

**Legislative Council
Panel on Constitutional Affairs**

**Access to Information: Follow-up Actions to the Recommendations of
The Ombudsman's Direct Investigation Report**

Purpose

This paper briefs Members on the Government's follow-up actions pursuant to the recommendations in The Ombudsman's direct investigation report released in March 2014 on the access to information regime in Hong Kong.

Background

2. The Code on Access to Information ('the Code') provides the policy that, for openness and accountability, the Government will make available information that it holds unless there are valid reasons to withhold disclosure. The Code has been applied since 1996 to all bureaux and departments.

3. In 2009, The Ombudsman launched a direct investigation on the effectiveness of administration of the Code. While commending the Government's efforts in promoting awareness of the Code, The Ombudsman made recommendations for more effective administration of the Code in the direct investigation report released in January 2010. The recommendations covered training and promotion within the Government, publicity, monitoring of departmental guidelines and compliance, and extending the coverage of the Code (details are at Annex A). All of the recommendations have since been implemented.

4. The Ombudsman embarked on a further direct investigation in 2013 to review the access to information regime in Hong Kong, drawing comparison from systems and practices in other jurisdictions. The direct investigation report ('the report') was published in March 2014. The recommendations by The Ombudsman in the report and Government's follow-up actions pursuant to these recommendations are set out in the ensuing paragraphs, and summarised in Annex B.

Follow-up Actions to The Ombudsman's Recommendations

Legislation

5. The Ombudsman recommended that consideration be given to introducing legislation to underpin the right of access to information, covering information held by the Government and public organisations, to be overseen by an independent body with enforcement powers. In this regard, the Law Reform Commission ('LRC') is conducting a comprehensive comparative study on the relevant systems and laws in overseas jurisdictions, with a view to considering whether and if so what measures should be implemented to improve the access to information regime in Hong Kong. We shall carefully study any recommendations the LRC may have on this and then consider the way forward.

Oversight

6. The Ombudsman recommended that the Government should explore ways and means by which bureaux and departments can have access to authoritative expert advice and clear guidelines on handling information requests that appear to involve personal data. Pursuant to this recommendation, we have discussed with the Department of Justice and was assured that the relevant unit will provide legal advice to bureaux and departments on requests for access to information when required. Should specific input be required on any special legal issues arising from the subject, counsels experienced in those areas of law will be consulted. Accordingly, we have reminded bureaux and departments of the arrangement for seeking advice on legal issues relating to the Code, including the interface between the Personal Data (Privacy) Ordinance and the Code in case of doubt.

7. The Ombudsman also recommended setting up an independent body to advise the Constitutional and Mainland Affairs Bureau ('CMAB') on matters relating to access to information. We have studied the arrangements in the five jurisdictions covered in The Ombudsman's report (i.e., United Kingdom, Australia, New Zealand, United States, and the mainland of China). From the information to hand, among these jurisdictions only Australia has set up an advisory body on access to information. In Australia, the Information Advisory Committee is established by statute to assist and advise the Information Commissioner, a statutory executive body, on matters relating to the performance of the Information Commissioner's functions. As such, the question of whether an advisory body should be set up is inter-related to the LRC's study on the access to information regime. We shall consider the matter further following the completion of LRC's study.

Coverage

8. In the report, The Ombudsman made an observation that the 22 public organisations which voluntarily adopted the Code or a similar guide had no reporting obligations on the implementation of the Code or guide. To ensure public access to information held by these organisations, Government should subject all of them to the same regulatory regime on access to information. The Ombudsman recommended drawing up and implementing a phased programme of subjecting public organisations, including but not limited to the current 22, to the Code and to the oversight of CMAB.

9. To follow up on this recommendation, we have as a first step consulted the 22 public organisations under The Ombudsman's purview. Five of them indicate that they have adopted the Code already; one which has its own policy on access to information has a plan to adopt the Code in the near future; and the other 16 have put in place corporate policies on access to information which have been drawn up taking into account their unique operational circumstances. Most of these 22 public organisations are statutory bodies established with the express purpose of empowering them to operate independently. One example is the Legislative Council ('LegCo') Secretariat, which is subject to the supervision of the LegCo Commission and the Commission is subject to the direction of the LegCo only. We therefore consider that subjecting them all to the Government's oversight might not be appropriate.

10. We have also conducted a careful examination of the access to information policies of the 17 organisations which have not adopted the Code (since five of the 22 organisations have adopted the Code already as per paragraph 9 above) to see whether their policies have incorporated the key features of the Code (i.e., proactive disclosure; presumption of disclosure; setting out target response times and charging arrangement; availability of internal review and complaint channels; and exemption provisions in refusing information requests). After thorough review and discussions with the public organisations concerned, it is found that 13 organisations among them have incorporated all the key features of the Code in their access to information policies. Two public organisations are updating their access to information policies to include all the key features of the Code, which will be completed shortly. We are continuing discussions with the remaining two public organisations on improving their access to information policies and we expect that they will update their policies within the first quarter of 2015.

