

Case Summary

Complaint against the Economic Services Branch, Government Secretariat for withholding two consultancy study reports without a valid reason under the Code on Access to Information

In March 1996, the Secretary for Economic Services (SES) undertook to report to a Panel of the Legislative Council (the Panel) by July 1996 on the results of two consultancy studies : (a) the Study of Demand for Electricity in Hong Kong from 1995 to 2005 and Ways of Meeting Demand (the Demand Study) commissioned in the light of a request by a power company to build additional electricity generating capacity in 2003 and indications of excess capacity of another power company; and (b) the Study on Demand Side Management Programs and Incentives (the DSM Study) for identifying measures that might be taken to manage the pattern of demand for electricity pursuant to the Government's policy of promoting energy efficiency and conservation.

2. In June 1996, the complainant submitted an application to the Economic Services Branch (ESB) for the full text of the two studies. However, the application was rejected by SES who opined that the studies constituted advice given to the Government and information including commercial confidence within the terms of the following sections of the Code on Access to Information (the Code); namely -

Section 2.10(b) - "Information whose disclosure would inhibit the frankness and candour of discussion within the Government, and advice given to the Government. Such information may include..... opinions, advice, recommendation, consultations and deliberations by government officials or advisers to the Government."

Section 2.16 - "such information including commercial, financial, scientific or technical confidences, trade secrets or intellectual property whose disclosure would harm the competitive or financial position of any person."

3. The complainant was dissatisfied. Firstly, there was no basis to believe that the disclosure would inhibit the frankness and candour of discussion within the Government or of advice given to the Government, as these studies were meant to be released to the Legislative Council members to provide justification for a proposal to establish an extra power facility. Secondly, even if the results of the studies indeed contain information which, if released, might cause damage to the parties concerned, consideration should be given by the authority to the provision of a copy of the original report with the sensitive data removed.

4. SES considered it inappropriate for the Demand Study to be disclosed as it contained extensive commercially sensitive data, analysis and conclusions derived from these data. Furthermore, deletion of such data and related commentary would render the document unintelligible. Nor did he

agree that the DSM Study should be disclosed as its contents would form the basis for forthcoming negotiations between the Government and the two power companies (the Companies).

5. After completion of the studies in July 1996, SES did not report the matter to the Panel as scheduled as ESB had to consider the reports internally and formulate its views on them for presentation to the public through the Panel. The Panel was informed by SES on the outcome of the Demand Study and, briefly, on the outcome of the DSM Study at its meeting on 11 November 1996. Later in the year, the Companies agreed to releasing the Demand Study provided that the commercially sensitive information was removed. ESB therefore provided the Panel with the edited versions of the reviews.

6. SES confirmed that ESB had no stated policy or agreement with the Companies regarding the disclosure of these studies. However, there was a clear mutual understanding between ESB and the Companies that the commercially sensitive information should be kept confidential by the Government. As the Companies operated in the commercial environment, they would be in a better position to decide which pieces of information should be regarded as sensitive.

7. SES considered it inappropriate to release the DSM Study at that stage as the Government would negotiate in confidence with each of the Companies a DSM agreement on the implementation of various DSM programs and associated incentive arrangements aimed at saving energy. It was also inappropriate to release the Demand Study or the DSM Study reports immediately to a member of the public when the Panel was still in the process of reviewing the issues. ESB opined that this approach would be consistent with the spirit of Section 2.17 (i.e. premature requests) of the Code. However,

at the time of the complainant's application, ESB was not in a position to confirm that the reports would be published in view of the Companies' known opposition to the publication of commercially sensitive information.

8. After reviewing the records available, this Office consider that (a) While there was no stated policy or agreement with the Companies on what was considered as commercially sensitive information with regard to these two studies, ESB had an understanding with them that their supplied information supplied would be classified as such. There is apparently some contradiction as an understanding would have constituted a form of agreement, albeit on an informal basis. (b) The information suppressed in the edited reports did contain commercially sensitive information, such as demand, sales and load forecast, annual tariff projections, etc., which should not be released by the Government without the prior consent of the Companies. (c) ESB first refused the complainant's request under Sections 2.10(b) and 2.16 of the Code. However, ESB also raised with this Office its concerns over the request on account of Section 2.17 of the Code later in the course of this investigation.

9. This Office agrees that as the unedited reports contain commercially sensitive information, ESB should not be faulted for not releasing them to a member of the public prior to their briefing to the Panel. Though the Guidelines on Interpretation and Application, Code on Access to Information (the Guide) stated that "if the extent of deletion is such that the original document becomes meaningless or misleading, consideration should be given to providing an intelligible summary", not until prompted by the Companies' agreement, ESB had made no attempt to provide the complainant with an edited version of the Demand Study. From ESB's file on this case, there was no record of any attempt having been made of such an offer to the complainant as recommended in the Guide.

10. In conclusion, The Ombudsman is of the view that while ESB should not be faulted for refusing to releasing the two study reports because both containing commercially sensitive information, its handling of the complainant' s application had been found wanting. On that basis, this complaint is concluded as partially substantiated. ESB did not accept the conclusion and commented that as this Office agreed that the Branch had a valid reason for withholding the two reports, it was illogical and perverse to say that the complaint was "partially substantiated" .

11. As a final remark, The Ombudsman opines that in considering this complaint in its totality, it is noted that the edited reports had been issued without any explanation after the rejection of the complainant' s application. As such, this would be tantamount to a change in stance on the part of ESB. Though it was not unreasonable for ESB to reject the application under Sections 2.10(b) and 2.16, there would be no reason to believe ESB was not aware that it would also be improper to release the studies on account of Section 2.17 as they were premature information. Thus it was an incomplete reply when Section 2.17 was not quoted. The partial substantiation of this complaint was judged on account of the less-than-complete reply to the request. ESB should have made full consideration and offered every assistance to meeting the request, even if it could only be acceded to partly.

12. In closing this case, SES has accepted our recommendation to work with the Companies to edit the DSM Study so that it can also be released as soon as the briefing of the Panel on the outcome of the negotiations with the Companies has been conducted.

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