香港特別行政區政府
保安局

香港添馬添美道 2 號

本函檔號 Our Ref.: SBCR 1/2361/16
來函檔號 Your Ref.: LS/B/6/18-19
電話號碼 Tel. No.: (852) 2810 3435
傳真號碼 Fax. No.: (852) 2868 9159

The Government of the
Hong Kong Special Administrative Region
Security Bureau

2 Tim Mei Avenue, Tamar, Hong Kong

(By E-mail)

11 February 2019

Miss Joyce CHAN
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Miss Chan,

Fire Safety (Industrial Buildings) Bill

Thank you for your letter of 11 January 2019 on the captioned. With respect to the matters raised in your letter, our response is set out at **Annex**.

Yours sincerely,

(Alex Chan)
for Secretary for Security

c.c. Director of Buildings (Attn: Mr Ken Ng) (Fax: 2136 8203)
Director of Fire Services (Attn: Mr Terrance Tsang) (Fax: 2312 0376)
Department of Justice (Attn: Miss Elaine NG) (Fax: 3918 4613)

Annex

Fire Safety (Industrial Buildings) Bill

Response to the issues raised in the letter of 11 January 2019 from the Assistant Legal Adviser

Clauses 7 and 11 – directing owner or occupier to take other measures and reasonable excuse for non-compliance with a fire safety direction

In enforcing the Fire Safety (Industrial Buildings) Bill (the Bill) upon enactment, authorized officers under the Enforcement Authorities (EAs) (i.e. the Director of Buildings (DB) and the Director of Fire Services (DFS)) will inspect the industrial buildings (IBs) regulated by the Bill to assess the existing fire safety construction as well as fire service installations or equipment (FSI) in the buildings. Upon inspection, if any fire safety requirement listed in Schedule 1 or 2 to the Bill is found to be necessary for improving the fire safety standard of the buildings concerned, fire safety directions (FSDns) will be issued to the owners and/or occupiers concerned. If it is apparent that any particular fire safety requirement listed in Schedule 1 or 2 to the Bill is infeasible, the EAs may direct the owner and/or occupier to comply with an alternative measure other than a requirement stipulated in the Schedules by specifying so in the FSDns. Under such circumstances, the EAs would apply clause 7 on its own initiative.

2. On the other hand, after receipt of an FSDn with any requirement(s) in Schedule 1 or 2 to the Bill, the owner or occupier concerned may encounter difficulties in compliance (for instance due to structural integrity). In the circumstances, the owner or occupier may apply, with justifications, to the EAs for taking alternative measure(s) in place of the requirement(s) concerned in the Schedules. The EAs will adopt a flexible and pragmatic approach in considering each application. Where an alternative measure is accepted by an EA, a fresh FSDn will be issued to the owner or occupier concerned to supersede the previous one.

3. The above application procedure is administrative in nature and often involves interaction between the EAs and the owners, occupiers or their professional representatives. Indeed, similar administrative mode of operation has worked effectively in the implementation of the Fire Safety (Commercial Premises) Ordinance (Cap. 502) and the Fire Safety (Buildings) Ordinance (Cap. 572). We consider it unnecessary to include express provisions for this purpose in the Bill.

4. The fire safety requirements listed in Schedules 1 and 2 to the Bill are by and large replaceable by appropriate alternative measures, but the necessity and practicability of adopting such alternative measures should be assessed on a case-by-case basis. For instance, the provision of emergency lighting and exit signs (section 1(1)(d) and (e) of Schedule 1) is relatively simple in nature. We do not envisage that there will be insurmountable difficulty for owners to comply with these simple requirements. Alternative measures in place of them may not be well justified.

Clauses 8 and 13 – time limit for compliance

5. Under clauses 8 and 13, an FSDn or a fire safety compliance order (FSCO) must specify the time limit for compliance with it, and the time limit must allow reasonable time for compliance. Our policy intent is that the relevant owner or occupier should **complete** the fire safety improvement works within the time limit, rather than merely having commenced the works, in order to be considered as having complied with the requirements.

6. Under clause 9, an EA that has issued an FSDn may from time to time amend or withdraw it by written notice. If satisfied that the owner or occupier concerned cannot complete the required works within the time limit specified in the FSDn with solid justifications (e.g. more time is required for selecting the consultants and/or contractors for the improvement works), the EA may grant extension of the specified time limit in the FSDn on a case-by-case basis. Similarly, when an FSCO is in force, the owner or occupier may apply to the magistrate for extension of the specified time limit, and the magistrate may vary the FSCO pursuant to clause 14.