11. The on-going study of the LRC on access to information regimes will consider the coverage of the relevant regimes in other jurisdictions and in Hong Kong, including what organisations should be covered. We shall

consider in the light of the LRC's recommendations whether and if so which public organisations in addition to the existing 22 should be included in the access to information regime.

Monitoring of Compliance and Statistical Analysis

12. In the handling of information requests, bureaux and departments are required to apply the provisions of the Code whether or not the requests are made in the specified form under the Code or citing the Code. For the purpose of monitoring bureaux and departments' compliance with the Code, The Ombudsman recommended that the definition of 'information request' should be reviewed, so as to cover those requests made without citing the Code.

13. Pursuant to The Ombudsman's observation that reference could be taken from the working definitions adopted in other jurisdictions, we have studied the practice in a number of jurisdictions. In New Zealand, no statistics on information requests are published. In other jurisdictions including Australia, Canada, Ireland, the mainland of China and Taiwan, the published statistics cover only applications lodged in forms prescribed by the authority and/or requests made with specific reference to legislation. The United Kingdom has a completely different reporting system which covers non-routine information requests (defined as 'requests for information that is not already reasonably accessible to the applicant by other means')¹.

14. Having regard to the practices of different jurisdictions we have studied, we consider that the present coverage of information requests in statistical reporting and monitoring in Hong Kong (i.e., reporting requests made in the specified form under the Code and requests made verbally or in writing with reference to the Code) is reasonable and appropriate.

Increase of Transparency

15. The Ombudsman recommended that the Government should make more information available to the public and consider introducing disclosure logs so as to facilitate the public's understanding and scrutiny of bureaux and departments' performance; and that the Government should significantly increase the amount, breadth and quality of information regularly provided to the public about the Code and its application.

¹ The Ministry of Justice, which is responsible for the statistical reporting and monitoring, has stated in its reports that there is likely to be a degree of inconsistency between monitored bodies' interpretations of the definition of non-routine information requests, and that it would be both uninformative and fundamentally unfeasible to include the provision of routine information in monitoring returns.

16. After studying the practices of nine jurisdictions, we found that disclosure logs were used in three of them (the United Kingdom, Australia and Canada) but not the other six (the United States, New Zealand, Ireland, Japan, Taiwan and the mainland of China). We are nonetheless considering the introduction of disclosure logs on the websites of bureaux and departments. We consider that the disclosure log could take the form of a list showing summary descriptions of the nature of information requested and released under the Code. This proposed form is modelled on the practice adopted in Canada, i.e., institutions will provide a summary of the request that reflects the final text of the request after clarification was obtained from the applicant. The proposed disclosure log could facilitate members of the public to understand what types of information they can expect to obtain from individual bureaux and departments under the Code.

17. To provide more information to the public about the operation of the Code, the following information has been added to the Code on Access to Information website (<http://www.access.gov.hk>):-

- (a) press releases relating to statistics of the Code which are issued on a quarterly basis;
- (b) television and radio Announcements of Public Interest relating to the Code;
- (c) address, email, and fax number to which enquiries relating to the Code could be sent; and
- (d) an updated list of precedent cases concluded by The Ombudsman on bureaux/departments' handling of information requests.

18. In addition, we are making preparations for the following information to be added to the Code's website:-

- (a) statistics of information requests handled by individual bureaux and departments and the result of processing in the current quarter;
- (b) statistics of refusal cases with breakdown by specific exemptions under the Code and by the handling bureaux/departments; and
- (c) questions and answers relating to the administration of the Code.

Regular Review and Provision of Compendium of Cases

19. The Ombudsman recommended establishing a mechanism for regularly reviewing the Code to keep up with the times, in particular its exemption provisions to ensure that they are not excessive and are clearly defined, and that their term of validity is specified where possible. We note that the on-going study by the LRC on the access to information regime will cover, inter alia, how the relevant regime is implemented in other jurisdictions, including how the exemption provisions in the Code compare with exemption provisions in other jurisdictions. LRC's deliberations and any suggestions it may make in this regard will be considered as part of the Government's overall consideration of the LRC's final recommendations in due course.

20. The Ombudsman's report also recommended devising and maintaining a compendium of cases on specific topics relating to the administration of the Code and the application of exemptions to facilitate understanding by bureaux/departments and the public. We have already implemented this recommendation by publishing on the Code on Access to Information website an updated list of precedent cases as mentioned in paragraph 17(d). We shall update the list of precedent cases regularly by adding new cases concluded by The Ombudsman.

Giving of Advice and Training

21. The Ombudsman recommended that the Government should enhance publicity to promote to the public the channels to seek advice on matters relating to the Code, and to provide more advice and support to bureaux and departments to help them with the interpretation and application of the Code including the exemptions. As set out in paragraphs 6 and 15-18 above, we have strengthened the provision of advice and support to bureaux and departments and the public in relation to the implementation of the Code. We will continue to strengthen publicity through various channels.

22. The Ombudsman recommended strengthening staff training, notably to include in the training exposure to knowledge and best practices of implementing legislation on freedom of information in other jurisdictions. We have implemented the recommendation by including relevant materials in the training for staff. The information on practices in overseas jurisdictions for such training will be updated from time to time.

