



1. Introduction

1.1 In Hong Kong, the right of access to information is a fundamental right provided under Article 16 of Section 8 of the Bill of Rights Ordinance (Cap. 383)¹, which mirrors Article 19 of the International Covenant on Civil and Political Rights.

1.2 However, Hong Kong does not have specific law governing freedom of information ("Fol"). At present, there is a non-statutory Code on Access to Information (the "Code") promulgated by the Government in 1995, under which members of the public may make requests to various bureaux/departments ("B/Ds") and other relevant bodies for access to the information held by them. The Code, which has remained broadly unchanged since 1995, defines the scope of information that will be provided, sets out how the information will be made available, and lays down the procedures governing its release.

1.3 Under the Code, B/Ds and other relevant bodies will make available information that they hold unless there are valid reasons – related to public, private or commercial interests, third party or privacy – to withhold it. However, the Code is not legally based and is subject to various limitations such as limited coverage, inconsistent application of exemption provisions and lack of review.² Over the years, there have been repeated calls for establishing a statutory regime on Fol to provide people with a legal right of access to information held by the Government.³

¹ According to Article 16, "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". The Article also stipulates that the exercise of rights carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others or for the protection of national security, public order, public health or morals.

² See Office of The Ombudsman (2014).

³ See The Law Reform Commission of Hong Kong (2018).

1.4 In contrast with Hong Kong, many places around the world already have a statutory regime on FoI. At the request of Hon Charles Peter MOK, the Research Office has conducted a study to examine the FoI legislation in overseas jurisdictions, with particular reference to the United Kingdom ("UK") and the United States ("US"). Both places have put in place a fairly comprehensive regulatory framework for public access to government information. This information note provides an overview on the administrative regime of Hong Kong's FoI, followed by a discussion of the global trend and the operation of the FoI laws in the UK and the US, particularly on the coverage of organizations, exemptions and appeal mechanism. The salient features are summarized in the **Appendix**.

2. Hong Kong's Code on Access to Information

2.1 The Constitutional and Mainland Affairs Bureau ("CMAB") of the Government is in charge of the administration of the Code, including giving advice to the bodies falling within the ambit of the Code ("public authorities") and monitoring their compliance. At present, the Code applies to all B/Ds and registries and administrative offices of courts and tribunals for which the Judiciary Administrator has responsibility.⁴ It also applies to two public organizations, namely the Hong Kong Monetary Authority and the Independent Commission Against Corruption. These public bodies are obliged to report to CMAB with quarterly returns of statistics on compliance. For the other public organizations, some have adopted the Code on a voluntary basis with adaptations to suit individual circumstances. Nevertheless, they are not required to submit regular returns to the Government on their application of the Code.

2.2 Public authorities are provided with a set of Guidelines on Interpretation and Application (the "Guidelines") to help them interpret and apply the Code. When a public authority receives a request for information which is in its possession, it is abided by the Guidelines to respond to the request within 10 days from the date of receipt of the request. There are provisions to claim extension of the time limit, but in any event not later than 51 days after receipt of the request.⁵ The receiving public authority may refuse to disclose if the requested information falls into one or more of the

⁴ See Code on Access to Information (2017a).

⁵ See Code on Access to Information (2016).

16 exemption categories specified in Part 2 of the Code, e.g. defence and security, law enforcement, legal proceedings and public safety, management and operation of the public service, third party information and privacy of individuals. Refusal to confirm or deny the existence of information is also allowed, but it is more likely confined to sensitive information in such areas as defence, security or law enforcement.⁶

2.3 With a few exceptions, the withholding of information is subject to a harm or prejudice test. Public authorities have to consider whether the public interest in disclosure outweighs any harm or prejudice that could result from disclosure.⁷ If there is overriding public interest in disclosure, the public authority concerned may disclose information notwithstanding the exemption provisions. Nevertheless, according to the Guidelines, public authorities do not need to prove in any particular case that harm or prejudice would result from disclosure of particular information. It is already sufficient if there is a risk or reasonable expectation of harm in the circumstances.

2.4 If a public authority decides to refuse to provide the requested information in full or in part, it must inform the requestor of the reasons for refusal by referring to the relevant exemption provision(s) under the Code. A total of about 5 140 information requests were received under the Code in 2016. Of the cases handled during the year, 84% were met in full, 2% met partially, and 2% refused.⁸ There were 6% not fulfilled due to lack of the requested information; and another 6% not dealt with due to subsequent request withdrawal.⁹

2.5 If the requestor concerned considers that the receiving public authority has failed to comply with any provision of the Code, he or she may ask the latter to internally review the decision. If the requestor is still not satisfied with the response made, he or she may only lodge a complaint to the independent body, The Ombudsman.¹⁰ In the financial year 2016-2017, The Ombudsman received a record high of 85 complaints about access to information.¹¹

⁶ Ibid.

