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Submission to
the LegCo Panel on Administration of Justice and Legal Services
and the Panel on Security

The Government's failure to discharge the duty of candour and the need for fairness in immigration control and security matters as well as a proper system for managing government records

April 2010

1. The Hong Kong Human Rights Monitor brings to the attention of the LegCo Panel on Administration of Justice and Legal Services, as well as the Panel on Security, the duty of candour which is owed by all decision-makers who are respondents in judicial review proceedings, and in particular on the Government and all its agencies. We urge the Panel on Administration of Justice (and also the Panel on Security) to discuss the issues.

2. The obligation to discharge this duty, and a gross example of Government's conspicuous failure to do so, is highlighted in the recent decision of the Court of Appeal in ***Hong Kong Association of Falun Dafa & Others v Director of Immigration***, CACV 119/2007. This case arose out of a challenge by certain Falun Gong practitioners from abroad who were denied entry into Hong Kong allegedly on "security grounds". The Immigration Department at all times declined to give precise reasons in support of its claim that these persons constituted a security risk and continued to maintain that position after the commencement of, and throughout, the resulting judicial review proceedings, and, indeed, apart from very limited concessions, during the appeal proceedings also.

3. Put simply, the duty of candour is a duty to be full and frank to both the court and the other party or parties in public law litigation. The Court of Appeal in the ***Falun Dafa*** case commented adversely on the "extremely unsatisfactory

way"[1] in which the affirmations filed by the Immigration Department dealt with the fundamental issue of what its reasons really were for denying entry.

4. The absence of substantive contemporaneous records which became apparent from the attempt at discovery, even though a claim of public interest immunity might be advanced in respect of some or all of them, was a matter of concern to Hartmann J in the first instance proceedings (HCAL 32/2003). He remarked that "the reasonable man in the street would probably have difficulty accepting that Government would have destroyed all of its records going to why some 80 people were refused entry to Hong Kong, two of those people having to be placed under physical restraint"[2] and twice wondered about the possibility that there had been some sort of "hoovering" of Government papers[3].

5. The Court of Appeal described as "remarkable" the affirmations of the immigration officers (who were the Falun Gong members' first point of contact with the Hong Kong authorities). It made the following points[4]:

   (1) Although all the deponents referred to the Applicants as "security risks", none provided any details whatsoever as to what these risks were, or even as to whether these risks were regarded as low or high or otherwise;

   (2) No documents were exhibited to support the assertion that the Applicants posed such a risk and the sources of the deponents' knowledge were not revealed;

   (3) No explanation was forthcoming as to why no details or documents were disclosed – for example, no claim to public interest immunity was put forward in justification until 2½ years after the judicial review proceedings commenced.

   (4) In summary then, all that was being said by these deponents in answer to the crucial question of why these Applicants were denied entry into Hong Kong was no more than they posed security risks.

6. At a later stage in the proceedings at first instance, in September 2005, and only after queries had been raised by the judge, did the then Acting Secretary

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1 Judgment of Ma, CJHC, at para 107.
2 HCAL 32/2003, para. 110.
3 Referred to by Ma, CJHC in CACV 119/2007, para. 90.
4 Ibid, para. 35.

for Security (Timothy Tong Hin-ming) make a second affirmation in which he deposed that the Applicants were excluded because intelligence showed that they were "involved with some other persons engaged in organizing disruptive activities which pose threats to public security in Hong Kong"[5]. That was the first time that a claim to public interest immunity was made to justify withholding disclosure of the identities of those "other persons" and details of the disruptive activities.

7. Furthermore, in the course of the proceedings before Hartmann J., in November 2005, the Department eventually revealed, but only after a discovery order had been made, that crucial records relating to the Applicants,[6] had been destroyed a matter of only 3 weeks after they were refused entry and that this was done "in accordance with standard Immigration Department practice". The Court of Appeal, referring to this "dramatic revelation", commented that it required a proper explanation. And not only as part of the duty of candour, "but also because the very act of destruction, without proper explanation, necessarily gave rise to questions of motive for the destruction and to the bona fides of the decisions challenged"[7].