Way Forward

23. We will continue to take appropriate measures to improve the access

to information regime in Hong Kong.

Advice Sought

24. Members are invited to take note of the content of this paper.

**Constitutional and Mainland Affairs Bureau
December 2014**

**Recommendations by The Ombudsman in the Direct Investigation Report
“Effectiveness of Administration of Code on Access to Information”
Published in 2010**

The Ombudsman commends CMAB on its proactive and positive efforts in promoting awareness of the Code. For more effective administration of the Code, he recommends the following measures:

Training and Promotion within Government

1. To organise more, and timely, training for AIOs and remind departments to provide AIOs with appropriate guidelines to assist their implementation of the Code;
2. To work with departments to organise more training for other staff directly or through their departments;

Publicity

3. To arrange regular publicity for the Code;
4. To add a Chinese version of the Guidelines to the Government webpage on the Code;
5. To require all departments’ homepages to introduce the Code briefly and to be hyperlinked to the webpage on the Code;

Promotion within Government

6. To prepare a dossier on the findings of our inquiries and investigations and the results of review cases of various departments for reference in staff training;
7. To update and re-circulate regularly relevant circulars;
8. To update the list of frequently asked questions and precedent cases regularly, taking into account the development of the dossier mentioned in (6);

Monitoring of Departmental Guidelines

9. To provide advice to departments to ensure that departmental guidelines are clear, correct and up-to-date;

Monitoring of Compliance

10. To keep the format of the quarterly return under regular review; and

Extension to Public Bodies

11. To follow up with other public bodies within The Ombudsman's purview for them to adopt the Code or some similar guide.

**Recommendations by The Ombudsman in the Direct Investigation Report
“The Access to Information Regime in Hong Kong” Published in 2014 and the Latest Position of Follow-up Actions**

Recommendations	Latest Position
<p>Legislation</p> <p>1. The Ombudsman recommends that Government consider introducing a law to underpin citizens’ right of access to information (‘ATI’), covering information held by both Government bureaux and departments (‘B/Ds’) and public organisations, to be overseen by an independent body with enforcement powers.</p>	<p>We shall consider the way forward after the conclusion of LRC’s study.</p>
<p>Oversight</p> <p>2. Government should explore ways and means by which B/Ds can have access to authoritative expert advice and clear guidelines on handling information requests that appear to involve personal data.</p> <p>3. Government should set up an independent body to advise the Constitutional and Mainland Affairs Bureau (‘CMAB’) on matters relating to ATI.</p>	<p>We have implemented this recommendation.</p> <p>We shall consider the way forward after the conclusion of LRC’s study.</p>

<p>Coverage</p> <p>4. Government should draw up and implement a phased programme of subjecting public organisations to the Code and to CMAB’s oversight.</p>	<p>For the 22 public organisations under the Ombudsman Ordinance, while it would not be appropriate to subject all of them to the Code and monitoring by the Government, we have followed up with them to review their access to information policies and reporting arrangements.</p> <p>On the question of whether public organisations outside The Ombudsman’s purview should be covered by the ATI regime, we shall consider the way forward after the conclusion of LRC’s study.</p>
<p>Monitoring of Compliance and Statistical Analysis</p> <p>5. Government should review its definition of “information request” for the purpose of monitoring B/Ds’ compliance with the Code, so as to cover those requests made without citing the Code.</p>	<p>We have studied the practices of different jurisdictions, and consider the existing practice reasonable and appropriate.</p>
<p>Increase of Transparency</p> <p>6. Government should make more information available to the public and consider introducing disclosure logs so as to facilitate the public’s understanding and scrutiny of B/Ds’ performance.</p>	<p>We are implementing this recommendation by phases.</p>

<p>7. Government should significantly increase the amount, breadth and quality of information that it regularly provides to the public about the Code and its application.</p>	<p>We are implementing this recommendation by phases.</p>
<p>Regular Review and Provision of Compendium of Cases</p> <p>8. Government should establish a mechanism for regularly reviewing the Code to keep up with the times, in particular its exemption provisions to ensure that they are not excessive and are clearly defined, and that their term of validity is specified where possible.</p> <p>9. Government should devise and maintain a compendium of cases on specific topics relating to the administration of the Code and the application of exemptions to facilitate both B/Ds' and the public's understanding.</p>	<p>We shall consider the way forward after the conclusion of LRC's study.</p> <p>We have implemented this recommendation.</p>
<p>Giving of Advice</p> <p>10. Government should enhance publicity to promote the channels for the public to seek advice on matters relating to the Code.</p> <p>11. Government should provide more advice and support to B/Ds to help them with interpretation and application of the Code, particularly for those exemptions in the Code that are subject to frequent queries and complaints from the public.</p>	<p>We are implementing this recommendation by phases.</p> <p>We have implemented this recommendation.</p>

Training

12. Government should reinforce training for staff, including exposure to knowledge and best practices on implementation of freedom of information legislation in other jurisdictions.

We have implemented this recommendation.