

立法會

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Panel on Constitutional Affairs

Background brief prepared by Legislative Council Secretariat for the meeting on 17 May 2010

Code on Access to Information and management of public records

Purpose

This paper summarizes the major issues relating to Code on Access to Information and management of public records raised by Members of the Legislative Council ("LegCo") since the first LegCo.

Background

The Government Records Service

2. Under the current government structure, the Government Records Service ("GRS") under the Administration Wing of Chief Secretary for Administration Office is tasked to oversee the management of government records on a government-wide basis. GRS has promulgated records management procedures and guidelines on management of government records, and provides records management training and advice to help bureaux and departments improve their records management. In line with the administrative framework set by GRS, bureaux and departments have appointed Departmental Records Managers to manage and maintain government records. GRS operates two central records centres to provide intermediate storage and disposal services of inactive government records, pending their final disposal (destruction or permanent retention). Government records appraised to have enduring value will be transferred to the Public Records Office ("PRO") of GRS as archival records for permanent preservation. Under the records management guidelines, records proposed by bureaux and departments for destruction have to be vetted by GRS before actual disposal.

3. Members may wish to note that a Steering Group on Records Management chaired by Head of Efficiency Unit was formed in February 1994 to oversee the formulation and implementation of a service-wide Records Management Strategy for all government departments. According to the Administration, the objective of the Strategy was to help departments reduce record stock, record growth, improve quality and service, and improve cost-effectiveness. A five-year phased approach was adopted to implement the Strategy commencing in December 1994.

4. Members may also wish to note that in his reply to a written question on electronic records of the Government raised by Hon Emily LAU at the Council meeting on 25 November 2009, the Chief Secretary for Administration ("CS") advised that GRS had since 2001 been working in conjunction with the Office of the Government Chief Information Officer and the Efficiency Unit to formulate policy, strategies, and standard for the effective management of electronic records. The ultimate objective is to develop new records management practices and tools to assist bureaux and departments to manage both electronic and non-electronic records in an integrated, efficient and consistent manner. Guidelines on managing electronic mail ("email") records were promulgated in 2001 to help bureaux and departments to identify, create, file and manage email records.

Public Access to Archival Records and Government Records

5. Under current practice, access to archival records kept by GRS is managed through the Public Records (Access) Rules 1996. The public may visit the Hong Kong Records Building in Kwun Tong to inspect records and other materials available for access. They may also visit GRS website for the online catalogue of PRO's holdings and some digitized holdings, such as photographs and posters. In general, public access will be granted to archival records containing open information and those containing classified information which have been closed for 30 years. Classified archival records containing sensitive information such as those relating to defence, security and external affairs will be considered on a case-by-case basis.

6. Separately, access to government records kept by any government bureau or department is provided through the Code on Access to Information.

Code on Access to Information ("The Code")

7. The Code was introduced in March 1995 to serve as a formal framework for the provision of information held by government bureaux and departments. The then LegCo Panel on Information Policy had been briefed by the Efficiency Unit on the implementation of the Code in respect of the requests received, grounds for refusal, complaints received, staff training and extension of the Code on 11 April 1996, 5 July 1996 and 1 November 1996 respectively.

8. Since 1 July 2007, the Constitutional and Mainland Affairs Bureau ("CMAB") has taken over the responsibility for the administration of the Code from the Home Affairs Bureau ("HAB"). According to CMAB, it is the established policy to make available as much information as possible so that the public can better understand how the Government formulates and implements policies, and can monitor the Government's performance more effectively.

9. The Code sets out what information must be made available to the public routinely and lays down rules for dealing with requests for access to other government

information. It embraces all government departments and two public bodies. Requests for access to information held by departments should be made to the Access to Information Officer of the relevant department. Unless there are specific reasons, departments are authorized and required routinely or on request to provide information. The 16 categories of information to which public access may be refused are set out in Part 2 of the Code (**Appendix I**).

10. Guidelines on Interpretation and Application were drawn up in 1995 to help departments comply with the Code. Salient points of the Guidelines include:

- (a) information will be released unless there are good reasons under Part 2 of the Code to withhold disclosure. Even if the information requested fall within Part 2, it does not necessarily imply that the request should be refused;
- (b) requests made with or without specific reference to the Code ("Code and non-Code requests") should be considered on the same principles;
- (c) the purpose of the request, or the applicant's refusal to reveal the purpose, should not be a reason for withholding information;
- (d) in refusing a request, the department concerned must inform the applicant of the reasons for refusal, quoting the relevant reasons in Part 2, and the avenues of internal review and complaint to The Ombudsman; and
- (e) for requests for information involving multiple departments, the department receiving the request should be responsible for coordinating the reply to the applicant.

