

**Transport Department refused to provide the list of tenderers and  
selection result of operators of three new franchised bus routes  
(Related to Code on Access to Information)**

**Investigation Report**

**The Complaint**

On 20 July 2018, the complainant emailed the Transport Department (“TD”). Citing the Code on Access to Information (“the Code”), he enquired about the progress and result of the tender selection (including the lists of all tenderers and the successful tenderers) for the three new franchised bus routes for the Heung Yuen Wai Boundary Control Point (“HYWCP”). With TD’s reply that details of the proposed bus routes were still under planning, the complainant kept following up on the matter. On 4 January 2019, TD informed him that the selection exercise was expected to complete within the month.

2. In response to the complainant’s follow-up enquiry in late January 2019, TD replied on 8 February 2019 that the assessments of the proposals submitted by the operators had been completed and discussions with the operators to confirm the details of the new bus routes were underway. After the discussions, TD would announce the operators of the three new franchised bus routes and the routes’ details.

3. The complainant considered TD’s refusal to provide him with the lists of tenderers and the successful tenderers for those franchised bus routes to be in breach of the Code. Hence, on 8 February, he requested TD to review its decision. In its reply of 15 February, TD indicated that it would be more appropriate to announce the transportation service arrangements for HYWCP after confirming the details with the operators so that members of the public could have a more comprehensive understanding about the arrangements. In TD’s estimation, the announcement could be made around late March.

4. In this connection, the complainant complained against TD for not following up on his request for information in accordance with the provisions of the Code, which included its failure to give the reason(s) for refusal in accordance with the provisions in Part 2 of the Code, and to advise him of the review and complaint channels.

5. Besides, the complainant pointed out that TD had previously at his request released to him in a timely manner the lists of tenderers and selection result in respect of the operators of the new bus routes for the Hong Kong-Zhuhai-Macao Bridge Hong Kong Port (“the Port”) and the West Kowloon Station (“WK Station”) of the Hong Kong section of Express Rail Link (“XRL”).

## **Our Findings**

### ***Background***

6. HYWCP, the seventh land-based control point on the Hong Kong-Shenzhen boundary, is a link between the highway systems in Hong Kong and Shenzhen. The whole HYWCP project, which included construction of connecting roads and port facilities, was expected to complete in phases within 2019. To cater for the needs of passengers travelling to and from HYWCP, TD had plans to provide public transportation service, including the following three franchised bus routes (collectively called “the bus routes”):

- (1) between HYWCP and Tsui Lai Garden, Sheung Shui;
- (2) between HYWCP and Tai Wai Station; and
- (3) between HYWCP and Tuen Mun Station.

### ***Relevant Provisions of the Code***

7. The Code stipulates that Government departments should release information upon request unless there is good reason(s) to withhold disclosure under the provisions in Part 2 of the Code.

8. Paragraph (vi) under “Introduction” to the Guidelines on Interpretation and Application of the Code (“the Guidelines”) states that *in case a ... request is to be refused, departments should, as far as possible, give reasons for refusal in accordance with the provisions in Part 2 of the Code (and) ... should add a footnote to the reasons given to the effect that the reasons are in line with those in the Code, quoting the relevant paragraph number of the Code as well. Departments should also advise the requestor of the review and complaint channels.*

9. Paragraphs 1.16 to 1.18 of the Code demand that information be made available within ten days (“days” here means “calendar days”) of receipt of the request. If that is not possible, an interim reply should be made within ten days, and information be provided within 21 days. Response may be deferred beyond 21 days only in exceptional circumstances (such as when time is needed for seeking legal advice or third party consent with regard to information disclosure), and any deferral should not normally exceed a further 30 days (i.e. the longest response time is 51 days of receipt of the request). If a request is to be refused, the applicant should be so informed within the timeframe set out above.

10. In addition, paragraph 2.17 in Part 2 of the Code states that departments can refuse to release information which will soon be published, or the disclosure of which would be premature in relation to a planned announcement or publication. This is further explained in paragraph 2.17.1 of the Guidelines that the provision may be used to protect information which will be published by the department within 60 days after the request is made. Factors to consider in determining whether to make use of this provision would be a planned publication/announcement date and evidence that release of certain information before that date would damage the impact of the planned publication/announcement and would not therefore be in the public interest.

