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政務司司長辦公室轄下行政署



The Government of
The Hong Kong Special Administrative Region
Administration Wing,
Chief Secretary for Administration's Office

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Ms Joanne MAK
Clerk to Panel on Constitutional Affairs
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms MAK,

Panel on Constitutional Affairs

**Joint letter from Hon Charles Peter MOK,
Hon Tanya CHAN and Hon Dennis KWOK**

Thank you for your letter of 8 May 2017 seeking the Government's preliminary comments on a member's bill, namely the draft "Public Records Bill", proposed by Hon Charles Peter MOK, Hon Tanya CHAN and Hon Dennis KWOK. Attached at **Annex** please find the Government's preliminary comments.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Bobby Cheng', written over a light blue circular stamp.

(Bobby CHENG)

for Director of Administration

Encl.

Panel on Constitutional Affairs

**Joint letter from Hon Charles Peter MOK,
Hon Tanya CHAN and Hon Dennis KWOK**

The Clerk to the Panel on Constitutional Affairs wrote to the Director of Administration on 8 May 2017 seeking the Government's preliminary comments on a member's bill, namely the draft "Public Records Bill", proposed by Hon Charles Peter MOK, Hon Tanya CHAN and Hon Dennis KWOK.

2. Having conducted a preliminary study of the draft "Public Records Bill" ("the Bill"), we set out our initial observations on the Bill in the ensuing paragraphs. Given the short time available, however, this represents our preliminary views on a few key aspects of the Bill and should not be taken as a complete and final response of the Government to the Bill.

3. We would also like to point out that the Archives Law Sub-committee formed under the Law Reform Commission (LRC) in May 2013 has been reviewing the current regime relating to the management and preservation of, and access to government or public records with a view to considering whether reform is needed. The Government will examine carefully the recommendations to be made by LRC before mapping out the way forward on the question of whether a law on public records and archives should be introduced in Hong Kong.

4. In making our preliminary assessment of the Bill, we have also taken into account the principle set out in Article 74 of the Basic Law which provides:

"Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief

Executive shall be required before bills relating to government policies are introduced”.

Members cannot introduce any bills that have any substantive effect on (and hence “relate to”) “public expenditure”, “political structure” or “operation of the government”. Members’ bills relating to “government policies” within the meaning of Article 74 of the Basic Law may not be introduced except with the written consent of the Chief Executive.

Observations on the Bill

Establishment of a new authority on archives and records management

5. The Bill seeks to establish a new authority on archives and records management, namely, the Public Archives and Records Authority (“the Authority”) (section 3(1)). The Government Archivist, appointed by the Chief Executive (CE), would be the head of the Authority (sections 8(2) and 8(4)). Section 9(9) of the Bill also states that in performing the duties of records inspection and audit, appraisal, disposal and transfer, etc., the Government Archivist is not subject to the direction or control of any person or any authority. Under the current records management system in Hong Kong, the Government Records Service (GRS), headed by the Government Records Service Director (GRSD), is the Government’s central records management and service agency. It is placed under the Administration Wing of the Chief Secretary for Administration’s Office. The proposed establishment of the new Authority under the Bill will be substantially different from the existing institutional arrangements relating to GRS and GRSD, thereby posing significant implications on records and archives management policies, operation and structure of the Government as well as public expenditure.

Extending the records management regime to cover all public agencies

6. The Bill seeks to bind the Government and all public agencies which are defined as “any existing, defunct or ceased institution, body or individual funded wholly or more than 50% by public money that creates, receives or maintains records in exercising a public function or delivering a public service”, including “any commission, authority, board, committee, task force, corporation, service, court, tribunal or any instrumentality

exercising any function of any branch of the executive, judicial and legislative power of the Hong Kong Special Administrative Region” (sections 2 and 5). It would also include “any organisation established for a public purpose, any commission or board of inquiry ordered by the CE or CE-in-Council, and anybody, office or institution declared by law to be a public office” (section 2).

