

Buildings Department failing to properly handle a request for historical documents of a building (Relating to Code on Access to Information) Investigation Report

Between 16 January and 10 February 2023, the complainant, the Incorporated Owners of a building (referred to as “the building” below), complained to this Office against the Buildings Department (“BD”).

The Complaint

2. According to the information provided by the complainant, BD had earlier on issued to it an Order in relation to an unauthorised building work found at the building and the complainant then raised an appeal against the Order with the Appeal Tribunal (Buildings Ordinance) (“the Tribunal”).

3. From 30 May 2022 to 12 January 2023¹, the complainant wrote to BD requesting access to “historical documents” of the building, including its approved building plans and documents supporting the then Government Secretariat’s decisions to approve those plans (“Information A”) and to issue Occupation Permits (“OPs”) (“Information B”) decades ago. The complainant also sought records showing a reconciliation between the final building plan approved by BD with the surveyed land title subsequently issued by the Lands Department (“LandsD”) (“Information C”) and a copy of land documents referred to in BD’s written confirmation that no deficiency was found when transfer of the building’s ownership eventually took place (“Information D”).

4. BD’s reply to the complainant of 13 January 2023 indicated that the complainant’s representative applied for part of “Information A” (i.e. copies of all relevant approved plans, referred to as “Information A1” at **paragraph 15** below) through BD’s existing charged services on 30 December 2022 and that part of “Information B” (i.e. inspection reports or photo records relating to the issuance of OPs, referred to as “Information B1” at **paragraph 15** below) did not exist according to BD’s file records.

5. Meanwhile, BD refused disclosing the remainder of “Information A” and “Information B” (i.e. supporting documents behind the approval of plans and issuance of OPs, referred to as “Information A2” and “Information B2” at **paragraph 15** below) and BD’s input in relation to the land title documents (referred to as “Information C1” at **paragraph 15** below) citing paragraphs 2.10(b) (i.e. disclosure would inhibit the frankness and candour of internal discussion within the Government) and 2.6(b) (i.e.

¹ The complainant, when lodging the complaint with this Office, provided copies of its correspondence to BD dated 30 May, 18 October, 27 October 2022 and 12 January 2023, as well as to the Chief Executive’s Office dated 14 November 2022 and 12 January 2023.

disclosure would harm or prejudice the conduct or impartial adjudication of a proceeding by a tribunal) of the Code on Access to Information (“the Code”) as the reasons, with a remark that a copy of the Building Authority’s Representations would eventually be served on the complainant by the Secretary to the Tribunal. In the same reply, BD also advised the complainant to approach LandsD for the matters relating to land title documents. Dissatisfied with BD’s handling of its request for information, the complainant complained to this Office against BD.

Our Findings

6. On 28 February 2023, this Office commenced a full investigation into the complaint. We received BD’s reply on 29 June and supplementary information on 18 July respectively. Having examined the information respectively provided by the complainant and BD as well as BD’s explanation, we completed this investigation report on 9 August 2023. Our findings are as follows.

The Code

7. The Code obliges Government departments to make available as much Government-held information as possible for the public to be well informed about the Government and its services. However, such information may be withheld if it falls into the categories under Part 2 of the Code, including:

- (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 2.14(a) of the Code);
- (b) information the disclosure of which would inhibit the frankness and candour of discussion within the Government (paragraph 2.10(b) of the Code); and
- (c) information the disclosure of which would harm or prejudice the conduct or impartial adjudication of legal proceedings or any proceedings conducted or likely to be conducted by a tribunal or inquiry, whether or not such inquiry is public or the disclosure of the information has been or may be considered in any such proceedings (paragraph 2.6(b) of the Code).

8. Paragraph 1.14 of the Code states that the Code does not oblige departments to create a record which does not exist.

BD's Response

BD's sequence of events

9. BD issued the Order to the complainant on 22 June 2022, against which the complainant filed an appeal with the Tribunal on 12 July (see **paragraph 2** above). BD clarified that it first received the complainant's request for information on 18 October 2022, instead of May 2022 claimed by the complainant (see **paragraph 3** above).

10. BD first replied to the complainant on 16 November 2022 explaining that it might access its Building Records Access and Viewing On-line ("BRAVO") system or visit its Building Information Centre ("BIC") in person for inspection and copying of building records. At the same time, BD informed the complainant that "Information C" and "Information D", being land matters, was under the jurisdiction of LandsD. On the same day, BD referred the complainant's request for "Information C" and "Information D" to LandsD for follow-up and asked it to reply to the complainant direct.

