recommendations, consultations and deliberations by government officials or advisers to the Government.*

- 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.

- 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.

Sequence of Major Events

5. On 18 December 2020, the complainant made a request to DH by email for access to **Information I** and **Information II**. Following an interim reply on 23 December 2020, DH issued a written reply on 6 January 2021, invoking paragraphs 2.10(b) and 2.14(a) of the Code (see **paragraph 4**) to refuse the request for information. DH explained that the advice from JSC and EAP was part of internal discussion solely for reference by the Government. Disclosing such information would inhibit the frankness and candour of discussion within the Government; DH might also breach the relevant confidentiality undertaking if it disclosed the advice received from third parties.

6. On 13 January 2021, DH received a letter from the complainant requesting a review of his application for access to information. In the letter, the complainant pointed out that overseas jurisdictions, such as the United Kingdom and the United States, were open and transparent about the procurement and approval of vaccines, making available to the public the detailed analysis of relevant vaccines by experts, the pros and cons of different vaccines, and the factors considered in decision making process. Besides, the complainant contended that the voting results (i.e. the number of votes that supported the procurement of each of the three vaccines) should not be regarded as third-party information. By disclosing the voting results and the expert advice on the vaccines anonymously, the preference or personal opinions of individual

members during the vote would not be revealed. Moreover, an overwhelming public interest was involved in the expert advice on the vaccines, with immense impacts on public health, livelihood and economy, and an enormous amount of public funds would be spent on vaccine procurement. Hence, he asserted that DH should disclose **Information I** and **Information II**.

7. Subsequent to an interim reply on 22 January 2021, DH issued an email to the complainant on 2 February and 5 March respectively, stating that it was fully engaged in anti-epidemic work, but it would strive to complete the review and give him a reply as soon as possible.

8. On 9 March 2021, DH completed the internal review and issued a written reply to the complainant. DH indicated that upon obtaining information about the vaccines for reference, the Government had entered into confidential disclosure agreements with the vaccine developers/manufacturers and was obliged to keep such information confidential. As such, DH invoked paragraph 2.16 of the Code (see **paragraph 4**) to refuse the request for **Information I** and **Information II**.

Response from DH

Background

9. The COVID-19 pandemic continues to wreak havoc worldwide, and Hong Kong is no exception. According to the views of the World Health Organisation (“WHO”) and health experts, the disease will not vanish before effective treatments and vaccination are available.

10. Apart from joining the COVID-19 vaccine Global Access Facility led by the WHO to procure doses for 35% of Hong Kong’s population, the Government has obtained additional supply of vaccines through signing advance purchase agreements with individual manufacturers. In entering into advance purchase agreements, the Government had referred to scientific evidence and clinical data, and consulted JSC and EAP. While the safety, efficacy and quality of the vaccines were considered, the Government also took into account the vaccines’ development progress, the technologies adopted, as well as practical circumstances and limitations, such as logistics, vaccine storage, cold chain management, etc.

11. At present, the Government has reached agreements with three vaccine manufacturers to supply an aggregate of 22.5 million doses of COVID-19 vaccines for Hong Kong.

Reasons for withholding information

Paragraph 2.10(b) of the Code (Inhibiting the frankness and candour of discussion within the Government)

12. DH stated that the JSC's and EAP's advice on different COVID-19 vaccines (i.e. **Information II**) was part of discussion at internal meetings or solely for reference by the Government. When giving advice, if the JSC and EAP had to concern themselves with the response of various sectors of the society, which might include scepticism, criticism or even rebukes, their members would likely have reservations in the discussion and advisory process, making them hesitant to speak their minds. DH reckoned that disclosing **Information II** would inhibit the frankness and candour of discussion within the Government and the advice given to the Government by JSC and EAP, resulting in the Government being unable to obtain the most candid and impartial scientific opinions on COVID-19 vaccine procurement.

Paragraph 2.14(a) of the Code (Third-party information)

13. DH explained that upon obtaining information about the vaccines for reference, the Government had entered into confidential disclosure agreements with the vaccine developers/manufacturers, barring it from disclosing such information ("Confidential Information").

14. The extensive scope of Confidential Information covers any information and documents in whatever form directly or indirectly disclosed to the Government by the vaccine developers or their associated companies, which might include proprietary information or trade secrets. Furthermore, Confidential Information encompasses the terms of the confidential disclosure agreements, whether Confidential Information should be disclosed, any possible business relations between the two parties and any discussions or negotiations taking place. Any analysis prepared with reference to Confidential Information and incorporating, reflecting or based on Confidential Information, and information or materials derived from Confidential Information also fall within the scope.

15. DH indicated that before scrutinising information provided by the vaccine developers/manufacturers and discussing the relevant issues, the members of JSC and EAP had signed a confidentiality undertaking that they would not disclose information (including Confidential Information) provided by the vaccine developers/manufacturers, nor would they disclose their advice and matters discussed during the meeting.