Clauses 13 and 18 – right of IB owner or occupier to be heard

7. Clause 17 provides for the application by an EA to the District Court for a prohibition order while clause 18 empowers the District Court to make a prohibition order prohibiting the occupation of a building or a part of a building. Specifically, clause 18(1) specifies that "*(a)n application under section 17* [an application for a prohibition order] *is to be heard and determined in accordance with the rules of court made under section 72 of the District Court Ordinance (Cap. 336)*" (i.e. Rules of the District Court (Cap. 336H)).

8. While there is no express provision in clauses 17 and 18 on an

owner or occupier's right to be heard in relation to a prohibition order, the owner or occupier would have a right to be heard as a party to the application by virtue of clauses 17(3) and 18(1).

9. Under clause 17(3), before making an application for a prohibition order, an EA must give at least 7 days' notice to the owner or occupier concerned. The owner or occupier concerned would thus be named as a Respondent to the application, who is a party to the proceedings. Since an application under section 17 is to be heard and determined in accordance with the Rules of District Court (Cap. 336H) pursuant to clause 18(1), the owner or occupier, as the Respondent, will have an opportunity to be heard at the hearing.

Clauses 11, 16 and 23 – penalties for non-compliance

10. Clause 11 is related to criminal offences of non-compliance with FSDns issued by the EAs. If an owner or occupier fails to comply with an FSDn without reasonable excuse, the owner or occupier is guilty of an offence and is liable upon conviction to a fine at level 4 (i.e. $25,000) and a further fine of $2,500 for each day during which the failure continues.

11. Clause 16 concerns the non-compliance with FSCOs made by magistrates. It is stipulated that failure to comply with an FSCO will be an offence and the owner or occupier will be liable upon conviction to a fine at level 5 (i.e. $50,000) and a further fine of $5,000 for each day during which the failure continues.

12. For clause 23, it is a provision concerning two offences related to prohibition orders made by the District Court under clause 18 –

(i) clause 23(1) and (2) relates to the offence where a person, without lawful permission, occupy a building or part of a building when a prohibition order is in force without reasonable excuse. Failure to comply with a prohibition order is an offence and is liable to a fine of $250,000 and imprisonment for 3 years upon conviction; and a further fine of $25,000 for each day during which the failure continues; and

(ii) clause 23(3) and (4) provides that when a prohibition order is in force, if the owner or occupier fails, without reasonable excuse, to take practicable steps to ensure that the building or its relevant parts are effectively secured against entry, the owner or

occupier will be guilty of an offence and be liable to a fine at level 4 (i.e. $25,000) and imprisonment for 6 months upon conviction.

13. When proposing the penalties in clauses 11, 16 and 23, we have made reference to the penalties for similar offences under Cap. 502 and Cap. 572. The proposed penalties are considered proportionate to the proposed offences and consistent with the similar offences under sections 5(7), 6(8) and 9 of Cap. 502 as well as sections 5(8), 6(8) and 9 of Cap. 572.

Clauses 14, 20 and 21 – revocation of fire safety compliance order, revocation of prohibition order, and discharge of prohibition order

14. When an FSCO or a prohibition order is "revoked" or when a prohibition order is "discharged", the respective order would cease to be in force under clauses 15(1)(b) and 22(3). The difference between the "revocation" and "discharge" of an order depends on whether the EA is satisfied that the fire safety requirements relating to the order have been complied with, i.e. whether the EAs have issued a certificate of compliance.

15. For scenario of "discharge" (解除) of a prohibition order under clause 20, it is stipulated that the EAs must, as soon as practicable after issuing a certificate of compliance, apply to the District Court for discharge of the order. It means that "discharge" of a prohibition order will only come into play when the EA is satisfied that the fire safety requirements related to that prohibition order have been complied with, such that the EAs would issue a certificate of compliance and apply to the District Court for discharge of the order.

16. The "revocation" (撤銷) of an FSCO and a prohibition order under clauses 14 and 21 respectively is a mechanism where the owners or occupiers concerned can apply to the magistrate for waiving the fire safety requirements as required in an FSCO, or to the District Court for removing the prohibition on occupation by a prohibition order, without a certificate of compliance from the EAs. At the time of "revocation", the EA may not be satisfied that the owner or occupier has fully complied with the requirements, but as long as the owner or occupier has strong justifications, they may be presented to the magistrate or the District Court, which are empowered to revoke the FSCO or prohibition order concerned, for consideration.