⁷ Based on the Guidelines, public interest means "something in which the public has a vital interest in either a pecuniary or personal sense. It can mean a purely inquisitive interest as well as a material interest".

⁸ Most cited reasons for refusal cases were third-party information, privacy and law enforcement protection.

⁹ See Code on Access to Information (2017b).

¹⁰ See Legislative Council Secretariat (2014) and GovHK (2017).

¹¹ See Office of The Ombudsman (2017).

Concerns and inadequacies

2.6 In Hong Kong, the public has all along expressed concerns over the reliance on the Code that merely sets out an administrative regime for FoI **without legal backing**. **The absence of an archives law** has added to the concerns over the effectiveness of the FoI regime, as the former essentially helps ensure effective management and preservation of government records. Currently, management of government records and archiving of records also rely on a purely administrative regime, which is administered by the Government Records Service ("GRS"). GRS's discharge of its responsibilities is not underpinned by law. It relies on compliance by B/Ds with the administrative manual and instructions that it issues from time to time. The opening of archival records for public inspection is also managed through a set of administrative rules, namely the Public Records (Access) Rules 1996. In general, members of the public are allowed access to archival records which have been in existence for not less than 30 years or the contents of which have at any time been published or wholly disclosed to the public.

2.7 The absence of legal backing has been identified by The Ombudsman as one of the inadequacies in the current administrative FoI system. In its direct investigation conducted in 2013, The Ombudsman has observed that the lack of legal backing of the Code might lead B/Ds to act overly cautious in information disclosure for fear of infringing other legislation. Also, there is no enforcement body that can make legally binding decisions on B/Ds and there is no statutory penalty for non-compliance. Other inadequacies identified by The Ombudsman include **(a) limited coverage of public organizations; (b) inconsistencies among B/Ds in the application of the exemptions and lack of a mechanism on review of the exemption provisions; and (c) inadequate proactive disclosure and public promotion**. It has recommended a series of improvement measures, and suggested the Government to introduce a specific legislation on FoI to underpin citizens' right of access to information.

2.8 In response to The Ombudsman's recommendations, the Government has taken follow-up actions such as raising the transparency of the FoI system by providing regular statistical information on handling the information requests, together with the release of reasons for refusal cases. It has also kept publishing an updated list of precedent cases online to facilitate understanding of the government bodies on the application of exemptions. However, the Government has yet to address the broadening of the coverage of public organizations and the establishment of a mechanism for

regular review of the Code, pending the study outcome of the Law Reform Commission ("LRC"). In 2013, LRC set up two sub-committees to study the subjects of archives law and access to information respectively. According to the Government, the two sub-committees will publish consultation papers in 2018 to gauge public views on the issues involved, before finalizing the reform proposals for the Government's consideration.¹²

3. Global trend and developments

3.1 Efforts to safeguard the access of citizens to information can be traced back to 1766 when Sweden introduced the world's first law to grant the public access to government documents. FoI laws did not sprout up again until the passage of an FoI law in Finland and the US in 1951 and 1966 respectively. After that, four countries in the 1970s and five countries in the 1980s followed suit.¹³ The global trend continued with increased number of countries passing their FoI laws over the past two decades. At present, over 100 jurisdictions from different parts of the world have a statutory FoI regime.¹⁴

3.2 In the Asia-Pacific region, Australia and New Zealand were the first countries to adopt FoI legislation as early as in 1982. South Korea followed in 1996, Thailand in 1997, Japan in 1999, and India and Taiwan in 2005. Emerging economies such as Philippines, Sri Lanka¹⁵ and Vietnam have also newly introduced a legal framework in recent years.

¹² See GovHK (2017).

¹³ Denmark, Norway, France and the Netherlands adopted their FoI laws in the 1970s, whereas Australia, New Zealand, Canada, Greece and Austria did the same in the 1980s.

¹⁴ See World Bank Group (2014) and freedominfo.org (2017).

¹⁵ According to the Right to Information Rating (2017), the FoI regime enacted by Sri Lanka in 2016 has received high global ratings on FoI law. Its legislation applies not only to government offices but also public corporations, government-funded organizations and institutions of higher education. In case of inconsistencies or conflicts with other written laws, the FoI law prevails. Yet since the legislation is being implemented by phases, its effectiveness in improving government transparency remains to be seen.