### ***TD’s Explanations***

11. In July 2018, the complainant first asked TD to provide information on the progress and result of the selection of operators of the bus routes. TD replied that month, telling him that details of the bus routes were still pending. In other words, the information he asked for was yet to be confirmed. On 28 November 2018, the complainant repeated his request to TD, with five subsequent follow-up emails. Each time, TD informed him of the progress of the selection, and later on, the expected date of announcing the selection result.

12. TD said that the tender exercise for the bus routes was completed on 10 January 2019, it then held the information of both the tenderers and successful tenderers. Nevertheless, HYWCP and the connecting roads were still under construction at that time, and progress of the construction works and the expected date of completion were far from certain. TD considered it more appropriate and prudent to gather more concrete information on the construction progress and confirm with the selected operators the specific arrangements for the bus services before making a public announcement on the details.

13. Consequently, TD informed the complainant on 15 February 2019 that the details would be announced around end of March that year. However, the construction progress of HYWCP and the connecting roads eventually precluded TD from completing the preparatory work and announcing the service details of the bus routes within the first quarter of 2019 as the Department originally planned.

14. On 17 May 2019, the Government announced the traffic and public transportation arrangements for HYWCP upon commissioning. The announcement covered the name of the operators of the bus routes, as well as the numbers, trip ends, main service areas and service schedules of the bus routes.

15. On the same day, TD released the selection result of operators of the bus routes (i.e. the list of successful tenderers) to the complainant, who immediately pointed out that the full list of tenderers was missing. On 23 May, TD provided the list of tenderers to the complainant. On its failure to provide the list of tenderers on 17 May, TD explained that the officer concerned had misunderstood that the complainant only enquired about the list of successful tenderers. TD subsequently reminded the officer in this regard.

16. TD stated that instead of refusing the complainant's information request, it had all along been planning to release the selection result of operators to the complainant in due course. It, therefore, had not considered invoking any reason under Part 2 of the Code to explain the situation. Besides, while TD failed to provide the information to the complainant upon his repeated enquiries, it did issue a proper reply to his every enquiry within the 21-day target time stipulated in paragraph 1.16 of the Code to update him on the progress of the tender selection and the expected date of announcement. Upon the Government's announcement on 17 May 2019 on the date of opening of the Heung Yuen Wai Highway and the construction progress of HYWCP, TD immediately provided the complainant with the information he needed (**paragraphs 14 and 15** above).

17. The complainant claimed that TD had previously, upon his request, released to him the lists of tenderers and the selection result of operators of the new franchised bus routes for the Port and the WK Station of XRL (**paragraph 5** above). On this, TD explained that HYWCP involved construction of large-scale infrastructure (including the construction of bus terminal facilities and the connecting roads), which often would take a long time to complete and be ready for commissioning after a tender exercise is

over. This long interim period may be filled with uncertainties of all sorts. Taking reference from the information dissemination arrangements for the development projects of the two control points of the Port and the WK Station of XRL, TD considered it more desirable to make public announcement on the traffic and public transportation arrangements for HYWCP after the information on the commissioning of the relevant road facilities had been confirmed. This could ensure accuracy in the information obtained by the public.

## **Our Observations and Comments**

18. According to TD's elaboration in **paragraph 12** above, the tender exercise for the bus routes was completed on 10 January 2019 and the Department had information about the tenderers and the successful tenderers. Nevertheless, upon review of the announcement arrangements for the Port and the WK Station of XRL, TD considered that it must confirm with the selected operators the specific arrangements for the bus services before announcing the details. This was explained to the complainant in TD's two replies issued in February 2019.

19. Our view was that while TD already possessed the information requested by the complainant in January 2019, there were still uncertainties in the progress and expected date of completion of the construction works, and there might still be variation on the transportation arrangements for HYWCP and service details of the bus routes. It was therefore understandable that TD withheld disclosure of the information to the complainant before the arrangements were confirmed.

20. That said, according to the Code and the Guidelines, government departments must provide information within 21 days of receipt of request "except under exceptional circumstances" (**paragraph 9** above). Regardless of whether a request for information by the public is to be refused or not, departments must comply with the timeframe set down in the Code and make a response. If information would not be provided within the timeframe, departments should cite the relevant provisions in Part 2 of the Code as reasons and advise the requestor of the review and complaint channels (**paragraphs 8 and 9** above).

