

## **Investigation Report**

### **Leisure and Cultural Services Department refused to provide the investigation report submitted by a sports association and the list of members of an investigation panel**

**(A case on Code on Access to Information)**

#### **The Complaint**

This Office received a complaint by Mr A against the Leisure and Cultural Services Department (“LCSD”) for refusing to provide the independent investigation report (“the Report”) submitted by a sports association (“the Association”) regarding the Central Lane Allocation Scheme (“the Scheme”) and the suspected transfer of swimming lanes for profits by some of the Association’s registered sports clubs (“affiliated clubs”), and the list of members (“the List”) of the independent investigation panel (“the Panel”) (collectively referred to as “the Information”) set up by the Association to conduct the investigation. Mr A alleged that LCSD’s refusal was in breach of the Code on Access to Information (“the Code”)<sup>1</sup>.

#### **Our Findings**

##### ***Background***

2. According to media reports, the affiliated clubs are all non-profit-making organisations. Under the Scheme, some eligible affiliated clubs are given priority allocation of swimming lanes in LCSD’s public swimming pools (“public swimming lanes”) for offering swimming classes. However, those affiliated clubs had made profits by instructing their students to deposit the swimming course fees into the bank accounts of private companies. This might constitute a violation of the conditions of use of LCSD’s public swimming pools. LCSD expressed great concern about such allegations and asked the Association to provide information. In this connection, the Association set up the Panel to probe into the matter and then submitted the Report to LCSD, spelling out the investigation results. The Association requested LCSD not to provide the Report to the media or other parties without its consent. The Department

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<sup>1</sup> Full text of the Code on Access to Information is available at <https://www.access.gov.hk/en/home/index.html>

was aware of the request.

### ***Sequence of Major Events***

3. Mr A requested the Information from LCSD, invoking the Code. In an interim reply, LCSD explained that a final response would take longer as it needed time to consult the legal opinion of the Department of Justice (“DoJ”). Later, LCSD wrote to Mr A, stating that the Information was “third party information” held by the Association, which objected to its disclosure. The Department, therefore, cited paragraph 2.14(a) of the Code to refuse Mr A’s request:

*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.*

Nevertheless, with the consent of the Association, LCSD provided a summary of the Report (“the Summary”) prepared by the Association to Mr A.

4. Mr A, considering LCSD’s refusal to provide the Information citing the above reason unjustified, sought a review by the Department on the following grounds:

- (1) The Summary did not explain the problems relating to the affiliated clubs’ accounts and incomes from course fees , hence could hardly allay public doubts and worries. Besides, the investigation was by no means independent because the Association failed to publish the List.
- (2) The Association is not a private organisation. It must publish its accounts and annual reports every year and its operation must remain transparent. The Information would shed light on the Association’s investigation into the affiliated clubs’ use of the public-funded swimming lanes, so there was no reason for non-disclosure. Nevertheless, Mr A agreed that should the Information include personal information, LCSD or the Association could delete such information before releasing the Report.

- (3) The public interest in disclosure of the Information might outweigh the harm or prejudice that might result.

5. In the light of the above development, LCSD sent an interim reply to Mr A, and sought the opinions of DoJ and the Association on Mr A's request for review again. Later on, LCSD replied to Mr A, pointing out that the Summary already served to balance and protect the public interest involved. It, therefore, upheld its decision not to provide the Information.

### ***Response from LCSD***

6. LCSD stated that the Information, provided by the Association, was "third party information". Upon receipt of Mr A's requests first for the Information and then a review, LCSD asked the opinions of the Association in order to understand whether it agreed to disclose the Information; and if not, its justifications and what harms to the Association would result if the Information was released. The Association twice expressed objection to disclosure in response to LCSD's two enquiries. In short, its justifications for non-disclosure included:

- (1) The Association is neither a statutory body nor a public organisation. It is only accountable to LCSD and its affiliated clubs, and has no obligation to publish the Report.
- (2) The Information contained sensitive personal information, disclosure of which would bring the affiliated clubs into disrepute.
- (3) The Summary could help dissipate public doubts as it already explained the investigation results clearly.
- (4) The Office of The Ombudsman was conducting a direct investigation against LCSD regarding the Scheme. The Association considers that the Information should not be disclosed lest the investigation be affected.

7. LCSD's view was that with the Association's express objection to disclosure, the Department must heed its wishes as the information owner when handling Mr A's request for the Information. Moreover, the Report contained such sensitive information as the Association's appraisal mechanism for and the marks given to the affiliated clubs, as well as the clubs' rankings and member sizes. LCSD could not

ascertain whether the public interest in disclosure would outweigh the harm or prejudice that might result, especially when the Association had already clearly indicated that the Report contained sensitive information and its disclosure in full would affect the reputation of the affiliated clubs. As regards the List, it formed part of the Report and therefore, needed to be considered as a whole.

8. Furthermore, with the consent of the Association, LCSD already provided Mr A with the Summary, which set out in detail the main content and conclusion of the Report. LCSD opined that this could well balance and protect the public interest involved. It therefore, considered its decision not to release the Information to Mr A reasonable.

### **Our Comments**

9. The Code stipulates that Government departments should provide the information it holds to the public as far as possible unless there is good reason to withhold disclosure under the provisions of Part 2 of the Code.