3.3 While the FoI legislation in various jurisdictions varies, international or regional bodies, such as the Commonwealth, the Council of Europe, and the Organization of American States, have established their respective general FoI principles for their member states.¹⁶ In addition, the United Nations Special Rapporteur on Freedom of Opinion and Expression also endorsed in 2000 a set of FoI principles – The Public's Right to Know: Principles on Freedom of Information Legislation – based on international and regional laws and standards, evolving practices and general principles of law. The endorsed principles underline, among others, maximum disclosure, promotion of open government, and clear and narrowly-drawn exemptions subject to harm or public interest test.¹⁷

3.4 The FoI regimes in the UK and the US are consistent with the above internationally accepted principles in various aspects. For example, in the US, when dealing with FoI requests, government bodies should adopt a general presumption in favour of disclosure. In the UK, the FoI regime has incorporated the open government concept by requiring public authorities to release dataset in a re-usable, electronic form (i.e. machine readable format) as far as reasonably practicable.¹⁸ It also provides for a public interest override¹⁹ in certain exemptions, while the US has set out the exemption categories reasonably clear through judicial interpretation.²⁰ The ensuing paragraphs depict the salient features of the regulatory regimes in both places, and their experience and barriers in the course of implementation and operation.

The United Kingdom

3.5 In the UK, access to government information relied on an administrative regime prior to the enactment of the Freedom of Information Act 2000 (the "Act"). In 1997, the government issued a white paper setting out the proposals on FoI legislation that would encourage a more open and accountable government.²¹ The bill, after much public discussion

¹⁶ See Commonwealth Human Right Initiatives (undated), Organization of American States (2011), and Council of Europe (2002).

¹⁷ See United Nations Educational Scientific and Cultural Organization (2008).

¹⁸ See ICO (2015).

¹⁹ Public interest override is stated in negative term in law. Section 2(2)(b) of the Freedom of Information Act 2000 provides that disclosure does not apply where "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

²⁰ See United Nations Educational Scientific and Cultural Organization (2008).

²¹ See Cabinet Office, the UK (1997).

and debate at the Parliament, was passed in 2000. At first, implementation was intended to take place phase-by-phase starting with the central government first and other parts of the public sector later. Yet it was finally implemented more ambitiously in one go across all covered organizations on the first day of 2005.^{22, 23} The independent authority, Information Commissioner's Office ("ICO"), is responsible for enforcing the Act.

Coverage of public authorities

3.6 The Act covers a broad range of **public authorities**, applying to more than 100 000 public authorities in England, Wales and Northern Ireland.²⁴ Broadly speaking, public authorities are public bodies exercising public functions²⁵, which include (a) government departments, legislative bodies²⁶, local authorities, publicly-funded universities and schools, police, National Health Service (a statutory body on health services), and other public bodies (e.g. regulatory authorities, advisory boards and committees with their names individually listed in Schedule 1 to the Act); and (b) companies wholly owned by the Crown and/or the public sector. The list of covered bodies is expandable through further designation by the Secretary of State. Certain government units, such as the Security Service and the Secret Intelligence Service, are explicitly excluded from the Act, considering that inclusion of them would affect their ability to effectively carry out the duties in the interests of the nation.²⁷

3.7 Public authorities covered by the Act have two main obligations: (a) proactively publishing routine information, such as organizational information and financial information; and (b) responding to requests for information held by them.²⁸ A person who requests information shall submit

²² Before full implementation on 1 January 2005, the public authorities had already been required to proactively publish certain classes of information on a regular basis (e.g. organizational information and financial information) under the Publication Scheme provisions.

²³ Nevertheless, implementation in one go has also resulted in other consequences, such as lack of earlier reference and common standards for handling requests by local governments, and significant delays in handling complaints.

²⁴ The Act does not cover Scotland which has its own FoI legislation.

²⁵ See House of Commons (2017).

²⁶ Legislative bodies include the UK Parliament, the Northern Ireland Assembly and the National Assembly for Wales. However, individual Members of the Parliament and Assemblies are not covered by the Act.

²⁷ See Cabinet Office, the UK (1997).

²⁸ Requests for environmental information are dealt with under the Environment Information Regulations 2004.

his or her request to the public authority in writing.²⁹ If the public authority has the information, the requestor will be entitled to have the information if it is not subject to exemption provisions. Any request is required to be answered within 20 days. According to the practice guide, reasonable extension of time is allowed. However, public authorities are not obliged under the Act to comply with the information request if it is a vexatious or repeated request, or when the cost of doing so exceeds the cost limit.³⁰

Exemptions

3.8 The exemptions contained in the Act are considered extensive with **24 categories grouped into two types: (a) absolute exemptions and (b) qualified exemptions.**³¹ If the exemption is absolute, the public authority can withhold the information without having to assess whether there is a public interest for disclosure. Examples include court records, parliamentary privilege, information provided in confidence, personal information of the requestor, and information protected from disclosure by other legislation.