Relevant issues raised by Members on the Code

Reviewing the validity of the reasons for refusing access to information by the public

11. At the Council meeting of 4 November 1998, Hon LAU Chin-shek raised a written question on statistics on requests for information raised under the Code. Mr LAU asked, among others, whether the Administration would review the validity of the reasons for government departments not providing the requested information to the public and relax the relevant restrictions to enable the public to have greater access to government information.

12. In his reply, the then Secretary for Home Affairs ("SHA") informed Members that it had been the Government's established practice to conduct reviews of the Code and its Guidelines for departments with a view to making improvements. The last review was carried out in mid-1997 and amendment sheets issued in early 1998. The

next review was scheduled for the end of 1998 with a view to identifying further improvement to the two documents. The then SHA further advised that HAB released statistics relating to the implementation of the Code from time to time in response to requests. To enhance transparency, the Administration would in future release the statistics through press releases on a quarterly basis.

Legislation on freedom of information

13. At the Council meeting of 28 January 2005, Hon James TO moved a motion for debate urging the Government to enact legislation on freedom of information. The motion as amended by Hon TSANG Yuk-sing and further amended by Dr Hon Margaret NG in **Appendix II** was carried.

Compliance with the Code

14. At the Council meeting of 9 April 2008, Hon Audrey EU raised a written question on the number of cases in which information was sought from the Government under the Code in 2007. Ms EU also asked about the number of complaints relating to the Code handled by the Ombudsman in the past three years.

15. In his reply, the Secretary for Constitutional and Mainland Affairs ("SCMA") advised that in 2007, the Government received 2 537 requests for information under the Code. Amongst them, 2 235 requests (88%) were met, either in full (2 202 requests) or in part (33 requests), 47 requests (2%) were refused, 105 requests (4%) were subsequently withdrawn by the applicants and the bureaux and departments concerned did not hold the requested information in respect of 86 requests (3%). The average time taken to provide the requested information was nine days. SCMA further advised that a total of 23 complaints in relation to the Code were lodged with the Ombudsman during 2005 to 2007.

16. Members may wish to note that according to CMAB, since the introduction of the Code in March 1995 and up to the end of September 2009, government bureaux and departments have handled 25 125 requests under the Code and 23 986 (95.5%) of them were met in full, 563 (2.2%) met in part, and 576 (2.3%) were refused for reasons set out in the Code.

Relevant issues raised by Members on management of public records

Enacting an archival law

17. Dr Hon Margaret NG raised a written question on management of government records at the Council meeting on 25 October 2006. Dr NG expressed concern over the loss of government records and raised the need for enacting an archival law.

18. In his reply, the then CS advised that access to archival records kept by GRS was managed through the Public Records (Access) Rules 1996. Separately, access to government records kept by any government bureau or department was provided through the Code which was also administrative in nature. While there was no archives or records legislation in Hong Kong, the present system was functioning effectively and the Administration would continue to improve on it. The Administration did not consider legislation a priority item for the Government.

19. At the Council meeting on 3 December 2008, Hon Cyd HO raised a written question on transfer of records from government departments and bureaux to GRS. She also expressed concern over the need of introducing legislation for preserving government records and materials with historical value. The incumbent CS reiterated that while there was no legislation on preservation of government records and materials with historical value, the present system was serving its purpose. The Administration did not consider legislation a priority item for the Government.

Records of statutory bodies

20. Dr Hon Margaret NG raised a written question on proper management and preservation of records of the Government and statutory bodies at the Council meeting on 8 November 2006.

21. In his reply, the then CS advised that all statutory bodies had to operate within the confines imposed by relevant legislation and had to be accountable for their own proper management. While they were not obliged to transfer their records to the GRS, the Administration did encourage statutory bodies to adopt appropriate measures to enhance their transparency and accountability to the public. Many of them had made available for public inspection papers and minutes of meetings, statistical reports, human resources information and statistics, and other documents and papers.

Retention period of government records

22. At the Council meeting on 18 April 2007, Hon LEE Wing-tat raised a written question on the retention period for government records. In response, the then CS advised that the retention and destruction of government records were determined according to practical needs, taking into account administrative, operational, financial and legal requirements, as well as the archival value of the records. Different retention periods would be drawn up for different categories of records. For example, records relating to unsuccessful applications for recruitment exercises would be retained for one year; routine records on building management three years; policy records on purchase, management and maintenance of government vehicles five years; accounting documents seven years; and records appraised to have archival value permanently.