Clause 24 – service of copy of prohibition order

17. Clause 24(1)(b) is intended to be read in conjunction with clauses 48 and 49 of the Bill. Clause 24(1)(b) states that "*(a)s soon as practicable after the District Court makes a prohibition order for a building or a part of a building, the enforcement authority must in another way serve a copy of the order on the owner or occupier concerned*". The term "a copy of the order" refers to a copy of the prohibition order, and is regarded as a document to be served by an EA.

18. Clauses 48 and 49 are provisions concerning service of documents to non-body corporate and body corporate respectively. Both clauses start with "*(i)f a document for a building or part of a building is given to or served on a person under this Ordinance by an enforcement authority…*" (emphasis added). As a copy of the prohibition order under clause 24(1)(b) is a document to be served by an EA under the Bill, the means of service of documents provided under clauses 48 and 49 are applicable. Since clauses 48 and 49 are applicable to all the clauses in the Bill that provide for the giving or service of documents by an EA (including clause 24), we consider it unnecessary to have specific references to clauses 48 and 49 under clause 24 or the other clauses.

Clause 28 – rejecting request for certificate of compliance

19. A certificate of compliance is proof that the EA is satisfied that the fire safety requirements under the Bill have been complied with. As the requirements are imposed by the EAs, who are the statutory authorities for the regulation of FSI as well as fire safety construction, the EAs are the ultimate authorities to determine whether the requirements have been fully complied with from the fire safety perspective. The EAs are already required under clause 28 to, by written notice, inform the owner/ occupier of the rejection with reasons. If an owner or occupier is dissatisfied with a rejection of a request for certificate of compliance, the owner or occupier may raise their concerns against the EA in question for consideration.

20. Separately, while an FSCO or a prohibition order is in force, the owner or occupier concerned may apply to the magistrate or the District Court for revocation of the FSCO or the prohibition order respectively. For instance, one of the circumstances under which an owner or occupier may apply for revocation of a prohibition order is that his request for a certificate of compliance has been rejected (clause 21(1)(a) refers). This

revocation mechanism in effect enables aggrieved owners or occupiers to challenge the rejection decision of the EAs.

Clause 32 – publishing information

21. Clause 32 reads "*(i)n order to provide appropriate information to the public, an enforcement authority may upload onto its departmental website, or in another way publish, information about a fire safety direction, a fire safety compliance order, or a prohibition order, for a building or a part of a building, including but not limited to –*

(a) the serial number of the direction or order;
(b) the address of the building or part;
(c) the date of the direction or order; and
(d) the compliance status of the direction or order."

22. The initiative of publishing information about FSDns, FSCOs and prohibition orders on the websites of the Buildings Department (BD) and the Fire Services Department (FSD) seeks to enable members of the public to obtain the relevant information and enhance their awareness of the outstanding legal liabilities (if any) of the IBs. When formulating the proposal, reference was also made to BD's online portal for searching for the issuance and compliance status of Mandatory Building Inspection Scheme / Mandatory Window Inspection Scheme notices[1]. While paragraphs (a) to (d) of clause 32 basically cover all the information that the EAs intend to publish online, it is prudent to allow flexibility for the EAs to upload other types of information in future, after having consolidated experience from implementing this initiative for some time.

23. We have thoroughly considered the personal data privacy issue when proposing the types of information to be published online in the Bill. The four types of information as presently proposed under clause 32 do not relate directly or indirectly to any living individual, nor are they data from which it is practicable for the identity of the individual to be directly or indirectly ascertained. Therefore, such information should not constitute "personal data" as defined under the Personal Data (Privacy) Ordinance (Cap. 486, PDPO), and non-compliance with PDPO is not an issue.

24. In case the EAs need to expand the scope of information to be uploaded on their departmental websites in future, they will carefully consider any implications, in particular with respect to personal data

[1] The link to the portal is : https://www.bd.gov.hk/en/resources/online-tools/search/index.html.

privacy and consult the Office of the Privacy Commissioner for Personal Data as appropriate.