21. Information showed that when the complainant first requested the information from TD on 28 July 2018, the lists of tenderers and successful tenderers were yet to be confirmed and could in no way be provided. However, when the complainant asked again for the selection result (including the lists of tenderers and the successful tenderers)

on 21 January 2019, TD already got hold of the information, only that it withheld the information from the complainant. We considered that if TD could not or would not provide the information to the complainant within the timeframe specified in the Code, it should have given a specific and reasonable explanation in accordance with the Code. It was inappropriate for TD to justify its non-compliance with the Code with the reason that it had never refused the request.

22. In fact, TD had no intention to release the information at once when it responded on 15 February 2019 to the complainant's information request made in late January. Nevertheless, it did indicate that general arrangements for public transportation service of HYWCP would be announced around end of March that year. Under this circumstance, TD could have considered citing paragraph 2.17 of the Code (information which will soon be published, or the disclosure of which would be premature in relation to a planned announcement or publication) as the reason for non-disclosure (**paragraph 10** above).

23. TD did inform the complainant of the selection progress within 21 days of receipt of every of his enquiries (**paragraph 16** above). This Office, however, must point out that such replies were not the same as "response" referred to in the Code, which means either disclosure of information or explaining the justification(s) for non-disclosure (**paragraphs 7 to 9** above). TD eventually provided to the complainant the lists of tenderers and successful tenderers of the bus routes on 17 and 23 May 2019 respectively. That was almost four months since the complainant made the information request again on 21 January 2019, when TD already possessed the information. It far exceeded the response timeframe stipulated in the Code and was in breach of the Code.

### **Overall Comments**

24. While TD had eventually provided the complainant with the information he requested, it had failed to comply with the Code in following up on and responding to his information request. Based on the analysis set out in **paragraphs 18 to 23** above, The Ombudsman considered this complaint **partially substantiated**.

### **Recommendation**

25. The Ombudsman recommended TD to remind its staff to follow the provisions of the Code in handling public requests for information, and ensure timely follow-up of cases.

## **TD's Response**

26. In response to our comments above, TD explained that upon receipt of the complainant's information request on 21 January 2019, it had considered invoking paragraph 2.17 of the Code to explain to him the reasons for non-disclosure of the information. Nevertheless, TD understood that the provision only applied to information to be announced within 60 days of receipt of a request (**paragraph 10** above). As the earliest expected date of announcement of the relevant transportation arrangements was end of March that year, some 70 days after receipt of the complainant's request, TD considered paragraph 2.17 of the Code to be not applicable to this case. Besides, there were no applicable guidelines in other parts of the Code for the Department to follow in refusing disclosure or handling the complainant's request in another way.

## **Our Comments on TD's Response**

27. Paragraph (i) under "General" of the Guidelines already makes it clear that *the purpose of these Guidelines is to help departments to interpret and apply the Code. They cannot cover every eventuality, and officers must exercise their judgement in particular cases in accordance with the principles of the Code.* In other words, the Guidelines only provide relevant materials and examples for departments' reference. The interpretations therein cannot prevail over the provisions of the Code.

28. Paragraph 2.17 of the Code has established the principle that Government departments can refuse to provide "information which will soon be published, or the disclosure of which would be premature in relation to a planned announcement or publication." There is no specific time limit. The Guidelines adds that the provision "may be used to protect information which will be published by the department within 60 days after the request is made." Obviously, the words "to protect information... within 60 days after the request is made" should not be interpreted rigidly. In fact, paragraph 2.17.1 of the Guidelines sets out clearly that factors to consider in determining whether to make use of paragraph 2.17 of the Code would be a *planned publication/announcement date and evidence that release of certain information before that date would damage the impact of the planned publication/announcement and would not therefore be in the public interest.*

29. We opined that the key factors in determining whether or not to invoke the

above provision are whether the department concerned already has a planned announcement date in the foreseeable future, and whether there is good reason to argue against premature release of the information. In this case, TD estimated that the details could be announced in 70 days and concluded, after prudent assessment, that pre-emptive announcement of the information by TD was not in the public interest. As such, we considered that it could have invoked paragraph 2.17 of the Code to refuse the complainant's information request.

30. We must also point out that if TD considered that no provision in Part 2 of the Code was applicable in handling an information request, then it should comply with the Code and provide the information to the requestor.

### **Conclusion**

31. In the light of the above, The Ombudsman decided to maintain the conclusion and recommendation set out respectively in **paragraphs 24 and 25** above.

**Office of The Ombudsman**  
**August 2019**