Recent development

23. The Ombudsman released a report on direct investigation on "Effectiveness of administration of Code on Access to Information" in January 2010. The direct investigation aimed to examine:

- (a) Government action to ensure understanding of and compliance with the Code among its officers;
- (b) Government mechanism to monitor departments' compliance with the Code; and
- (c) Government measures to promote public awareness of the Code.

24. The Ombudsman has put forward 11 recommendations to CMAB for more effective administration of the Code. A summary of the observations and recommendations made is in **Appendix III**.

Relevant documents

25. A list of relevant documents available on the LegCo website (<http://www.legco.gov.hk/>) is in **Appendix IV**.

Code on Access to Information – Part 2

INFORMATION WHICH MAY BE REFUSED

- 2.1 A department may refuse to disclose information, or may refuse to confirm or deny the existence of information, in the categories and for the reasons set out below, which will normally be referred to if a request is refused.
- 2.2 References in this Part to “harm” and “prejudice” include both actual harm and prejudice and the risk or reasonable expectation of harm and prejudice. In such cases the department will consider whether the public interest in disclosure of the information outweighs any harm or prejudice that could result.

DEFENCE AND SECURITY

- 2.3 (a) Information whose disclosure would harm or prejudice Hong Kong’s defence.
- (b) Information whose disclosure would harm or prejudice Hong Kong’s security.

EXTERNAL AFFAIRS

- 2.4 (a) Information whose disclosure would harm or prejudice the conduct of external affairs, or relations with other governments or with international organisations.
- (b) Information received in confidence from and conveyed in confidence to other governments, courts in other jurisdictions, and international organisations.

NATIONALITY, IMMIGRATION AND CONSULAR MATTERS

- 2.5 (a) Information relating to immigration or nationality cases.
- (b) Information whose disclosure would harm or prejudice the administration of nationality, registration of persons, immigration or consular matters, or the performance of consular functions as an agent for other governments.

LAW ENFORCEMENT, LEGAL PROCEEDINGS AND PUBLIC SAFETY

- 2.6 (a) Information whose disclosure would harm or prejudice the administration of justice, including the conduct of any trial and the enforcement or administration of the law.
- (b) Information whose disclosure 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.

- (c) Information which relates to proceedings which have been completed, terminated or stayed, or which relates to investigations which resulted in or may have resulted in proceedings, whether any such proceedings are criminal or civil.
- (d) Information which would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (e) Information whose disclosure would harm or prejudice the prevention, investigation and detection of crime and offences, the apprehension or prosecution of offenders, or the security of any detention facility or prison.
- (f) Information whose disclosure would harm or prejudice the preservation of the peace, public safety or order, or the preservation of property.
- (g) Information whose disclosure might endanger the life or physical safety of any person (whether or not such person is in Hong Kong), or identify the source of information or assistance given in confidence for security purposes, or for the enforcement or administration of the law.

DAMAGE TO THE ENVIRONMENT

- 2.7 Information whose disclosure would increase the likelihood of damage to the environment or to rare or endangered species and their habitats.

MANAGEMENT OF THE ECONOMY

- 2.8 Information whose disclosure would harm or prejudice the conduct of monetary policy, the maintenance of stability in financial markets, or the ability of the Government to manage the economy.

MANAGEMENT AND OPERATION OF THE PUBLIC SERVICE

- 2.9
- (a) Information whose disclosure would harm or prejudice negotiations, commercial or contractual activities, or the awarding of discretionary grants and ex-gratia payments by a department.
 - (b) Information whose disclosure would harm or prejudice the competitive or financial position or the property interests of the Government.
 - (c) Information whose disclosure would harm or prejudice the proper and efficient conduct of the operations of a department.
 - (d) Information which could only be made available by unreasonable diversion of a department's resources.

INTERNAL DISCUSSION AND ADVICE

- 2.10 (a) Papers prepared for, and records of meetings and deliberations of the Executive Council.
- (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 -
- (i) records of discussion at any internal government meeting, or at any meeting of a government advisory body;
 - (ii) opinions, advice, recommendations, consultations and deliberations by government officials or advisers to the Government.

PUBLIC EMPLOYMENT AND PUBLIC APPOINTMENTS

- 2.11 Information which would harm or prejudice the management of the public service.

IMPROPER GAIN OR ADVANTAGE

- 2.12 Information whose disclosure could lead to improper gain or advantage.

RESEARCH, STATISTICS AND ANALYSIS

- 2.13 (a) Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the department or any other person of priority of publication or commercial value.
- (b) Information held only for preparing statistics or carrying out research, and which relates to individuals, companies or products which will not be identified in reports of that research, or in published statistics.