7. Currently, the Government’s mandatory and administrative requirements on records management are applicable only to Government bureaux and departments (B/Ds) and they do not cover public organisations¹. Taking into account the some 470 advisory and statutory bodies set out in the list compiled by the Home Affairs Bureau² as well as the large number of organisations receiving funding or subvention from the Government, the provisions of the Bill to cover all public agencies would significantly enlarge the scope of the records management regime in Hong Kong, thereby creating serious and far-reaching implications on records management policies, operation of the Government, the Government-funded and subvented sector and public expenditure. To enable all public and subvented agencies to follow the new legal requirements as well as the recordkeeping and records management standards and procedures, a thorough assessment will need to be conducted to assess the public expenditure required for enhancing the institutional capabilities for a wide range of records management functions including training, storage and preservation of archival records. Prior consultation with the many public and subvented agencies concerned to ascertain their readiness would also be necessary.

Establishment of the Archives and Records Council

8. The Bill seeks to create a new independent Archives and Records Council (“the Council”) (section 12). The Council would be given a wide range of responsibilities and powers, including advising the CE and the Government Archivist on matters relating to public records and archives, determining records access appeals, making recommendations to the CE on the appointment of the Government Archivist, and advising the CE and the

¹ With the exception of the Independent Commission Against Corruption and the Hong Kong Monetary Authority.

² See the homepage “Advisory and Statutory Bodies” (available at: http://www.hab.gov.hk/en/policy_responsibilities/District_Community_and_Public_Relations/advisory.htm)

Government Archivist on the operation and compliance of the Ordinance to be enacted, etc. Currently, most of the above powers and responsibilities are vested with GRS and GRSD. The proposed establishment of the Council under the Bill would pose significant implications on the policies and operation of the Government on archives and records management.

New statutory duties on records management

9. Sections 13 to 16 of the Bill seek to impose statutory duties upon all public agencies in relation to the management of public records throughout their entire life cycle from creation to disposal and transfer of public records. For instance, under the Bill, heads of public agencies assisted by their designated staff are responsible for creating and maintaining public records in an accurate, complete, reliable and usable manner, and in conformity with the standards, recommendations and guidance issued by the Government Archivist (section 13(1)). On records disposal, heads of public agencies shall ensure that no public records are disposed of without the prior written consent of the Government Archivist (section 14(4)). All provisions on public records in the Bill are applicable to the electronic records created, received or kept by public agencies (section 16). Heads of public agencies must ensure that there is adequate technical capability to ensure authenticity, reliability, integrity and usability of the electronic records in their office against modification, unauthorised access, deletion or technological obsolescence (section 16(4)(b)).

10. To fulfil these new statutory responsibilities imposed on them, public agencies would need to enhance their manpower and improve their modus operandi by, for example, upgrading their systems on records management and implementing new systems for digital preservation. It is expected that not all public agencies would have the necessary expertise and resources in carrying out the statutory duties. A more in-depth assessment would be required.

New statutory requirements on transfer of records

11. The Bill seeks to provide for the Government Archivist to direct and arrange the transfer of records appraised and nominated as public archives to the archival repository of the Public Records Office or any place of deposit as early as practicable and in general no later than 20 years

from the record creation date (section 9(3)(a)). Heads of public agencies shall be responsible for cooperating with the Government Archivist to meet this new statutory time frame on transfer of records (section 15(1)).

12. Currently, B/Ds should follow the Disposal Authorities approved by GRS in transferring time-expired records to GRS for appraisal or retention. Adopting a new statutory time frame of “no later than 20 years” for records transfer represents a major departure from the existing policy and would pose significant implications on the operation of the Government as well as public expenditure. According to the experience of the National Archives of the United Kingdom, reduction of the deadline for transfer from 30 to 20 years is being implemented over a ten-year period using a phased approach so as to make this major change manageable and affordable. We expect that the new statutory deadline to be imposed by the Bill on records transfer would significantly increase the workload and departmental expenses of GRS and B/Ds. A detailed study would be required to thrash out the implications.

New 20-year Access Rule

13. The Bill seeks to introduce a new 20-year Access Rule (sections 17 to 21). Under such Rule, unclassified public archives must in general be made available for public access 20 years after creation or earlier, whereas classified public archives must be reviewed for public access 20 years after creation or earlier by public agency that created the records or by its successor in function (sections 17(2) and 17(3)). Public agencies may request extended closure for their records based on the grounds provided in section 17(4). Any person may apply to the Government Archivist for access to a closed archival record under section 19. If any applicant is not satisfied with the result of the application, he or she may appeal to the Council in writing according to section 20 of the Bill.