11. In the course of this investigation, BD furnished this Office with copies of supplementary correspondence between the Department and the complainant, including the complainant's email to the Development Bureau ("DEVB") of 16 November 2022 (which was later referred to BD for handling), the file note of a tele-conversation between the complainant's representative and BD's staff dated 30 November 2022, an interim reply issued to the complainant on 8 December 2022 reiterating existing charged services of BRAVO and BIC and indicating that the complainant's request for "other office records" would be handled separately, as well as the complainant's follow-up email of 30 December 2022 and letter of 4 January 2023 to BD.

12. In its letter of 4 January 2023, the complainant expressed to BD that its request for all relevant approved building plans of the Building (referred to as "Information A1" at **paragraph 15** below) was not fully acceded to as the BRAVO system contains only a copy of the latest approved building plan but not "historical copies" from previous approvals.

13. On 13 January 2023, BD gave the complainant a substantive reply (see **paragraphs 4 to 5** above), indicating that:

- (a) all relevant approved building plans of the building (referred to as "Information A1" at **paragraph 15** below) was obtained by the complainant's representative on 30 December 2022 via BD's existing charged services;
- (b) inspection reports or photo records relating to the issuance of OPs (referred to as "Information B1" at **paragraph 15** below) did not exist according to BD's file records;

- (c) the complainant’s request for BD’s internal records relating to the approval of building plans, BD’s internal records relating to the issuance of OPs, BD’s internal records of its involvement in the subsequent issuance of the land title of the building and BD’s internal records of its involvement in the eventual division of the land title of the building (referred to as “Information A2”, “Information B2”, “Information C1” and “Information D1” respectively at **paragraph 15** below) was refused by citing paragraphs 2.10(b) and 2.6(b) of the Code as the reasons (see **paragraphs 7(b) and 7(c)** above); and
- (d) land documents relating to the issuance of the land title of the building and division of the land title were under the jurisdiction of LandsD and the complainant may approach the latter for access of the information.

14. BD considered itself to have handled the information request in a timely manner² given the complexity of this case and the need for an extensive search of files.

BD’s review of the complainant’s information request

15. In response to our investigation, BD delineated the complainant’s request for information as follows:

- (a) all relevant approved building plans of the building (“Information A1”);
- (b) BD’s internal records relating to the approval of building plans (“Information A2”);
- (c) inspection reports or photo records relating to the issuance of OPs (“Information B1”);
- (d) BD’s internal records relating to the issuance of temporary OPs and final OPs (“Information B2”);
- (e) BD’s internal records of its involvement in the issuance of the land title of the building (“Information C1”); and
- (f) BD’s internal records of its involvement in the division of the land title of the building in accordance with relevant guidelines (“Information D1”).

16. Subsequent to the commencement of this investigation, BD conducted an internal review of the complainant’s request for information. BD’s review result is detailed below.

² Paragraph 1.18 of the Code: Response may be deferred beyond 21 (calendar) days only in exceptional circumstances, which should be explained to the applicant. Any deferral should not normally exceed a further 30 days.

Information A1

17. Concerning the complainant's allegation that "historical copies" of building plans could not be obtained via BD's existing charged services (see **paragraph 12** above), BD explained that under the obligation of confidence, it has all along been a common understanding and an established practice within the construction industry that any building plans submitted by Authorised Person ("APs") to BD for the purpose of the Buildings Ordinance ("BO") would not be disclosed until the subject building or works have been completed. The building plans that may be inspected by or issued with copies to the public are therefore confined to the latest approved ones. Although the above norm was only formalised when BD first issued the Practice Note for Authorised Persons, Registered Structural Engineers and Registered Geotechnical Engineers APP-39 ("the Practice Note") in 1985, BD considered that its handling of the complainant's request for "historical plans" of the building should follow the same spirit given the existence of an implicit understanding between the predecessor of BD and the relevant AP that building plans submitted to BD, except the latest approved ones, would not be disclosed.

18. Considering that the building was completed decades ago and hence it is infeasible to seek the relevant AP's consent to the disclosure of the "historical plans", coupled with no overriding public interest to the disclosure of such plans, BD upon review refused the complainant's information request pursuant to paragraph 2.14(a) of the Code (see **paragraph 7(a)** above).

Information B1

19. BD reiterated the stance in its reply to the complainant of 13 January 2023 that it does not possess "Information B1".

Information A2 and B2

20. BD decided after review to release "Information A2" and "Information B2" to the complainant. BD explained that the risks of inhibiting the frankness and candour of discussion within the Government and of prejudicing a fair hearing of the appeal case (see **paragraph 2** above) as a result of releasing "Information A2" and "Information B2" are relatively low. BD would release "Information A2" and "Information B2" to the complainant in due course.

Information C1 and D1

21. BD advised that it does not have any record of "Information C1". BD's records indicate that the only available record related to land matters in the time period concerned is a lease plan which was not issued by BD, but under LandsD's purview. BD considered itself not in a position to provide the document to the complainant and

therefore made a referral to LandsD when handling the complainant's information request (see **paragraph 10** above).