THIRD PARTY INFORMATION

- 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.
- (b) Information provided in confidence by a third party if disclosure to the subject of the information would harm his or any other individual's physical or mental health, or should only be made to him by an appropriate third party.

PRIVACY OF THE INDIVIDUAL

- 2.15 Information about any person (including a deceased person) other than to the subject

of the information, or other appropriate person, unless -

- (a) such disclosure is consistent with the purposes for which the information was collected, or
- (b) the subject of the information, or other appropriate person, has given consent to its disclosure, or
- (c) disclosure is authorised by law, or
- (d) the public interest in disclosure outweighs any harm or prejudice that would result.

BUSINESS AFFAIRS

2.16 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.

PREMATURE REQUESTS

2.17 Information which will soon be published, or whose disclosure would be premature in relation to a planned announcement or publication.

LEGAL RESTRICTIONS

2.18 Information whose disclosure would constitute -

- (a) a contravention of any law which applies in Hong Kong, or
- (b) a breach of any obligation arising under common law or under any international agreement which applies to Hong Kong.

The LegCo Reporter

2004-2005

Issue No. 10 (29 January 2005)

At its meeting on 26, 27 and 28 January 2005, the Legislative Council passed the following two resolutions:

- (1) Resolution moved by Hon Miriam LAU Kin-yee relating to the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region.
- (2) Resolution moved by the Secretary for Health, Welfare and Food relating to the Pharmacy and Poisons (Amendment) (No. 4) Regulation 2004 and the Poisons List (Amendment) (No. 4) Regulation 2004.

At the same meeting, the Council passed the following two motions with no legislative effect:

- (1) *Motion on "Introducing a fair competition law for the oil industries", moved by Hon Mrs Selina CHOW LIANG Shuk-ye*e

"That, as the adjustments of local oil product prices are always quick in going up but slow in coming down and the pace of price adjustments by various oil companies tends to be synchronized, while oil product pump prices often fail to truly reflect import costs, this Council urges the Government to actively consider introducing a fair competition law and other effective measures for the oil industries, including requesting the Competition Policy Advisory Group to take heed of any unfair mode of competition that may emerge in the local oil market, and entrusting the Group to monitor and study the situation, with a view to increasing competition in the oil industries and enhancing the transparency of product prices, thereby avoiding oligopoly, promoting fair competition and safeguarding commercial clients and the public against high oil prices."

- (2) *Motion on "Enacting legislation on freedom of information", moved by Hon James TO Kun-sun as amended by Hon Jasper TSANG Yok-sing and further amended by Hon Margaret NG*

"That this Council urges the HKSAR Government to enact legislation on freedom of information, on the premise of fully consulting various sectors of the community and having regard for the public's right to know and their social responsibilities, so as to safeguard Hong Kong's freedom of the press and information, enhance the transparency and accountability of the HKSAR Government, safeguard the public interests of the

Hong Kong community, and consolidate the core values of Hong Kong as well as facilitate public participation in assessing and proposing public policies; and the relevant legislation should provide for:

- (a) the public's right of access to information held by public authorities;
- (b) clearly defined categories of information the disclosure of which may be refused;
and
- (c) the mechanisms for enforcing the right and for appeal."

Our Observations

Case Studies

6. The cases in **Chapter 4** of the report illustrate deficiencies among certain departments, displaying considerable misunderstanding of the provisions and unfamiliarity with the procedural requirements of the Code after well over a decade of implementation. Some have refused requests for information without giving any reason or with reasons not specified in the Code; others have misused the reasons specified in the Code. Some have failed to inform requesters of the avenues of departmental review and complaint to our Office, while others have overlooked their responsibility to coordinate replies involving multiple departments.

Inadequate Training

7. HAB had provided no training for AIOs from 1997 to 2004 and for other departmental supporting staff during 2002 to 2007.

8. CMAB has stepped up training. Nevertheless, AIOs are not trained at the most appropriate time, i.e. just before or immediately after they assume their posts, to enable them to effectively discharge their responsibilities. CMAB should, therefore, organise more (and timely) training to AIOs and other staff, as well as facilitating more in-house training by various departments.

Inadequate publicity

9. Since the announcements through press releases and broadcasts over radio and television in 1995, 1996 and 1997, there had been no positive media publicity for 11 years. In this regard, we appreciate CMAB enhancing publicity since late 2008 in response to our pre-investigation inquiry.

10. The Government homepage features the Code (bilingually) and the Guidelines (in English only). We consider a Chinese version of the Guidelines necessary to facilitate public understanding.