3.9 Qualified exemptions are subject to the public interest test, and they cover national security, law enforcement, ministerial communications, formulation of government policy, and research information newly added in recent years to protect pre-publication research material. It is noteworthy that information relating to government policy formulation had originally been proposed to be protected by absolute exemption. It was a subject of debate during deliberations at the Parliament and many legislators believed that one of the main purposes of the Act was to provide access to information used by ministers and senior civil servants to decide policy.³² In the end, it was changed into a qualified exemption subject to the public interest test and applies only to the central government.³³

²⁹ See UK Parliament (2004).

³⁰ The cost limits set by the central government and other public authorities are £600 (HK\$6,570) and £450 (HK\$4,930) respectively. If the public authority opts to fulfil the request when the cost of handling it exceeds the limit, it may charge the requestor a fee.

³¹ Exemptions can be also either class-based or prejudice-based. While both terms are not defined in the Act, they are elaborated in the practice guide issued by ICO. Generally, class-based exemptions protect information because it is of a particular type (e.g. information held for investigation purpose), whereas prejudice-based exemptions protect information where disclosure would or would be likely to harm a particular interest (e.g. prevention or detection of crime). For prejudice-based exemptions, the public authority must carry out a public interest test, i.e. the public authority must assess whether the public interest in withholding the information from the requestor outweighs the public interest in disclosure. See ICO (2016b).

³² See World Bank Group (2014).

³³ See ICO (2016a).

3.10 Exemption also applies if the information being requested is the personal data of a third party and disclosure would breach one of the data protection principles in the Data Protection Act. In considering whether disclosure would breach the data protection principles, public authorities may need to consider the element of public interest as well.³⁴

3.11 Public interest is not defined in the Act, but ICO has issued guidance on the conduct of the public interest test. Public authorities can only withhold the information if the public interest in holding back the information outweighs the public interest in disclosure. Of the 24 exemption categories under the Act, 15 are wholly subject to public interest test while three partially.³⁵ The Act also allows public authorities to refuse to confirm or deny that information if doing so would in itself disclose sensitive or potentially damaging information.

3.12 According to the national statistics on central government, 46% of some 33 340 resolvable information requests handled in 2016 were met in full, 17% partially met, and 37% not met due to exemption protection or cost reason. The most commonly cited exemptions were personal information, law enforcement, information intended for future publication, commercial interests, and prohibitions on disclosure.

3.13 Although public authorities can withhold the exempt information from disclosure, the public interest in maintaining an exemption will generally diminish over time. Certain types of information should not be subject to the exemption once they become historical records.³⁶ The Act, thus, incorporates specific provisions on access to historical records which were formerly under the Public Records Act. Some exemptions will cease to apply when the information becomes a historical record, e.g. information on government policy, ministerial communications and court records. Originally, a record at the end of the period of 30 years since creation would become a historical record. Upon an independent review during the late 2000s, the UK government has **amended the 30-year threshold to 20 years**, with a view to giving a better balance between openness, affordability and the protection of

³⁴ See ICO (2017).

³⁵ Three exemption categories, which are "prejudice to effective conduct of public affairs", "communications with Her Majesty, etc. and honours", and "personal information" respectively, are partially subject to public interest test because they comprise various sub-categories with some absolute in nature requiring no public interest test.

³⁶ See Cabinet Office, the UK (2017).

information.³⁷ According to the Act, the relevant public authority is required to consult the Secretary of State if it refuses to disclose information contained in historical records.

3.14 For certain types of information involving specified interest, they have a longer closure period, e.g. 30 years for trade secrets, and 100 years for law enforcement records.³⁸ Some types of inherent sensitive information are protected from disclosure indefinitely, such as national security and defence, information provided in confidence, and parliamentary privilege.

Appeal mechanism

3.15 Where an information request is refused, the requestor must be notified in writing by the public authority concerned. Under the Act, there is no obligation for a public authority to provide a complaint process. Nevertheless, the practice guide issued by ICO states that public authorities should have a complaint procedure and ensure the review takes no longer than 20 working days in most cases, or 40 in exceptional circumstances. In 2016, one in six requests denied by central government bodies has sought internal review. Internal reviews have overturned fully or partially the original decision in about 19% of the handled cases.

3.16 Where the request continues to be denied by a public authority after internal review, the requestor can appeal to ICO. It will carry out a full merits assessment and decide whether to uphold or not the public authority's refusal. Requestors who are dissatisfied with the decision can appeal to the First-Tier (Information Rights) Tribunal for carrying out another full merits-based review. If an appeal is unsuccessful, the requestor can further appeal to the Upper Tribunal, and then to the Court of Appeal, and ultimately the Supreme Court.

3.17 The Act notably provides for the power of the Cabinet to veto the decision issued by ICO, or, on appeal, by a tribunal or court. Nevertheless, the use of cabinet veto is seen to be rare, and it can be subject to challenge by judicial review. In an appeal case concluded in 2015, the Supreme Court

³⁷ Amendments were also made to the Public Records Act, reducing the threshold period for records of historical value to be transferred to The National Archives from 30 years to 20 years. Implementation of the changes commenced in 2013 on a phased-in basis over 10 years until 2022.