Clause 36 – power to enter IB without warrant

25. Under clause 36(1), if an authorized officer knows or reasonably believes that an IB is one to which the Bill applies, the officer may enter and inspect the building or part of it without warrant. Notwithstanding that an authorized officer enjoys the power of entry without warrant under this clause, we envisage that, in practice, when an authorized officer intends to carry out the initial inspection of an IB, the officer will first notify the owner or occupier concerned in writing in advance. However, if warrantless entry to the IB concerned by an authorized officer (as provided under clause 36(1)) has been refused, or is reasonably expected to be refused, or if he has not been able to contact the owner or occupier after making reasonable efforts, the officer concerned may apply to a magistrate for a warrant for entry pursuant to clause 37.

26. Generally speaking, due to the incompatibility of industrial uses and domestic uses, there should not be any domestic part in the IBs to be regulated under the Bill. A part that is being used for domestic purposes in an IB is highly suspicious to be illegal domestic premises. When an authorized officer carries out inspection, the officer would not have prior knowledge as to whether the premises are being used for illegal domestic purposes. That said, the authorized officer will normally follow the aforesaid practice of giving prior notice in writing for initial inspection to the owner or occupier. If the request for entry and inspection is denied, the authorized officer may apply to the magistrate for a warrant.

Clause 54 – power to make regulations

27. Clause 54 empowers the Secretary for Security (S for S) to make regulations for the better carrying into effect of the provisions and purposes of this Ordinance. As the Bill has already comprehensively set out the legal framework of requiring owners and occupiers of pre-1987 IBs to upgrade the fire safety standards of such buildings, we currently do not envisage any particular matter which warrants the making of regulations in the near future. Indeed, although Cap. 502 and Cap. 572 each consists of a similar rule-making provision, no subsidiary legislation has been made under them since enactment. Nevertheless, we see merits in leaving flexibility for S for S to make regulations under the Bill should such a need arise in future. Such regulations, if ever made, will be

introduced into the Legislative Council for scrutiny.

Clause 57 – amendment to section 4 of Cap. 502

28. Section 4(1) of Cap. 502, which provides for the application of the Ordinance, stipulates that "*(t)his Ordinance applies to –*

(a) prescribed commercial premises comprising or forming part of an existing building that was constructed on or before 2 May 1997 as well as to premises comprising or forming part of an existing building that is constructed after that date;
(b) any specified commercial building listed in Schedule 4 [of the Ordinance]."

29. The amendment proposed under clause 57 serves to **clarify the existing policy intent of the application of Cap. 502** to the effect that the second half of section 4(1)(a) of Cap. 502 would read "…as well as to prescribed commercial premises comprising or forming part of an existing building that is constructed after that date". As provided for in the long title and explanatory memorandum of the Bill, this is to rectify a textual error in the application section of Cap. 502.

30. Clause 3(3) provides that the Bill does not apply to a building if Cap. 502 or Cap. 572 applies to the whole of the building. Since the scope of application of the Bill depends on those of Cap. 502 and Cap. 572, it is desirable to take the opportunity to clarify the scope of application of Cap. 502 by rectifying the textual error in its section 4(1).

Clauses 58 and 59 – amendments to Cap. 502 and Cap. 572

31. Clauses 58 and 59 seek to amend section 21 of Cap. 502 and section 22 of Cap. 572 respectively. The latter provisions, which are almost identical to each other[2] (see **Appendix** for the full text of the sections), are related to the offence of disclosure of information obtained officially. In gist, an authorized officer who, without lawful authority, discloses to another person information obtained while exercising a function under the Ordinances is guilty of an offence. The two provisions provide for certain exceptions. An authorized officer has lawful authority to disclose the information obtained officially, if it is used–

[2] Except that "perform a function under this Ordinance" in section 21(2)(a) in Cap. 502 is replaced by "perform a function conferred or imposed by this Ordinance" in section 22(2)(a) in Cap. 572.

(a) in order to exercise or perform a function under this Ordinance;
(b) in connection with proceedings brought under this Ordinance;
(c) in relation to exercising a power or performing a function under the Buildings Ordinance (Cap. 123), or for the purpose of enabling or facilitating any thing or work to be done by any person under that Ordinance;
(d) in accordance with an order of the District Court; or
(e) with the consent of all persons who are entitled to have the information kept confidential.