22. Meanwhile, BD regarded "Information D1" as the Department's comments given to LandsD dated 15 May 1995 on gross floor area relating to the division of the land title of the building. When handling the complainant's information request, BD considered that the information involved internal discussion and advice within the Government and hence refused disclosure by citing paragraph 2.10(b) of the Code (see **paragraph 7(b)** above) in its reply to the complainant of 13 January 2023 (see **paragraph 13(c)** above). Upon review, BD considered that it should consult LandsD on whether or not "Information D1" might be released before responding to the information request.

23. On 5 July 2023, BD wrote to seek LandsD's view on the disclosure of both "Information C1" and "Information D1". BD would in due course reply to the complainant regarding the two pieces of information taking into account LandsD's comments.

Our Comments

24. We have examined all available information pertinent to this case, including the correspondence between the complainant and BD, the information under request, BD's response, relevant provisions of the Code, etc.

Information A1

25. The complainant's disagreement with BD's refusal of its request for "historical plans" was noted. However, the "historical plans" requested were submitted by the relevant AP to the predecessor of BD for the construction of the building and hence should be regarded as third-party information under the Code. BD explained that under the obligation of confidence, it has all along been a common understanding and an established practice within the construction industry that any building plans submitted by APs to BD for the purpose of the BO would not be disclosed until the subject building or works have been completed (see **paragraph 17** above). While the above norm was formalised by way of the Practice Note only in 1985 (i.e. after completion of the building), we concur that an implicit mutual understanding exists between BD and the relevant AP that building plans submitted to BD, except the latest approved ones, are not subject to disclosure to other parties. Hence, it is not unreasonable for BD, upon review, to refuse disclosure of the "historical plans" pursuant to paragraph 2.14(a) of the Code.

Information B1

26. BD had reiterated the non-existence of “Information B1”. We consider BD’s handling to be in line with paragraph 1.14 of the Code (**paragraph 8** above), which states that the Code does not oblige departments to create a record which does not exist.

Information A2 and B2

27. We note BD’s decision to release “Information A2” and “Information B2” to the complainant after its internal review (see **paragraph 20** above) and that it has recently notified the complainant of the collection of the information upon payment.

Information C1

28. We have scrutinised “Information C1” and concur with BD’s view that Information C1 was issued by LandsD. In fact, BD had made relevant referrals to LandsD in November 2022 (see **paragraph 10** above) and July 2023 (see **paragraph 23** above). The complainant may consider contacting LandsD direct if it has any query in this regard.

Information D1

29. Having scrutinised “Information D1”, we note that the information is a mix of BD’s input and other parties’ (including LandsD’s) involvements in the division of the land title of the building. As such, we consider BD’s attempt, upon review, to consult LandsD on the release of the information to the complainant understandable. We urge BD to review its decision on the complainant’s information request and reply to it as soon as possible upon receiving LandsD’s comments. While it would be reasonable for BD to take into account LandsD’s comments, we are of the view that BD should consider releasing to the complainant any individual sub-pieces of information within “Information D1” that are possessed by BD and the disclosure of which can be decided on its own.

General comments on BD’s handling

30. Regarding the date on which the complainant first made its information request (see **paragraph 9** above), we have examined the complainant’s letter to BD of 30 May 2022 and consider it not an information request but an expression of opinions on BD’s enforcement action. That said, it still took BD 87 calendar days from receiving the complainant’s request dated 18 October 2022 to issue its second substantive reply of 13 January 2023. We consider this handling time not desirable, but somehow understandable given the need for an extensive search of files.

31. While BD’s first substantive reply was issued on 16 November 2022 (i.e. 29 calendar days from 18 October), we consider this reply to have failed to address the



complainant’s request for BD’s own internal documents by simply asking the complainant to access the requested information from the Department’s existing charged services and making a referral to LandsD on the remainder of the information (see **paragraph 10** above). It was only after the complainant’s follow-up phone call of 30 November 2022 that BD acknowledged its request for internal documents in its interim reply of 8 December 2022 (see **paragraph 11** above) and addressed it in its second substantive reply of 13 January 2023 (see **paragraph 13** above). In this regard, we consider BD could have done better by more thoroughly understanding the essence of the complainant’s information request before giving a reply.

Conclusion

32. Based on the analysis at **paragraphs 24 to 31** above, The Ombudsman considers BD to have appropriately handled the complainant’s request for “Information B1” and, after internal review, properly explained its refusal of disclosure of part of “Information A1” and rectified its decision on “Information A2” and “Information B2” by acceding to the request. Meanwhile, BD is taking appropriate action regarding “Information C1” and “Information D1” after review. Nevertheless, part of the information request should have been handled more properly as pointed out in **paragraph 31** above. Hence, this complaint is **unsubstantiated** but with **other inadequacies found**.

Office of The Ombudsman
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