

**Security Bureau refused to disclose information
regarding the written submissions received by the Government
on the proposed amendments to the Mutual Legal Assistance Ordinance
and the Fugitive Offenders Ordinance
(Related to Code on Access to Information)**

Investigation Report

The Complaint

This Office received a complaint from a complainant against the Security Bureau (“SB”) for allegedly failing to comply with the Code on Access to Information (“the Code”) in handling his information request.

2. On 5 December 2019, the complainant requested SB to disclose the following information to him under the Code regarding the written submissions (about 4,500) it received during the public consultation on the proposed amendments to the Mutual Legal Assistance in Criminal Matters Ordinance and the Fugitive Offenders Ordinance (altogether the “Proposed Legislative Amendments”):

- (1) an index containing the names of respondents with submissions;
- (2) the respective number of submissions by individuals and organisations;
- (3) a breakdown of submissions in support of, in opposition to and with unclear stance on the Proposed Legislative Amendments; and
- (4) a copy each of the submissions including those from public and professional bodies.

3. On 24 December 2019, SB replied to the complainant. SB provided him with a breakdown of respondents who supported, opposed and did not clearly indicate their stance regarding the Proposed Legislative Amendments (*see paragraph 2(3) above*). For paragraph 2(2), SB replied that it did not have the requested information. For the remaining two items (*see paragraphs 2(1) and 2(4) above*) (“the Requested Information”), SB, citing paragraph 2.14 of the Code as the justification for its decision, stated that such request related to third-party information and therefore the

Requested Information could not be disclosed without the third parties' consent.

4. The complainant considered SB's refusal to disclose the Requested Information unreasonable. He pointed out that:

- (1) the Code imposed a general duty on SB to disclose the Requested Information in a positive approach and SB failed to observe that duty;
- (2) the Requested Information was either not third-party information or, in the absence of any statement which waived or imposed a presumption of disclosure, of unclear status;
- (3) submissions from any bodies (especially public bodies and professional bodies) invited by SB to provide views should not be viewed as third-party information and were therefore not exempted from disclosure, unless stated otherwise; and
- (4) the public consultation on the Independent Police Complaints Council Bill ("IPCC Bill") in 2002 confirmed that SB could disclose third-party information without seeking approval from the parties.

Our Findings

The Code and the Guidelines on Interpretations and Application to the Code

5. The Government requires civil servants, routinely or on request, to provide information unless there are specific reasons for not doing so. The general principles are stated in the Guidelines on Interpretations and Application to the Code ("the Guidelines").

6. A department may refuse to disclose information by citing the reasons set out in Part 2 of the Code. Such reasons include:

Paragraph 2.14(a) of the Code: 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 1.20.1 and 1.23.1 of the Guideline: In the context of the Code, “third party” means any individuals or organisations other than (a) the Government; or (b) the person who makes the request for access to information.

SB’s Explanation

7. SB was fully aware that the surrender of fugitive offenders was an issue of significant public concern. As there was a pressing need to pass the Proposed Legislative Amendments in view of the expected release of a suspected murderer from prison in October 2019, SB decided not to seek consent from the respondents to the public consultation for the disclosure of their views so that it would focus its efforts on the comprehensive analysis of the views collected. Eventually, SB received around 4,500 written submissions.

8. SB pointed out that the Requested Information, including the index and copy of the submissions, was third-party information and hence could not be released without the third parties’ consent. Besides, among the submissions, a number of them were provided without contact details. For those with contact information (e.g. postal address, email address or fax number), SB was uncertain whether such information could be used for contacting the respondents as it had not specified in the consultation document that the respondents might be contacted. It was also concerned about the time needed to contact the respondents one by one.

9. SB had examined the issue on whether the public interest in disclosure of the Requested Information would outweigh any harm or prejudice that could result from disclosure. While acknowledging that disclosing all submissions in their entirety might help the public better understand the views of various community sectors on the Proposed Legislative Amendments, SB was of the opinion that disclosing the Requested Information without the prior consent of the respondents would infringe on their privacy and cause them harm or prejudice, because the content of some submissions was distinctive or indicative of the respondents’ backgrounds, personal experiences or political affiliations.

10. On the point about the IPCC Bill in 2002, SB clarified that it had not sought the respondents’ consent for disclosing their views and therefore had not disclosed their views, except those provided by two professional organisations. SB explained that the said organisations had the prevailing practice to express their views on the

Government's legislative proposals in public. With this in mind, SB had provided their views to the Legislative Council's Bills Committee on the IPCC Bill upon request.

Our Comments

11. First and foremost, written submissions containing the name and views of individual and corporate (including public bodies) respondents on the Proposed Legislative Amendments are no doubt third-party information.

12. As a good practice, the Government should conduct public consultation in an open and transparent manner as far as possible, especially when the subject of consultation is of wide public concern and in controversy. Disclosing the views collected could, on the one hand, help the public grasp the respondents' reasons for and against the subject of consultation, and on the other hand, show to the public that the Bureau/Department concerned has a fair and concise analysis and summarisation of the views.

13. We share SB's concern that the public consultation on the Proposed Legislative Amendments involved an issue of significant public interest that needed to be completed within a tight timeframe (*see paragraph 7 above*). Despite the tight timeframe, SB still invited the public on 13 February 2019 to send written submissions on the Proposed Legislative Amendments, thereby collecting views from various sectors of the community for drafting the Proposed Legislative Amendments. With this in mind, we consider that it was even more crucial for SB to state, at the time of conducting the consultation, that all submissions received might be disclosed in their entirety unless the respondent requested anonymity or confidentiality. It would have saved the time and efforts of subsequently seeking consent from individual respondents in the face of a request. We consider that it is obviously not forthcoming and highly undesirable that SB did not include such a statement in the consultation paper.

14. Regarding the failure to consult the respondents whether they would consent to disclose their views before refusing the complainant's request for information (*see paragraph 8 above*), SB explained that it was unable to contact those respondents who had not provided their contact details, which might be a fact of hindrance. However, for those respondents whose contact details were available to SB, SB made no attempt to contact them in order to ascertain whether they would consent to disclose their

views and, if they refused, whether the grounds in support of the refusal were enough to outweigh the public interest for the disclosure. We understand that substantial resources would be required to contact the respondents by thousand counts, but that kind of burden could have been avoided if SB had included the statement from the outset of consultation as mentioned in paragraph 13 above. In light of the above, we consider SB to have failed to comply with the Code in handling this request.

15. As SB did not state at the time of conducting the public consultation that it might disclose the submissions received, it would have to allocate additional resources if the Requested Information was to be disclosed. That would inevitably cause SB unreasonable allocation of resources. Given the fact that the Government had already withdrawn the Proposed Legislative Amendments, it would not serve a useful purpose for SB to contact all the traceable respondents for their consent to disclose their submissions.

16. On the point about the IPCC Bill, SB explained the case specifically (*see paragraph 10 above*) and we find the clarification acceptable.

17. Having regard to the reasoning in paragraphs 11 to 14 above, The Ombudsman considers this complaint **substantiated**.

18. This Office is glad to learn that SB has undertaken to take reference from this case as well as other previous cases of similar nature and put in place measures to ensure that when a similar consultation exercise is conducted in the future, its staff will clearly state in the consultation paper that the views collected may be disclosed to the public, unless the respondents request anonymity or confidentiality in handling their views.

Office of The Ombudsman
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