16. Regarding the complainant's contention that the voting results should not be regarded as third-party information, and the preference and personal opinions of individual members would not be revealed if the voting results and expert advice on the vaccines were disclosed anonymously (see **paragraph 6**), DH reiterated that both **Information I** and **Information II** are subject to the above confidential disclosure

agreements between the Government and the vaccine developers/manufacturers, and the confidentiality undertaking signed by the members of JSC and EAP. Even if the identities of the members giving the advice were not specified when disclosing **Information I** and **Information II**, information within the scope of the confidential disclosure agreements with the vaccine developers/manufacturers might be involved, resulting in a breach of the confidential disclosure agreements and the confidentiality undertaking by the Government and relevant persons (including the members of JSC and EAP).

Paragraph 2.16 of the Code (Trade secrets)

17. As detailed in **paragraphs 13 to 16** above, **Information I** and **Information II** involve trade secrets, which are information that could be withheld under paragraph 2.16 of the Code. Disclosure by the Government might lead to litigation and claims brought against the Government by the vaccine developers/manufacturers, and might also damage the business community's legitimate interests or undermine its trust placed in the Government.

Consideration of public interest

18. DH stated that the advice from JSC and EAP was solely for reference by the Government and one of the factors considered by the Government in vaccine procurement. After considering the totality of all factors and conducting vaccine procurement, the Government would give an account to the public in a timely manner. Members of the public can obtain relevant information from the Food and Health Bureau's press conferences, press releases and website¹. Details of the JSC and EAP's authorisation to and approval for the emergency use of COVID-19 vaccines are available on Government websites^{1&2}.

19. Moreover, DH reiterated that if the Government disclosed the information that it had undertaken, and had requested members of advisory bodies to also undertake, to keep confidential, it would seriously disrupt the entire consultation system, detrimental to the Government's future efforts to seek advice. Worse still, disclosure of information might cause not only litigation and claims brought against the Government by the vaccine developers/manufacturers, but also their refusal to supply vaccines for Hong Kong in future, which would have dire consequences for the fight against the pandemic.

Our Comments

20. According to DH's information, **Information I** and **Information II** both fall within the scope of Confidential Information subject to the confidential disclosure

¹ Website: https://www.fhb.gov.hk/en/our_work/health/rr3.html

² Website: <https://www.chp.gov.hk/en/static/24008.html>

agreements between the Government and the vaccine developers/manufacturers (see **paragraphs 13, 14 and 16**).

21. Regarding **Information I**, we consider it understandable for DH to have refused disclosure of the JSC's and EAP's advice on the three COVID-19 vaccines (including the number of votes in support of procurement) due to the confidential disclosure agreements.

22. On the other hand, members of JSC and EAP had signed a confidentiality undertaking before scrutinising information provided by the vaccine developers/manufacturers and discussing the relevant issues (see **paragraph 15**). Members gave advice on the three vaccines to the Government on the basis of confidentiality. While the Government requested members not to disclose the information, it is reasonable for the Government to preserve the confidentiality of their advice itself.

23. This Office, therefore, finds it justified for DH to withhold **Information I** by invoking paragraphs 2.14(a) and 2.16 of the Code.

24. As regards **Information II**, with reference to the relevant provisions of the Code and the Guidelines³, we accept that the advice to the Government given by JSC and EAP falls within the category specified in paragraph 2.10(b) of the Code.

25. Moreover, as mentioned above, the disclosure of **Information II** is also subject to the confidential disclosure agreements between the Government and the vaccine developers/manufacturers, and the confidentiality undertaking signed by the members of JSC and EAP. Since JSC's and EAP's advice was based on scrutiny and discussion of information provided by the vaccine developers/manufacturers (third-party information and trade secrets), we also accept DH's rationale, as cited in **paragraph 15**, that disclosing the advice would inevitably allude to the Confidential Information subject to the confidential disclosure agreements and the confidentiality undertaking. Hence, **Information II** falls within the categories specified in both paragraphs 2.14(a) and 2.16 of the Code.

26. Regarding the consideration of public interest, we note that the Government has released important information about COVID-19 infections and vaccines from time to time, including the authorisation to and approval for the emergency use of vaccines, and the conclusions reached by the Government's expert advisers in their on-going review of the benefits and risks of the authorised COVID-19 vaccines (see **paragraph 18**). We consider there is currently no information indicating an overriding public interest in disclosure of **Information I** and **Information II**.

³ Paragraph 2.10.3 of the Guidelines: *It is important that civil servants involved in the decision-making process be able to express views and tender advice without being concerned that these views and advice will be subject to public debate and criticism. The same considerations apply to discussion, opinions, advice, etc., tendered by members of the Government's advisory bodies, and to opinions, advice, etc. tendered by individuals, whether paid (e.g. consultants) or otherwise, and groups having particular expertise which the Government may consult in considering various issues.*

Other Observations

27. In this case, after receiving the complainant's request for review on 13 January 2021, DH advised him of the results of review on 9 March 2021, or after 56 days, slightly exceeding the maximum response time of 51 days applicable only in exceptional circumstances as set out in the Code. Records show that DH advised the complainant on 2 February and 5 March 2021 (see **paragraph 7**) that it needed more time to handle his request for review. Given that Hong Kong was impacted by the fourth wave of epidemic of COVID-19 at that time, we consider it understandable for DH to have focused resources on anti-epidemic work and become unable to meet the target time frame set out in the Code.

Conclusion

28. Based on the analysis in **paragraphs 20 to 26**, this Office considers the complaint against DH **unsubstantiated**.

**Office of The Ombudsman
June 2021**