8. But neither an explanation nor elaboration was provided; the Department was, as the Court of Appeal observed, "quite content to leave everyone, including the court, in the dark"[8]. The Court of Appeal observed that at that point the judicial review proceedings had been in existence for 2 years and 9 months, yet until then there had not been any hint that vital records had been destroyed even before the proceedings had commenced. The court raised the following additional concerns:

   (1) If important records had been destroyed, what was the basis of the knowledge for the beliefs asserted by the various deponents for the Government?

   (2) What was the "standard Immigration Department practice"?; and

   (3) What was the status of records that were not in the possession of the Immigration department but were held in other Government Departments? (As to this point, Hartmann J. firmly rejected as a "surprising submission" and "bizarre to say the least" the respondent's

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[5] Ibid, para. 34.

[6] The more technical term "records" in archival science is used in this submission to cover generally the terms "documents", "materials", "files", "records", "paper files" and "computer records" used in the court judgments.

[7] CACV 119/2007, para. 56.

[8] Ibid, para. 61.

"narrow view" that the issues going to precisely why the Applicants were considered security risks did not involve departments of Government outside the Immigration Department – afterall, it had itself relied on an affirmation by a high official of the Security Bureau.[9])

9. The Monitor is deeply concerned about the Government's failure in the ***Falun Dafa*** case to discharge faithfully and fully its duty of candour. It would thus like to propose that the issue be discussed in the relevant LegCo panels. In particular, the Monitor would like the Department of Justice to explain its position with regard to the criticisms made of the respondent's legal advisers by the court and to indicate what measures have been or will be taken to ensure that the Government fulfils its duty of candour in future proceedings.

10. The Monitor is also concerned about the handling of important and sensitive records within the Immigration Department under what it calls the "standard Immigration Department practice". The Monitor urges the Immigration Department to disclose relevant parts of the standard practice.

11. The Monitor particularly notes with concern that whereas the maximum time normally allowed for making an application for leave to apply for judicial review is 3 months from the date when grounds for an application arose, the standard practice apparently requires destruction of documents relating to person on the "watch list" only some 3 weeks after a name is removed from it.

12. The Immigration Department should always be well prepared to encounter judicial reviews. The Monitor would thus like the Immigration Department to elaborate the content of the "standard Immigration Department practice" regarding the handling of sensitive records, and indicate how it intends to amend its present practice if any part of it prevents, interferes with or inhibits it from discharging its duty of candour.

13. The Monitor would also like the Immigration Department to inform the LegCo and the public whether it has approached the Government Records Services, as well as the Privacy Commissioner, as the cases in question involves primarily records of a personal nature, for advice and guidance on how to establish a proper management system of records to ensure government transparency and accountability while at the same time properly addressing all proper legitimate privacy concerns.

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[9] See references at Ibid, para. 63.

14. Records created as a result of any Government functions and activities are evidence of those particular functions and activities. A proper system of managing government records is essential for ensuring government transparency and accountability and is vital to good governance, judicial scrutiny and other independent oversights.[10] Human rights cannot be effectively protected if ~~a~~ government or government officials are allowed to destroy records unfavourable to them or to withhold the relevant records from the judiciary or persons who are adversely affected by their decisions or acts.

15. Many modern jurisdictions have enacted records management laws to ensure that government records are properly created, managed and disposed of, and are properly selected for transfer to the archives. The public have the legal right~~s~~ under such legislation to access such records. Almost all of our neighbouring jurisdictions have enacted laws on managing government records. They include Mainland China, Macau, Taiwan, Singapore, Malaysia, South Korea, Vietnam and Japan. Hong Kong clearly lags behind in the region in this respect.

16. Hong Kong should enact similar legislation on managing and preserving government records. Contrary to what the Government has repeatedly claimed, the current administrative measures adopted, including the so-called mandatory records management guidelines and directives issued in early 2009 to government departments and agencies for compliance, have proven to be ineffective and futile. Before such laws are properly enacted, it is no guarantee that the Immigration Department and all other governmental bodies are required to have a proper system of records for ensuring transparency and accountability.

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[10] The Commissioner on Interception of Communications and Surveillance, Mr. Justice Woo Kwok-hing, has complained that the ICAC had improperly destroyed the records of the interception obtained in a wrongful interception making him impossible to conduct certain checks in discharging his duty. See:
http://www.info.gov.hk/info/sciocs/eng/pdf/Annual_Report_2008.pdf