14. The above represents a significant departure from the current archives access policy. At present, access to archival records kept by GRS is managed through the Public Records (Access) Rules 1996. In general, public access will be allowed 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. The GRSD may, in his discretion and in accordance with general instructions given to him by

the Chief Secretary for Administration, permit any person to inspect closed records held in GRS. For access to closed records, members of the public may apply in writing to GRS. Upon receipt of the applications, GRS will seek the views of the records originating or transferring B/Ds on whether access to the records should be granted. If B/Ds consider that the whole or a certain part of the records is not suitable for public inspection, they are required to provide reasons with reference to Part 2 of the Code on Access to Information. Since 2015, GRS has institutionalised the appeal/complaint channel by reminding the public of their right to seek an appeal to the Director of Administration on a decision on access request for closed records and/or to lodge a complaint with The Ombudsman if they consider there is any maladministration in the handling of the access application. The 20-year Access Rule proposed under the Bill will not only impose new statutory requirements on the archival management work but also have implications on the government policy on access to information.

Criminal liability on all civil servants and members of public agencies in relation to non-compliance, and other sanctions

15. The Bill seeks to impose criminal liability on the following non-compliance acts:

- (1) for those staff or member of a public agency who fails to create or manage public records according to the recordkeeping and records management requirements pursuant to sections 13 to 16, he or she is liable on conviction to a fine and imprisonment for 2 years (section 23(1));
- (2) for any person who removes or destroys any public records/archives without proper authorization, and wilfully mutilates any public records/archives, he or she is liable on conviction to a fine or imprisonment for 3 years (section 23(2));
- (3) for any person who denies access to public records/archives without a reasonable cause, he or she is liable on conviction to a fine or imprisonment for 1 year (section 23(3)); and
- (4) for any person who commits illegal export of public records/archives, he or she is liable on conviction to a fine or imprisonment for 3 years (section 24).

16. At present, non-compliance with records management requirements is subject to civil service disciplinary actions instead of criminal sanction under the laws of Hong Kong. The new criminal liability proposed to be introduced under the Bill will have profound implications for the prevailing policy on similar misconducts. Making reference to the archives laws in some overseas jurisdictions such as Australia, the United Kingdom, Ireland, Singapore and New Zealand, we note that there is no sanction against denial to access as in item (3) of paragraph 15 above. Provisions on sanction in the archives law in these overseas jurisdictions mainly are confined to the behaviour like items (2) and (4) above. While New Zealand has a general provision in its archives law against non-compliance to statutory recordkeeping requirements, the sanction is a fine rather than imprisonment. The stringent punishment proposed to be introduced under the Bill will require detailed assessment of its implications on the civil service as well as members of the public agencies. Thorough consultation would have to be carried out in the first place.

Implications on other existing laws and policy areas

17. The Bill seeks to introduce new provisions to address the incongruities between the Bill and other existing legislation in Hong Kong relating to archives and records management. For example, section 29 of the Bill proposes that making available or providing a copy of public archives for inspection, internal processing, preservation or educational activities by the Government Archivist does not infringe on any government copyright or private copyrights. Obviously, such provision will have direct implications on the Copyright Ordinance (Cap. 528). Section 30 and section 31 seek to cater for the requirements of personal data and census and statistics records, thereby creating implications on the Personal Data (Privacy) Ordinance (Cap. 486) and Census and Statistics Ordinance (Cap. 316) respectively. The impact of the above provisions on the policies and operation of the relevant B/Ds would need to be fully examined.

Conclusion

18. As requested by the Panel, we have set out in the above paragraphs our preliminary comments on the draft "Public Records Bill". Given the

limited time available, the above assessment should not be taken as a complete and final response to the Bill by the Government. Nonetheless, in the various areas highlighted above, it is abundantly clear that the Bill will have substantive effect on public expenditure, government policies as well as operation of the Government. As explained in paragraph 3 above, the Archives Law Sub-committee of LRC has been studying the subject of archives law and reviewing the current records management regime in Hong Kong. The Government will keep in view the study outcome and examine carefully the recommendations to be made by LRC before mapping out the way forward.

Administration Wing
Chief Secretary for Administration's Office
May 2017