³⁸ According to The UK government (1993) and The National Archives (2009), records closed for 100 years are those containing sensitive personal information which would substantially distress or endanger individuals or their descendants.

conceded that the provision is not "crystal clear" and has "a very narrow range of potential application".³⁹

Independent review after 10 years of operation

3.18 In 2015, the UK government established a cross-party Independent Commission on Freedom of Information to review the Act after 10 years of its operation. The review report was released in 2016, concluding that the Act has been generally working well with the openness and transparency strengthened. Nevertheless, it has also highlighted several areas of inadequacies and suggested improvement measures which include that:

- (a) **coverage of public authorities should be extended** to large organizations/companies contracted by public authorities to provide public services;
- (b) **provisions on the exemption relating to formulation or development of government policy** should be redrafted to clearly reflect the policy intention. There have been instances of confusions and disputes about the scope of exemption on formulation or development of government policy, e.g. it is not clear whether the exemption covers information concerned with the policy implementation stage;
- (c) **statutory time limit** should be introduced for internal review to standardize the relevant procedures; and
- (d) **the appeal mechanism** should be streamlined as the existing appeal structure is lengthy and complex with duplications on the review work of ICO and the First-tier Tribunal.

In response to the review report, the UK government said that it would carefully consider the recommendations but no commitment is made to make legislative changes.⁴⁰

³⁹ See UKSC blog (2015).

⁴⁰ See GOV.UK (2016).

The United States

3.19 The US's Freedom of Information Act (5 U.S.C. § 552) ("FOIA") was enacted in 1966 to provide citizens with a legal right of access to federal government information that is not publicly available. The Act, considered rather comprehensive and broad in scope,⁴¹ has been the basis for FOI laws throughout the US at the state level and around the world. It has undergone a number of amendments over the years to improve its openness and transparency. The former US President Barack Obama issued an executive memorandum on FOIA in 2009 stating that "[FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails". The Office of Information Policy under the Department of Justice is responsible for overseeing FOIA compliance and developing policy guidance on all aspects of FOIA administration.

Coverage of government agencies

3.20 FOIA applies to federal agencies, covering those with substantial independent authority in the exercise of their functions, and those "perform governmental functions and control information of interest to the public"⁴², which include executive and military departments, corporations controlled or owned by the government, independent regulatory agencies, and other establishments in the executive branch of the government. These government agencies are required to designate a senior staff as Chief FOIA Officer to monitor FOIA implementation and ensure appropriate compliance. However, certain parts of the Executive Office of the President with the function solely to advise and assist the President are not covered by FOIA, as these units are not considered to have substantial independent authority.⁴³ Moreover, FOIA does not apply to Congress, courts, and state and local governments⁴⁴.

3.21 Under FOIA, a person can submit an information request to a government agency in writing with a description of the records wanted. The receiving government agency is required to respond to the request within 20 working days after receiving the request, extendable for up to 10 working

⁴¹ See World Bank Group (2014).

⁴² See U.S. Congress (1975).

⁴³ See U.S. Department of Justice (2014a) and (2007).

⁴⁴ All states and some localities have passed their own laws similar to FOIA.

days for unusual circumstances.⁴⁵ Charging of a reasonable fee for processing requests is allowed but it can be waived in certain situations.⁴⁶ In addition to responding information requests from the public, government agencies are obliged to publish information such as regulations, rules and public notices on the Federal Register, as well as proactively disclose information about their statements of policy, manuals, etc.

Exemptions

3.22 FOIA provides for **nine exemption categories** under which information is exempted. These categories include matters such as classified information on national defence and foreign policy information; investigatory records; internal procedures and communications; materials exempted from disclosure by other statutes; confidential business information; and matters involving personal privacy.⁴⁷ Access to and declassification of classified information is governed by an executive order issued by the US President.⁴⁸ For personal or privacy-related information, the Privacy Act expressly stipulates that disclosure is not prohibited if it is required by FOIA.⁴⁹ To determine whether to release or withhold such information under FOIA, government agencies are required to apply a public interest balancing test⁵⁰ when making the decision.

3.23 Some of the exemptions have been litigated and undergone considerable judicial interpretation.⁵¹ This is particularly the case for the exemption that allows withholding of information protected from disclosure by another statute, as there are numerous federal statutes determined by the courts to be qualified as an exemption statute (e.g. statutes on federal election, patent, and bank secrecy). This exemption has thus been criticized as having created "an insurmountable barrier" to disclosure.⁵²

⁴⁵ For example, extension of time limit is allowed when the information request involves a "voluminous" amount of records that must be located, compiled, and reviewed.