11. We also note that departments' homepages already provide the public with instructions on access to information under the Code. However, some of the homepages are not hyperlinked to the webpage on the Code and the Guidelines and do not even contain a brief introduction of the Code to highlight the public's right to information. These deficiencies should be rectified.

Inadequate promotion within Government

12. During the decade 1997 to June 2007, only two general circulars and one memorandum were issued to remind departments of the provisions of the Code.

Need to update departmental guidelines

13. Some departments have drawn up internal circulars/guidelines on the Code, modelled on a 1996 sample, but without any monitoring or updating by HAB. This may well mean a diversity of guidelines, possibly inconsistent with the Code. In this connection, CMAB has just issued an updated sample circular.

Inactive monitoring of compliance

14. HAB had not carried out any updating of the format of the quarterly return on Code-related requests. Since taking over in 2007, CMAB has revised the format of the return to include more details and cases for effective monitoring.

Inadequate extension to public bodies

15. As more public bodies come into existence to provide services to the public, it is essential that they be brought under the same spirit of the Code and advance the principle and policy of transparency of public administration. CMAB should, therefore, follow up with public bodies within The Ombudsman's purview which have yet to adopt the Code or some similar guide.

Recommendations

16. The Ombudsman commends CMAB on its enhanced efforts in promoting awareness of the Code over HAB's meagre contribution.

17. Nevertheless, The Ombudsman makes 11 recommendations to CMAB for more effective administration of the Code, including:

- (a) to organise more, and timely, training for AIOs;
- (b) to work with departments to organise more training for other staff;

- (c) to add a Chinese version of the Guidelines to the Government webpage on the Code;
- (d) to require all departments' homepages to introduce the Code briefly and to be hyperlinked to the webpage on the Code;
- (e) to provide advice to departments to ensure that departmental guidelines are clear, correct and up-to-date; and
- (f) to follow up with other public bodies within The Ombudsman's purview for them to adopt the Code or some similar guide.

Office of The Ombudsman
January 2010

Code on Access to Information and management of public records

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Panel on Information Policy	1 December 1995	Background information on "Records Management Strategy" [LC Paper No. PL252/95-96] Minutes of meeting [LC Paper No. PL613/95-96]
	11 April 1996	Administration's paper on "Code on Access to Information" [LC Paper No. CB(2)993A/95-96(01)] Minutes of meeting [LC Paper No. CB(2)1187/95-96]
	7 June 1996	Administration's paper on "Progress of Phases I and II Implementation of the Records Management Strategy" [LC Paper No. CB(2)1468/95-96A(03)] Minutes of meeting [LC Paper No. CB(2)1744/95-96]
	5 July 1996	Administration's paper on "Code on Access to Information" Minutes of meeting [LC Paper No. CB(2)2068/95-96]
	1 November 1996	Administration's paper on "Code on Access to Information" [LC Paper No. CB(2)302/96-97(02)] Minutes of meeting [LC Paper No. CB(2)645/96-97]
Legislative Council	25 February 1998	Official Record of Proceedings of the Council on a written question raised by Hon CHOY Kan-pui on "Code on Access to Information"

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
	4 November 1998	Official Record of Proceedings of the Council on a written question raised by Hon LAU Chin-shek on "Code on Access to Information"
	28 January 2005	Official Record of Proceedings of the Council on the motion moved by Hon James TO on "Enacting legislation on freedom of information"
	25 October 2006	Official Record of Proceedings of the Council on a written question raised by Hon Margaret NG on "Management of Government Records"
	8 November 2006	Official Record of Proceedings of the Council on a written question raised by Hon Margaret NG on "Management and Preservation of Records of Government and Statutory Bodies"
	18 April 2007	Official Record of Proceedings of the Council on a written question raised by Hon LEE Wing-tat on "Setting up of Government Records Office"
	20 June 2007	Official Record of Proceedings of the Council on an oral question raised by Dr Hon Fernando CHEUNG on "Request for Government to Provide Information"
	9 April 2008	Official Record of Proceedings of the Council on a written question raised by Hon Audrey EU on "Code on Access to Information"
	3 December 2008	Official Record of Proceedings of the Council on a written question raised by Hon Cyd HO on "Government Records with Historical Value"
House Committee	2 January 2009	Administration's supplementary reply to a Member's written question concerning Government records with historical value raised at the Council meeting on 3 December 2008 [LC Paper No. CB(2)614/08-09(01)]

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Legislative Council	25 November 2009	<u>Official Record of Proceedings of the Council on a written question raised by Hon Emily LAU Wai-hing on "Electronic Records of Government"</u>

Council Business Division 2
Legislative Council Secretariat
12 May 2010