32. When formulating a similar offence provision (namely clause 42) in the Bill, the EAs have reviewed the existing scope of exceptions under section 21 of Cap. 502 and section 22 of Cap. 572 in the light of experience in implementation over the past years. The EAs consider the existing scope of exceptions to be rather stringent. If identical exceptions are proposed under the Bill, it could compromise the EAs' enforcement efficiency or even fire safety of the premises concerned, as it does not allow for information exchange within and amongst government departments even for legitimate purposes. For example, when an FSD officer, pursuant to the Dangerous Goods Ordinance (Cap. 295), processes a licensing application for a dangerous goods store which is proposed to be located in an IB to be regulated under the Bill, he may need to obtain the information in relation to the fire safety requirements imposed to this IB under the Bill. Nonetheless, an authorized officer enforcing the Bill will not be allowed to share such information if the Bill adopts the existing scope of exceptions. Similarly, an authorized officer responsible for enforcing Cap. 502 is also not allowed to share information in respect of prescribed commercial premises with another authorized officer enforcing the Bill upon enactment even if the two officers are under the same EA, because of the restriction under the existing section 21 of Cap. 502.

33. Furthermore, experience shows that other law enforcement agencies, government departments or statutory bodies with a regulatory function may have requested for information from the EAs in respect of buildings regulated under Cap. 502 and Cap. 572 for legitimate purposes. The EAs, however, were unable to respond to such requests given the existing offence provisions in the two Ordinances.

34. To enable a smooth implementation of the Bill and necessary exchange of information amongst government departments and within and between the EAs, we propose an amended scope of circumstances where authorized officers may disclose information obtained officially

under clause 42. There are two major changes. Firstly, section 21(2)(ba) of Cap. 502 and section 22(2)(ba) of Cap. 572 make it lawful for an authorized officer to disclose information obtained officially if such disclosure is in relation to exercising a power or performing a function under Cap. 123, or for the purpose of enabling or facilitating any thing or work to be done by any person under Cap. 123. Clause 42(2)(c) of this Bill on the other hand permits the disclosure if it is in relation to performing a function, or enabling or facilitating any thing or work to be done by any person, under any law of Hong Kong, rather than confining the scope to Cap. 123 only. Secondly, section 21(2)(c) of Cap. 502 and section 22(2)(c) of Cap. 572 make it lawful for an authorized officer to disclose information obtained officially if such disclosure is in compliance with an order of the District Court. Clause 42(2)(d) of this Bill on the other hand permits such disclosure if it is made in compliance with a court order.

35. With a view to aligning the relevant offence provisions in Cap. 502 and Cap. 572 with that in the Bill for better enforcement efficiency, we consider it appropriate to include clauses 58 and 59 in this Bill.

Security Bureau
Buildings Department
Fire Services Department
February 2019

Provisions on Offence to Disclose Information Obtained Officially in Cap. 502 and Cap. 572

Cap. 502	Fire Safety (Commercial Premises) Ordinance	02/08/2012

21. Offence to disclose information obtained officially

(1) A person who, without lawful authority, discloses to another person information obtained while exercising or performing a function conferred or imposed on the person by this Ordinance is guilty of an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

(2) A person has lawful authority to disclose information if the person discloses the information—

(a) in order to exercise or perform a function under this Ordinance; or

(b) in connection with proceedings brought under this Ordinance; or

(ba) in relation to exercising a power or performing a function under the Buildings Ordinance (Cap. 123), or for the purpose of enabling or facilitating any thing or work to be done by any person under that Ordinance; or *(Added 16 of 2011 s. 47)*

(c) in accordance with an order of the District Court; or

(d) with the consent of all persons who are entitled to have the information kept confidential.

(3) For the purposes of subsection (2), information that a person is entitled to have kept confidential includes, but is not limited to, information that concerns the trade, business or profession of the person or another person with whom the person has business dealings.

(Format changes—E.R. 2 of 2012)

22. Offence to disclose information obtained officially

(1) A person who, without lawful authority, discloses to another person information obtained while exercising or performing a function conferred or imposed on the person by this Ordinance is guilty of an offence and is liable on conviction to a fine at level 5 and to imprisonment for 6 months.

(2) A person has lawful authority to disclose information if the person discloses the information—

(a) in order to exercise or perform a function conferred or imposed by this Ordinance;

(b) in connection with proceedings brought under this Ordinance;

(ba) in relation to exercising a power or performing a function under the Buildings Ordinance (Cap. 123), or for the purpose of enabling or facilitating any thing or work to be done by any person under that Ordinance; *(Added 16 of 2011 s. 49)*

(c) in accordance with an order of the District Court; or

(d) with the consent of all persons who are entitled to have the information kept confidential.

(3) For the purposes of subsection (2), information that a person is entitled to have kept confidential includes, but is not limited to, information that concerns the trade, business or profession of the person or another person with whom the person has business dealings.

(Format changes—E.R. 2 of 2012)