⁴⁶ These include the situation where a requestor can show that the disclosure of the requested information is in the public interest in terms of contributing significantly to public understanding of the operations and activities of the government.

⁴⁷ See U.S. House of Representatives (2016).

⁴⁸ It is governed under Executive Order 13526. Unless exempted, records of 25 years old are subject to declassification.

⁴⁹ See section (b)(2) of the Privacy Act (5 U.S.C. § 552a) and U.S. Department of Justice (2015).

⁵⁰ Government agencies are required to balance the privacy interest of persons affected by disclosure against the public interest in disclosure. If the public interest in disclosure outweighs the privacy interest, the information should be disclosed.

⁵¹ See Congressional Research Office (2014).

⁵² See U.S. Department of Justice (2016b) and World Bank Group (2014).

3.24 Inasmuch as the FOIA's exemptions are not mandatory by law, government agencies may make "**discretionary disclosure**" as a matter of their administrative discretion. The exemptions with the broadest discretionary disclosure are Exemption 2, which protects documents that are "related solely to the internal personnel rules and practices of an agency", and Exemption 5, which protects inter-agency or intra-agency memorandums or letters under privileges.⁵³ According to the Department of Justice, the potential for discretionary disclosure necessarily varies from exemption to exemption, government agencies should only exercise this discretion upon "full and deliberate consideration" of all interests involved and foreseeable harm.

3.25 In 2016, there were about 498 000 FOIA requests processed by the government agencies with information disclosed or withheld. Of the total, 35.2% were met in full, 56.2% partially met while 8.6% were denied due to exemption protection. Privacy-related exemptions accounted for over half of the exemptions cited. The next frequently used exemption is the exemption that protects law enforcement techniques, procedures and guidelines; followed by the exemption concerning inter- or intra-agency privileged material.⁵⁴

Exclusions

3.26 Apart from exemptions, special protection has been incorporated in FOIA for three categories of particularly sensitive information, where publicly acknowledging even the existence of the records could cause harm to law enforcement or national security interests. The provisions protecting those records are known as "exclusions", which apply to: (a) pending criminal law enforcement investigation where there is reason to believe that the target is unaware of the investigation; (b) criminal law enforcement agencies to protect against disclosure of unacknowledged, confidential informants; and (c) the Federal Bureau of Investigation to protect against sensitive information.⁵⁵ For these exclusions, federal law enforcement agencies are authorized to "treat the records as not subject to the requirements of [FOIA]".

⁵³ One frequently cited privilege is the deliberative process privilege, which protects documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. The exemption is intended to preserve the quality of agency decisions by encouraging open, frank discussions on matters of policy, protecting against premature disclosure of proposed policies before they are finally adopted, and protecting against public confusion that might result from disclosure of reasons and rationale that were not, in fact, ultimately the grounds for an agency's action. See Reporters Committee for Freedom of the Press (2012).

⁵⁴ See U.S. Department of Justice (2017).

⁵⁵ See U.S. Department of Justice (2012).

Appeal mechanism

3.27 Requestors whose information requests have been denied in full or in part may appeal to the relevant agency for an internal review. There is a statutory time limit of 20 working days for the internal review to be processed, extendable for up to 10 working days for unusual circumstances. There is no provision for an independent administrative appeal, however. If the requestor is still not satisfied with the appeal result, he or she may take legal action against the agency through the District Court, further to the Regional Court of Appeals and finally to the Supreme Court. As an alternative to litigation, the requestor may seek mediation services from the Office of Government Information Services.⁵⁶

3.28 Where the government agency's withholding of information is judged improper by the court, an independent federal investigative and prosecutorial agency, namely the Office of Special Counsel, will initiate a proceeding to determine whether the involved personnel has acted arbitrarily and capriciously. The findings and recommendations it makes will be sent to the agency concerned for follow-up. Nevertheless, referral to the Office of Special Counsel for investigation is found to be rare. According to a recent audit report released by the Government Accountability Office, no court orders have been issued since 2008 requiring the Office of Special Counsel to initiate such a proceeding.⁵⁷

Identified deficiencies and recent improvements

3.29 The Committee on Oversight and Government Reform of the US House of Representatives is responsible for conducting independent oversight of the federal government. In 2015, it conducted a review on the operation of FOIA by gathering feedback from different stakeholders and holding hearings. The review report was released in January 2016, which identified excessive delays in responding to FOIA requests as the biggest barrier faced with access to information under FOIA. For the other barriers, government agencies were found to have a tendency to adopt a presumption in favour of secrecy when responding to FOIA requests, and their way of handling FOIA

⁵⁶ The Office of Government Information Services offers mediation services to resolve disputes between FOIA requestors and agencies as an alternative to litigation. It also reviews agencies' compliance, policies, and procedures on FOIA. The Office is part of the National Archives and Records Administration, and was created through the OPEN Government Act of 2007 in 2007.