10. Paragraphs 1.16 to 1.18 of the Code state clearly that information should be made available within ten days of receipt of a request. If that is not possible, an interim reply should be sent to the applicant. Within 21 days, the applicant should either be provided with the information requested or notified of the reasons for his/her request being refused. Response may be deferred beyond 21 days only in exceptional circumstances (e.g. need to seek legal advice), which should be explained to the applicant. Any deferral should not normally exceed a further 30 days.

11. In handling Mr A's request first for the Information and then a review, LCSD replied to Mr A within 42 and 45 days respectively. It had also explained to him in its interim replies the reasons for delay (**paragraphs 3 and 5** above). This was in compliance with the Code.

12. For LCSD's citing paragraph 2.14(a) under Part 2 of the Code in rejecting Mr A's request, we acknowledged that the Information was "third party information" as defined in the Code (**paragraph 3** above). Since the Association has indicated objection to disclosing the Information to Mr A, whether LCSD should provide the Information hinged on whether the public interest in disclosure would outweigh the harm or prejudice that might result.

13. This Office considers that the Association, while not a statutory organisation, receives government subvention every year. Its operation must, therefore, be transparent. Moreover, under the Scheme, its affiliated clubs are given priority allocation of public swimming lanes at a price lower than the commercial rate in their capacity as non-profit-making organisations. As such, the Association has a duty to tell the public how its affiliated clubs had been using the public swimming lanes in order to ensure the proper use of public funds. Besides, the investigation was conducted by the Association at LCSD's request, with the aim of probing into the media's allegations against the affiliated clubs for reaping profits with public swimming lanes (**paragraph 2** above). The matter had involved precious public resources (public swimming lanes) and aroused wide public attention. Disclosure of the Information is undoubtedly of significant public interest. Although LCSD had already provided the Summary to Mr A, the Summary only stated the conclusion reached by the Panel in very general terms, indicating that no affiliated clubs had been found monopolising or transferring swimming lanes, and that the clubs only engaged third parties to carry out the administrative work for their swimming classes and did not reap profits with the public swimming lanes they had been allocated. The Summary said nothing about the investigation process and the justifications behind the Panel's conclusion. It could hardly address public queries.

14. On the other hand, we do not accept LCSD citing the Association's explanations (i.e. disclosure of the Information might bring the affiliated clubs into disrepute) as a reason for non-disclosure of the Information (**paragraph 7** above). We must point out that the purpose of the Association in setting up the Panel and submitting the Report to LCSD was to verify whether the media's allegations against the affiliated clubs were true. If the Panel had conducted the investigation in a fair and just manner, and reached the conclusion after objective analysis of investigation findings, then releasing the Information should not have any unfair or unreasonable impact on the reputation of the Association or its affiliated clubs. In fact, LCSD had not specified the disclosure of which part of the Report, and how such disclosure, would damage the reputation of the Association or its affiliated clubs. This Office considers that, even if LCSD had good reasons to believe that releasing certain parts of the Report would damage their reputation, it should have followed paragraph 1.13.1 of the Guidelines on Interpretation and Application of the Code<sup>2</sup> and considered redacting those contents not

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<sup>2</sup> Paragraph 1.13.1 of the Guidelines on Interpretation and Application of the Code stipulates that: "It is preferable to provide, if possible, a copy of the original record containing the requested information. If the original record contains information falling within Part 2 of the Code, and it is decided that such information should not be disclosed, such information should be obliterated from the copy of the document to be provided to the requestor. When information is so obliterated, reference should be made against the obliteration to the relevant paragraph(s) in Part 2 of the Code...."

suitable for disclosure before providing the Information to Mr A. There was, however, no record on LCSD having considered and made such arrangements in accordance with the Code.

15. Public swimming lanes are precious public resources. It is through the Scheme that LCSD gives priority allocation of public swimming lanes to the Association and its affiliated clubs so that they can organise swimming classes and swimmer training. The actual allocation of swimming lanes, therefore, should be subject to public scrutiny. The investigation was conducted by the Association at the request of LCSD in response to outside doubts that its affiliated clubs had breached the conditions of use of public swimming lanes. Although the Association had clearly requested confidentiality when it submitted the Information to LCSD, the public had legitimate expectation that LCSD would publish the Information so that they could see whether the investigation process and results were fair and just, and public resources had been used properly and appropriately.

16. We opined that LCSD had not assessed whether the Association's justifications were adequate while considering its wishes. Actually, LCSD should have made it clear right from the outset when it asked the Association to conduct the investigation that the Report and the List would normally be made public.

17. The Association mentioned that the Information should not be released to Mr A because of our on-going direct investigation against LCSD regarding the Scheme. We would like to clarify here that disclosure or otherwise of the Information by LCSD or the Association will not affect in any way the direct investigation being conducted by this Office.

## **Conclusion**

18. In the light of the above, The Ombudsman considers this complaint against LCSD **substantiated**.

## **Recommendations**

19. The Ombudsman recommends that LCSD reconsider Mr A's request on the basis of the Code and release the related information to him as appropriate, in particular those parts relating to the allocation and use of public swimming lanes under the Scheme (including operation of the Scheme, the List, the investigation and the findings, such as

interviews with the affiliated clubs, results of vetting the relevant records, as well as the Panel's analysis of the findings and the justifications behind its conclusion). If there are contents that should not be disclosed, LCSD should follow the Code and explain the reasons for non-disclosure, and consider redacting those contents before providing Mr A with the remaining parts of the Information.

**Office of The Ombudsman**  
**January 2019**