⁵⁷ See U.S. Government Accountability Office (2018).

requests also varied. There were also cases of overuse and misapplication of exemptions by government agencies, notably related to deliberative process privilege.

3.30 The FOIA Improvement Act of 2016 signed by the former US President Barack Obama is seen as part of the efforts to strengthen openness and transparency. The new law, incorporating certain proposals put forward by the above Committee and passed in 2016, made a number of amendments to FOIA, including:⁵⁸

- (a) **codifying the "foreseeable harm standard" in FOIA** which was established by the Attorney General in 2009, requiring government agencies to release information under FOIA unless "the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law";
- (b) **establishing a Chief FOIA Officers Council** to develop recommendations for increasing compliance and efficiency in responding to FOIA requests, and to roll out initiatives for increasing transparency and compliance with FOIA's requirements;
- (c) **adding a sunset provision to Exemption 5** by establishing that "the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested"; and
- (d) **requiring government agencies to make records available to the public electronically** if they are releasable and have been requested three or more times.

⁵⁸ See Office of the Press Secretary, the White House (2016).

4. Observations

4.1 In Hong Kong, there is no specific law governing FoI. The Code currently in use is an administrative code without legal backing and subject to various limitations. As such, there have been calls for Hong Kong to follow other jurisdictions in introducing a statutory FoI regime. Currently, over 100 jurisdictions around the world have established their respective FoI laws to give people a legal right of access to information.

4.2 The UK and the US have put in place their statutory FoI regime in 2000 and 1966 respectively, which are considered fairly broad in terms of the number of public authorities covered. In the UK, the FoI law applies to more than 100 000 public authorities including not only government departments but also publicly-owned corporations. Likewise in the US, the FoI law covers all government agencies including executive and military departments, independent regulatory agencies, and corporations controlled or owned by the government. In contrast, the non-statutory Code in Hong Kong applies to B/Ds, registries and administrative offices of courts and tribunals, and two public organizations. For the other public organizations, some have adopted the Code on a voluntary basis with no reporting obligations to the Government.

4.3 In Hong Kong, a public authority may refuse to disclose information falling into one or more of the 16 exemption categories specified in the Code. The UK has allowed for a more extensive exemption regime with 24 exemption categories divided into absolute and qualified exemptions. While the exemption regime is considered broad, the exemption protection may cease to apply when certain types of information become historical records, defined for most parts as records which are more than 20 years old. In comparison, the threshold is 30 years in Hong Kong. In the US, there are nine exemption categories that are considered reasonably clear through judicial interpretation. If disclosure of information is not prohibited by law, government agencies may exercise discretionary disclosure upon consideration of all interests involved. Access to classified records is however not governed by FOIA but an executive order.

4.4 There is no independent administrative appeal regime in the US. Litigation remains a major means of resolving FOIA disputes. In the UK, independent review is firstly conducted by ICO and further appeal is made through the judicial system. There is no legal appeal channel in Hong Kong, and requestors might only lodge FoI-related complaints with The Ombudsman.

4.5 In recent years, the FoI laws in the UK and the US have undergone a number of refinements in order to improve their openness and transparency. For example, the UK has incorporated the dataset provisions requiring public authorities to make available information in re-usable and electronic form when responding to requests concerned with datasets. The US has set out a sunset term of 25 years for the exemption that protects information under deliberative process privilege. In contrast, Hong Kong's Code has not undergone any comprehensive review since its promulgation in 1995.

Table – Salient features on the FOI regime in selected jurisdictions

| | Hong Kong | United Kingdom | United States |
|---|---|--|---|
| (1) FOI regime | <ul style="list-style-type: none"> Code on Access to Information (the "Code"). | <ul style="list-style-type: none"> Freedom of Information Act 2000 (the "Act"). | <ul style="list-style-type: none"> Freedom of Information Act (5 U.S.C. § 552)("FOIA"). |
| (2) Statutory system | <ul style="list-style-type: none"> No. | <ul style="list-style-type: none"> Yes. | <ul style="list-style-type: none"> Yes. |
| (3) promulgation/ enactment year | <ul style="list-style-type: none"> 1995. | <ul style="list-style-type: none"> 2000. | <ul style="list-style-type: none"> 1966. |
| (4) Administration body | <ul style="list-style-type: none"> Constitutional and Mainland Affairs Bureau. | <ul style="list-style-type: none"> Independent authority – Information Commissioner's Office ("ICO"). | <ul style="list-style-type: none"> Office of Information Policy under the Department of Justice. |
| (5) Coverage of organizations | <ul style="list-style-type: none"> Mainly government units. | <ul style="list-style-type: none"> Public authorities at both the national and local levels. Public authorities are in general public bodies exercising public functions. | <ul style="list-style-type: none"> Agencies at the federal level. Agencies cover those with substantial independent authority in the exercise of their functions, and those "perform governmental functions and control information of interest to the public". |
| Inclusion | <ul style="list-style-type: none"> Bureaux and departments, Registries and administrative offices of courts and tribunals, and Two public organizations. | <ul style="list-style-type: none"> Government departments, Legislative bodies, Local authorities, National Health Service, Publicly-funded schools and universities, Police, Other public bodies (e.g. regulatory authorities, advisory boards and committees as listed in Schedule 1 to the Act), and Companies wholly owned by the Crown and/or the public sector. | <ul style="list-style-type: none"> Executive departments, Military departments, Government corporations, Government-controlled corporations, Independent regulatory agencies, and Other establishments in the executive branch of the government. |
| Exclusion of government units | <ul style="list-style-type: none"> – | <ul style="list-style-type: none"> Certain government units (e.g. Security Service) are explicitly excluded from the Act. | <ul style="list-style-type: none"> Certain parts of the Executive Office of the President with a sole function to advise and assist the US President are not covered. |
| Inclusion of the legislature | <ul style="list-style-type: none"> No. | <ul style="list-style-type: none"> Yes, including the UK Parliament, the Northern Ireland Assembly and the National Assembly for Wales. Individual Members of the Parliament and Assemblies are not covered. | <ul style="list-style-type: none"> No. |
| Inclusion of the courts | <ul style="list-style-type: none"> No. | <ul style="list-style-type: none"> No. | <ul style="list-style-type: none"> No. |

Table – Salient features on the FOI regime in selected jurisdictions (cont'd)

| | Hong Kong | United Kingdom | United States |
|---|---|--|--|
| (6) Exemptions | <ul style="list-style-type: none"> • 16 categories. | <ul style="list-style-type: none"> • 24 categories. | <ul style="list-style-type: none"> • 9 categories. |
| Classification | <ul style="list-style-type: none"> • Not specified in the Code. | <ul style="list-style-type: none"> • Absolute exemptions and qualified exemptions. | <ul style="list-style-type: none"> • Not specified in FOIA. |
| Harm test/ prejudice test/ public interest test | <ul style="list-style-type: none"> • Most exemptions are subject to harm test or prejudice test. | <ul style="list-style-type: none"> • Qualified exemptions are subject to public interest test (e.g. ministerial communications and formulation of government policy). • Of the 24 exemptions categories, 18 are wholly or partially subject to public interest test. • No public interest test is required for absolute exemptions (e.g. court records and information provided in confidence). | <ul style="list-style-type: none"> • Privacy-related exemptions are subject to public interest balancing test. • Exemptions allowing for "discretionary disclosure" (e.g. information under deliberative process privilege) require consideration of foreseeable harm. |
| Duration of exemption | <ul style="list-style-type: none"> • Not specified in the Code. • Under the Public Records (Access) Rules 1996, public access is allowed for records in existence for not less than 30 years. | <ul style="list-style-type: none"> • Exemptions generally cease to apply when records reach 20 years old. • Certain exemptions are subject to longer closure period, e.g. trade secrets (30 years). • Certain types of information are protected indefinitely, e.g. national security. | <ul style="list-style-type: none"> • Not specified in FOIA, except for information under deliberative process privilege which has a sunset term of 25 years. • Classified information is not governed by FOIA but an executive order with a general closure period of 25 years. |
| Refusal to confirm or deny existence of information | <ul style="list-style-type: none"> • Yes, for sensitive information. | <ul style="list-style-type: none"> • Yes, for sensitive or potentially damaging information. | <ul style="list-style-type: none"> • Yes, for three types of particularly sensitive information (criminal law enforcement and national security related), which are defined as "exclusions" not subject to FOIA. |
| (7) Appeal mechanism | <ul style="list-style-type: none"> • Internal review, followed by lodging complaints to The Ombudsmen. | <ul style="list-style-type: none"> • Internal review, followed by independent review by ICO. • Unsatisfied requestors may take legal action in the judicial system. | <ul style="list-style-type: none"> • Internal review, with the option of seeking mediation from the Office of Government Information Services under the National Archives and Records Administration created by the OPEN Government Act of 2007. • Unsatisfied requestors may take legal action in the judiciary system. |
| (8) Legislative changes in recent years | <ul style="list-style-type: none"> • No comprehensive review since the promulgation of the Code in 1995. | <ul style="list-style-type: none"> • Amending the 30-year rule for historical records to 20 years. • Adding a new exemption on research information to protect pre-publication research material. • Requiring public authorities to release dataset in re-usable, electronic form. | <ul style="list-style-type: none"> • Adding a sunset provision to the exemption on information relating to deliberative process privilege. • Requiring government agencies to make information publicly available in electronic format if it has been requested three or more times. |

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